Court File No. CV15-10961-00CL

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 NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS (Sale Approval Motion and RBC Motion returnable August 13, 2015)

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TAB A

CITATION: Nelson Education Limited (Re), 2015 ONSC 3580
COURT FILE NO.: CV15-10961-00CL
DATE: 20150602

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SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Robert J. Chadwick, Caroline Descours and Sydney Young*, for the Applicants

D.J. Miller and Kyla E.M. Mahar, for the Royal Bank of Canada

Kevin J. Zych, for the First Lien Lenders

Jay Swartz and Robin Schwill, for Alvarez & Marsal Canada Inc.

HEARD: May 29, 2015

ENDORSEMENT

[1] On May 12, 2015, Nelson Education Ltd. ("Nelson") and its parent company, Nelson Education Holdings Ltd. sought and obtained an initial order pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Notice had been given to RBC only late the day before and RBC took the position that it had not had sufficient time to consider or prepare a response to the application. The resulting initial order was pared

down from what was sought by the applicants and it provided that on the comeback date the hearing was to be a true comeback hearing and that in moving to set aside or vary any provisions of the initial order, a moving party did not have to overcome any onus of demonstrating that the order should be set aside or varied.

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[2] On the comeback date, RBC moved to have Alvarez & Marsal Canada Inc. ("A&M Canada") replaced with FTI Consulting Canada Inc. ("FTI") as the Monitor, and for other relief. At the conclusion of the hearing, I ordered that FTI replace A&M Canada as Monitor for reasons to be delivered. These are my reasons.

Relevant History

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The first lien debt is currently approximately US$269 million plus accrued interest. There are 22 first lien lenders. RBC is a first lien lender holding approximately 12% of the principal amount outstanding. The first lien debt matured on July 3, 2014. It has not been repaid.

[6] The second lien debt is currently approximately US$153 million plus accrued interest. RBC is a second lien lender, holding the largest share of the principal amounts outstanding, and is the second lien agent for all second lien lenders. The maturity date is July 3, 2015 subject to acceleration.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. In the past year, overall revenues in the K-12 market have declined by 13% and in the higher education market by 3%.

[8] Notwithstanding the industry decline over the past few years, Nelson according to Mr. Nordal has maintained strong EBITDA, which is a credit I am sure to the efforts of Mr. Nordal and the management of Nelson. Nelson's EBITDA has remained positive over the last several years. For the fiscal year ended June 30, 2011 it was $47.4 million, for the fiscal year ended June 30, 2012 it was approximately $37.3 million and for the year ended June 30, 2013 it was approximately $40.9 million.

[9] Mr. Nordal is of the view that Nelson is well positioned to take care of increasing future opportunities in the digital educational market.

[10] Nelson had a leverage ratio of debt to EBITDA of approximately 17:1 for the fiscal year 2015. Its first lien debt matured and has not repaid and it has made no interest payments on the second lien debt since March 31, 2014.

[11] Nelson's efforts to deal with this situation have led to a proposed sale transaction under which the business of Nelson would be sold to the first lien lenders by way of a credit bid and the second lien lenders would be wiped out. In their application requesting an initial order, the applicants proposed a hearing date to be held nine days after the Initial Order to approve this sale transaction. That request was not granted.

[12] In March 2013, Nelson engaged Alvarez and Marsal Canada Securities ULC ("A&M") as its financial advisor to assist the Company in reviewing and considering potential strategic alternatives, including a refinancing and/or restructuring of its credit agreements.

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[13] Commencing in April 2013, Nelson, with the assistance of A&M and legal advisors, entered into discussions with a number of stakeholders, including RBC as the second lien agent, the first lien steering committee, and their advisors, in connection with potential alternatives to address Nelson's debt obligations. A number of without prejudice and confidential proposed transaction term sheets were discussed between August 2013 and September 2014, without any agreement being reached.

[14] During this time, interest continued to be paid on the first lien debt. In March, 2014 Nelson did not paid interest on the second lien debt. In return for a short cure period to May 9, 2014, a partial payment of US$350,000 towards interest was paid on the second lien debt. A further cure period to May 30, 2014 was given on the second lien debt but nothing was paid on it by that date. No further cure period was agreed and no further interest has been paid. Initially during the discussions that took place with the second lien lenders' agent, the professional fees of the advisors to the second lien lenders were paid by Nelson but these were stopped in August, 2014 after there was no agreement regarding further extensions of the second lien debt or agreement on any term sheet.

[15] On September 10, 2014, Nelson announced to the first lien lenders Nelson's proposed transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "First Lien Term Sheet") for a sale or restructuring of the business and sought the support of all of its first lien lenders.

[16] In connection with the First Lien Term Sheet, Nelson entered into a support agreement (the "First Lien Support Agreement") with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprise 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

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[17] Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, Nelson, with the assistance of its financial advisor, A&M, commenced on September 22, 2014, a sale and investment solicitation process (the "SISP") to identify one or more potential purchasers of, or investors in, the Nelson business, which process was conducted over a period of several months. According to Mr. Nordal, Nelson and A&M conducted a thorough canvassing of the market and are satisfied that all alternatives and expressions of interest were properly and thoroughly pursued.

[18] The SISP did not result in an executable transaction acceptable to the first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. Accordingly, pursuant to the First Lien Support Agreement Nelson wishes to proceed with a transaction pursuant to which the first lien lenders will exchange and release all of the indebtedness owing under the first lien credit agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser to which substantially all of the Nelson's assets would be transferred, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the purchaser.

[19] The proposed transaction provides for:

(a) the transfer of substantially all of Nelson's assets to the purchaser;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the second lien credit agreement, and a Nelson promissory note) and employment obligations incurred in the ordinary course and as reflected in the Nelson's balance sheet; and

(c) an offer of employment by the purchaser to all of Nelson's employees.

[20] Under the proposed transaction, with the exception of the obligations owing under the second lien debt and intercompany amounts, substantially all of the liabilities of Nelson are

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being paid in full in the ordinary course or are otherwise being assumed by the purchaser. The purchaser will not assume Nelson's obligations to the second lien lenders.

[21] On September 10, 2014, pursuant to the First Lien Support Agreement Nelson agreed not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders.

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Role of A&M Securities

[22] Nelson engaged A&M, an affiliate of Alvarez & Marsal Canada Inc., as its financial advisor in March, 2013. A&M has been operating as a financial advisor to Nelson for more than two years prior to the date of the Initial Order.

[23] The scope of A&M's engagement in 2013 included the following:

(a) Analyze and evaluate Nelson's financial condition;

(b) Assist Nelson to prepare its 5-year financial model, including balance sheet, income statement and cash flow statement and its 5-year business plan;

(c) Assist Nelson to respond to questions from its lenders regarding Nelson's business plan and financial model;

(d) If requested by management, attend and participate in meetings of the board of directors with respect to matters on which A&M was engaged to advise Nelson; and

(e) Other activities as approved by management or the board of Nelson and agreed to by A&M.

[24] In September 5, 2014 A&M was further engaged to act as the exclusive lead advisor for the transaction that has led to the proposed transaction, including the SISP process undertaken by Nelson. A&M's goal was identified as completing a successful transaction in the most expedient manner. Under this second engagement, A&M's compensation was described as being based on time billed at standard hourly rates and "subject to any other arrangements agreed upon among Nelson, the lenders and A&M". The word "lenders" referred only to the first lien lenders.

[25] In undertaking its mandate under the 2013 and 2014 engagements, A&M was authorized to utilize the services of employees of its affiliates under common control with A&M and subsidiaries. The sample accounts provided by A&M indicate that a substantial number of hours were billed to the A&M engagement for work of the personnel who are intended to act on behalf of the Monitor in this proceeding. A total of approximately $5.5 million plus HST and disbursements have been billed by A&M for its services to Nelson.

[26] An affiliate of A&M was engaged in 2013 to advise Cengage Learnings, the name of the U.S. operations of Thomson that was changed when Thomson sold its business. The 2013 and 2014 engagements of A&M by Nelson sought Nelson's waiver of any conflict of interest in connection with an A&M affiliate's engagement with Cengage. At the time of the 2013 engagement, A&M U.S. was engaged by Cengage to provide restructuring and financial advisory services and Cengage and Nelson had common shareholders. At the time of the September 2014 engagement, an A&M affiliate was providing financial advisory and financial management services to Cengage. Nelson maintains a strong relationship with Cengage and is the exclusive distributor for Cengage educational content in Canada pursuant to an agreement that expires on January 1, 2018. Cengage also provides certain operational support to Nelson. According to Mr. Nordal, Cengage is a preferred and key business partner of Nelson.

[27] A&M was present at the meetings of Nelson's board of directors wherein the decision was made by that board to not make interest payments to the second lien lenders on March 20, 2014, March 27, 2014, April 7, 2014 and June 27, 2014. A&M was also involved in discussions

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with RBC and its financial advisors in connection with the extension of the cure period for payment of interest to the second lien lenders as the financial advisor to Nelson.

Analysis

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[28] In its factum, RBC asserted that the application by Nelson was not an appropriate use of the CCAA as it was intended to be a nine-day proceeding to bless a quick flip credit bid by the first lien lenders to acquire the business of Nelson and extinguish the second lien lenders interest in the assets. RBC however also took the position that it would support a CCAA proceeding on the basis that there would be a neutral Monitor. I must say that in reviewing the circumstances of this application, I can see the issues raised by RBC as to whether this CCAA proceeding was an appropriate use of the CCAA. However in light of the position taken by RBC and my ruling that A&M Canada should be replaced by FTI as Monitor, I make no further comment or finding on the issue.

[29] This is a true comeback motion with no onus on RBC to establish that A&M Canada should not be the Monitor. Rather the situation is that it is Nelson who is required to establish that A&M Canada is an appropriate monitor.

[30] The problem is that Nelson has proposed a quick court approval of a transaction in which the first lien lenders will acquire the business of Nelson and in which essentially all creditors other than the second lien lenders will be taken care of. Nelson has asserted in its material that the SISP process undertaken by Nelson prior to the CCAA proceedings has established that there is no value in the Nelson business that could give rise to any payout to the second lien lenders. The SISP process was taken on the advice of A&M and under their direction. It was put in Nelson's factum that:

> The Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

[31] Nelson intends to request Court approval of the proposed transaction. An issue that will be front and centre will be whether the SISP process prior to this CCAA proceeding can be relied on to establish that there is no value in the security of the second lien lenders and whether other steps could have been taken to obtain financing to assist Nelson in continuing in business other than a credit bid by the first lien lenders. A&M was centrally involved in that process. It is in no position to be providing impartial advice to the Court on the central issue before the Court.

[32] There is no suggestion that A&M are not professional or not aware of their responsibilities to act independently in the role of a monitor. A&M is frequently involved in CCAA matters and is understandably proud of its high standard of professionalism. However, that is not the issue. In my view, A&M should not be put in the position of being required to step back and give advice to the Court on the essential issue before the Court in light of its central role in the whole process that will be considered.

[33] In an article in the Commercial Insolvency Reporter, (LexisNexis, August 2010), entitled *Musings (a.k.a. Ravings) about the Present Culture of Restructurings,* former Justice James Farley, the doyen of the Commercial List for many years and no stranger to CCAA proceedings, had this to say about the role of a monitor:

> I mean absolutely no disrespect or negative criticism towards any monitor when I observe that they are only human. I think it is time to consider whether a monitor can truly be objective and neutral under present circumstances- it would take a true saint to stand firm under the pressures now prevailing. It should be appreciated that monitors are in fact hired by the debtor applicant (aided by perhaps a party providing interim financing, possibly in the role of the power behind the throne) and retained to advise the debtor well before the application is made. Is it not human nature for a monitor to subconsciously wonder where the next appointment will come from if it crosses swords with its hirer?

[34] Mr. Farley went on to suggest that the role of a monitor be split in two. That may be a laudable objective, but would require legislation. In this case, I do not think it would be appropriate in light of the extremely extensive work done by A&M over the course of two years.

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[35] A monitor is an officer of the Court with fiduciary duties to all stakeholders and is required to assist the Court as requested. It has often been said that a monitor is the eyes and ears of the Court. It is critical that in this role a monitor be independent of the parties and be seen to be independent. I can put it no better than Justice Topolniski in *Winalta Inc. (Re),* 2011 ABQB 399 in which she said:

> **67** A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.
>
> **68** Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:
>
>> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[36] In this case, A&M is in no position to comment independently on the activities of Nelson in regards to the very issue in this case, namely the reliability of the SISP program in determining whether the second lien lenders' security has any value.

[37] There is also a question of the appearance of a lack of impartiality. During the two years that A&M was engaged prior to this CCAA proceeding, for which it billed over $5 million, it was involved in advising Nelson during negotiations with the interested parties, including RBC, and in participating in those negotiations with RBC on behalf of Nelson. This history can cause an appearance of impartiality, something to be avoided in order to provide public confidence that the insolvency system is impartial. See *Winalta* at para. 82. It was this concern of a perception of bias that led to the prohibition being added to section 11.7(2) of the CCAA preventing an auditor of a company acting as a monitor of the company.

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[38] The issue of an appropriate monitor requires the balancing of interests. This is not like some cases in which a financial advisor has had some advisory role with the debtor and then becomes a monitor, usually with no objection being raised. Often it may be appropriate for that to occur taken the knowledge of the debtor acquired by the advisor. This case is different in that the financial advisor has been front row and centre in the very sales process that will be the subject of debate in these proceedings and has engaged in negotiations on behalf of Nelson.

[39] In all of the circumstances of this case, I concluded that it would be preferable for another monitor to be appointed and for that reason replaced A&M Canada as Monitor with FTI.

Other issues

[40] In the Initial Order, RBC was directed to continue its cash management system. There was no charge provided in favour of RBC. RBC says that it should not be required to continue the cash management system without the protection of a charge. During this hearing, Mr. Chadwick on behalf of Nelson said that it might be possible to satisfy RBC by requiring some minimum balance in the accounts, failing which a charge would be provided in favour of RBC. I take it that this issue will be worked out.

[41] In the draft Initial Order that accompanied the CCAA application at the outset, a paragraph was included that provided that Nelson could not pay any amounts owing by Nelson to its creditors except in respect of interest, expenses and fees, including consent fees, payable to the first lien lenders and fees and expenses payable to the first lien agent under the support agreement. That provision was deleted from the Initial Order. It was replaced with a provision that Nelson could pay expenses and satisfy obligations in the ordinary course of business.

[42] RBC takes the position that there should be a level playing field for the second lien lenders consistent with the treatment of the first lien lenders in this CCAA process, and that if interest is to be paid to the first lien lenders and expenses of their financial and legal advisors paid, the same should happen to the second lien lenders.

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[43] RBC points out that it was Nelson who decided in June, 2014 to stop paying interest on the second lien debt and a little later reduce paying RBC's advisors in light of Nelson's view that there was not sufficient progress in negotiations with RBC. Payment of these professional fees was stopped in August, 2014. In September 2014 Nelson agreed in the First Lien Support Agreement not to make further payments in connection with the second lien debt, including any payment for fees, costs or expenses to any legal, financial or other advisor to RBC, the second lien agent, without the consent of the consenting first lien lenders. The consenting first lien lenders are opposed to any interest or expenses being paid to the second lien lenders.

[44] The second lien credit agreement provides for interest to be paid on the debt and in section 10.03 for all costs of the second lien agent, RBC, arising out of CCAA proceedings. The intercreditor agreement between the first and second lien agents provides in section 3.1(f) that nothing in the agreement save section 4 shall prevent receipt by the second lien agent payments for interest, principal and other amounts owed on the second lien debt. Section 4 provides that any collateral or proceeds of sale of the collateral shall be paid to the first lien agent until the first lien debt has been repaid and then to the second lien agent. As there has been no sale of the collateral, there is nothing in the intercreditor agreement that prevents payment of interest and expenses of the second lien lenders. The second lien lenders are contractually entitled to receive payment of their interest, costs, expenses and professional fees.

[45] No determination has been made in these proceedings that there is no value available for the second lien lenders. RBC disputes the applicants' views on this point. RBC contends that these CCAA proceedings should not commence with the Court accepting as a *fait accompli* that the second lien lenders should not be paid in the proceeding when every other stakeholder is being paid.

[46] There is no evidence that Nelson has not been in a position to pay the interest, costs, expenses and professional fees of the second lien lenders since it made a decision in 2014 to stop paying these amounts. Since the First Lien Support Agreement with the consenting first lien

lenders, the decision has been taken out of the hands of Nelson and turned over to the consenting first lien lenders.

[47] In my view, on the basis of the evidence, there is no justification to pay all of the interest, costs and expenses of the first lien lenders but not pay the same to the second lien lenders. In the circumstances, it is only fair that pending further order, Nelson be prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders are made, and it is so ordered.

[48] RBC has requested costs of the comeback motion and I believe other costs. A request for costs may be made in writing by RBC within 10 days, along with a proper cost outline, and the parties against whom costs are claimed shall have 10 days to file a response to the cost request.

Newbould J.

Date: June 2, 2015

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TAB B

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

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

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

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

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S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

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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

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — 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 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

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

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PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

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, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

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Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

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Bankruptcy Code, 11 U.S.C.
s. 363 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.*:**

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

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9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the

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timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5 th) 135 (Ont. C.A.) at para. 44.

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32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially

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disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

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> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the <u>means</u> contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
>
> (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

> (a) Nortel has been working diligently for many months on a plan to reorganize its business;
>
> (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

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(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

End of Document

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TAB C

2009 CarswellOnt 7627
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 7627, [2009] O.J. No. 5207, 183 A.C.W.S. (3d) 28

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 Brainhunter Inc., TrekLogic Inc., Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited (Applicants)

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Newbould J.

Heard: December 2, 2009
Judgment: December 4, 2009
Docket: 09-8483-00CL

Counsel: Jay A. Swartz, James D. Bunting for Applicants
Grant B. Moffat for Deloitte and Touche Inc.
Edmond Lamek for Toronto-Dominion Bank
Joseph Bellissimo for Roynat Capital Inc.
Daniel R. Dowdall for certain noteholders
Patrick F. Schindler for an unsecured judgment creditor

Subject: Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Discretion of court

Canadian Company, located in Toronto, provided human resources services to clients — Bank was secured creditor of Company and agreed to provide applicants with $7 million to meet working capital requirements during Companies' Creditors Arrangement Act (CCAA) proceedings — Company made application for protection under s. 18.6 of CCAA — Company intended to solicit going concern asset sale of business, which meant no plan of arrangement filed — Application allowed — Court can allow CCAA protection in cases where company does not file formal plan of compromise or arrangement.

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Cases considered by *Newbould J.*:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List]) — considered

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Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 3 — referred to

s. 9 — referred to

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 2005, c. 47, s. 128] — considered

s. 11.4(1) [en. 1997, c. 12, s. 124] — considered

s. 11.4(2) [en. 1997, c. 12, s. 124] — considered

s. 11.4(3) [en. 1997, c. 12, s. 124] — considered

s. 11.4(4) [en. 1997, c. 12, s. 124] — considered

s. 11.51(1) [en. 2005, c. 47, s. 128] — considered

s. 11.52(1) [en. 2007, c. 36, s. 66] — considered

s. 36(1) — considered

APPLICATION by company for protection under s. 18.6 of *Companies' Creditors Arrangement Act*.

***Newbould J.*:**

1 On December 2, 2009 after hearing submissions from the parties present, I made an initial order granting CCAA protection to the applicants, with reasons to follow. These are my reasons.

2 There is no question that the Court has jurisdiction to hear the application pursuant to section 9 of the CCAA as the applicants' head offices are located in Toronto, Canada. At the time of the application, Brainhunter Inc. was listed on the TSX. The applicants qualify as debtor companies pursuant to section 3 of the CCAA as the applicants are affiliated companies with total claims against them of more than $5 million. The applicants are all insolvent.

3 The applicants are in the business of providing human resources with the skill sets to satisfy their clients' needs. The applicants' business operates in large part through umbrella agreements generally referred to as Master Service Agreements. These agreements are entered into by the applicable applicant and each of their respective contract staffing clients.

4 Each time a contract staffing client wishes to retain the services of an individual (each a "Contractor") pursuant to a Master Services Agreement, the client will enter into a sub-agreement referred to as a statement of work in respect of the specific Contractor. The applicable applicant subsequently enters into an agreement with the Contractor to fulfill the statement of work and the Contractor issues invoices to the applicant for the work he or she performs for the client. The applicant then pays the

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Contractor and bills the client. Because the applicants receive payment from their clients after they pay their Contractors, the applicants are dependent on having adequate credit facilities available to fund the payments to Contractors until the related invoices from the client can be collected.

5 TD Bank and Roynat are secured creditors with security over all of the assets of the applicants. As at October 31, 2009 there was principal outstanding of $18.7 million to TD Bank and principal and interest of $5.9 million owing to Roynat.

6 In addition there are secured subordinated promissory notes secured only on the assets of Brainhunter Inc. The principal and interest outstanding as at October 31, 2009 was $11.9 million. Most of the material assets of the applicants are not held in Brainhunter Inc., but by the other applicants.

7 TD Bank and the applicants have entered into a debtor-in-possession financing term sheet, pursuant to which the TD Bank has agreed to provide the applicants with $7 million of DIP financing to enable the applicants to meet their working capital requirements during the CCAA proceedings.

8 This application is in some respects unusual because the applicants state that they intend at the outset to solicit a going concern asset sale of the business, and that it is likely that there will be no plan of arrangement filed. The factum on their behalf states:

> 5. If protection is granted under the CCAA, the Applicants intend to bring a motion seeking approval of a bid process to solicit going concern asset purchase offers for the Applicants' business, as well as offers to sponsor a plan of arrangement (the "Bid Process"). The Applicants have entered into an agreement to sell substantially all of their assets as a going concern on the understanding that this agreement will serve as a stalking horse bid. The Bid Process will solicit competing offers from prospective investors to bid up the stalking horse bid.
>
> 24. Although the proposed Bid Process could result in the filing of a plan of arrangement or plan of compromise, it is more likely to result in the sale of the Applicants' business.

9 The applicants submit that this Court has the jurisdiction to provide them with protection under the CCAA in circumstances such as these where the applicants may not file a formal plan of compromise or arrangement.

10 I agree with the applicants that protection under the CCAA may be granted in these circumstances. I say that for the following reasons.

11 The initial protection is supported by TD Bank and Roynat. It is also supported by the secured noteholders represented by Mr. Dowdall, being a little more than 60% of the noteholders. Mr. Dowdall has other concerns that I will deal with.

12 It is well settled in Ontario that a court in a CCAA proceeding may approve a sale of all or substantially all of the assets of a debtor company as a going concern. In *Consumers Packaging Inc., Re*, 27 C.B.R. (4th) 197 (Ont. C.A.), the Court stated:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

13 Similarly, it is well settled in Ontario that a court in a CCAA proceeding may order the sale of a business in the absence of a plan of arrangement being put to stakeholders for a vote. In *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) Morawetz J. came to this conclusion after analyzing a number of cases that had made such an order. See paras 35 to 40 of his reasons for judgment.

14 It seems to me that if at some point in time after an initial CCAA protection order has been made, it appears appropriate to undertake a sales process to sell the business without a plan of arrangement in place, there is no reason why CCAA protection should not initially be granted if at the outset it is thought appropriate to undertake a sales process without a plan of arrangement

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in place. It is simply a matter of timing as to when it appears appropriate to pursue a sale of the business without a plan of arrangement in place.

15 *Nortel Networks Corp., Re* was decided before the new CCAA provisions came into force on September 18, 2009. The new relevant provision does not, however, affect the principles accepted by Morawetz J. in that case. Section. 36(1) provides:

> 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.

16 In *Canwest Global Communications Corp., Re* [2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List])] released November 12, 2009, Pepall J. stated the following regarding s. 36:

> The CCAA is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."

17 The applicants have not yet brought their motion for approval of a sales process, and consideration as to whether such a sales process is appropriate will take place when the motion is heard. [1] The fact that the motion was anticipated at the time of the initial order with no plan of arrangement in sight does not mean however that the initial order should not be made.

18 The applicants seek an order declaring that the Contractors are "critical suppliers", permitting the payment of pre-filing amounts to the contractors and creating a charge that secures the obligations owed to the Contractors.

19 The authorization to pay pre-filing amounts is now codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

> (a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));
>
> (b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2));
>
> (c) grant a charge in favour of a person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order (s. 11.4(3)); and
>
> (d) order the security or charge to rank in priority over the claim of any secured creditor of the company (s. 11.4(4)).

20 The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

> Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

21 The applicants submit, and I accept, that an order permitting the payment of pre-filing amounts is necessary to ensure the continued provision of personal services from the Contractors to the applicants and to prevent the potentially significant harm that could follow if such payments are not made. If the Contractors are not paid for services provided before the filing of

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the application, there is a substantial risk they will not continue to perform services under the current statements of work. This would result in a default by the applicants to their clients and impact the ability of the applicants to continue as a going concern.

22 As the Contractors are individuals, the applicants did not seek an order requiring the continued supply of personal services. However, they requested a charge to secure payment to the Contractors in order to provide assurances to the Contractors that their relationship will be unaffected during the CCAA proceedings. The amount of the Contractors' charge requested is $15 million which represents an estimated average of the amount owing to Contractors. The applicants requested that the Contractors' charge rank in priority to all secured lenders other than the TD Bank. Roynat is agreeable to that and the notesholders represented here do not oppose it. Deloitte & Touche Inc, in their capacity as the proposed monitor, in their pre-filing report support the charge as reasonable.

23 I am satisfied that it is appropriate to provide in the initial order that the Contractors are declared to be critical suppliers, that the applicants shall be entitled to pay outstanding and future amounts owing to Contractors and that a Contractors' charge as requested be provided.

24 The applicants also requested other charges, being (i) an administration charge of $1 million: (ii) a KERP charge of $290,000 under which the CEO is to be paid a retention bonus of $50,000 for two months in addition to his salary and 10 key employees will be paid up to $190,000 if they remain with the company for four months from the date of filing: (iii) a directors and officers charge of $1.7 million; and (iv) a DIP charge to secure the $7 million DIP facility being provided by TD Bank.

25 TD Bank and Roynat support these charges and their priority provided for in the initial order. Deloitte & Touche Inc. expressed the view that the proposed charges are necessary and reasonable and will provide the applicants with the opportunity to successfully complete a restructuring.

26 Mr. Dowdall for the noteholders raised a concern with some of these charges. He said that while counsel for the applicants discussed with him in advance the intention to file, he was not made aware of the details and his clients have not had an opportunity to review the information provided in the material filed with the Court. Thus he wishes to reserve his clients' rights with respect to these charges. He has a concern that while typically such concerns when raised at the initial application are met with the response that there is a come-back clause in the initial order, people start relying on the charges and it becomes difficult to oppose them as time passes. I think his concern is a fair one. In this case, however, not only is there a come-back clause with a 7 days notice requirement, but the matter will be before the Court shortly on December 8, 2009 when the motion to approve a sales process will be dealt with. Mr. Dowdall's clients will have had an opportunity to consider their position before then and be able to move to vary the initial order if they so desire.

27 In the circumstances, on the basis of the record before me, the charges appear appropriate and are approved. This is without prejudice, however, to the noteholders right to contest them. Any delay, however, in taking steps to contest them will obviously seriously affect any attack on them.

28 Mr. Schindler represents an unsecured judgment creditor owed approximately $250,000. His client of course had not seen the material before it was filed, and Mr. Schindler said that he had been intending to ask that the entire matter be adjourned for a week, and that he was asking that the charges not be made for at least a week to provide his client with time to consider whether they are warranted.

29 In exercising the balancing of interests required in a CCAA application, it would be risky indeed to delay the application or these charges at the request of one unsecured creditor. These are standard charges and deemed necessary by the proposed monitor. It should be noted that the sections of the CCAA under which the charges are authorized, being sections 11.2(1), 11.4(1), 11.51(1) and 11.52(1), provide that notice of a request for such charges is to be given to the secured creditors who are likely to be affected by the charge. Notice is not required to be given to unsecured creditors. In the circumstances, I declined the request to delay the charges.

Application allowed.

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Footnotes

1 The motion is now scheduled for December 8, 2009

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TAB D

2009 CarswellOnt 8207
Ontario Superior Court of Justice [Commercial List]

Brainhunter Inc., Re

2009 CarswellOnt 8207, 183 A.C.W.S. (3d) 905, 62 C.B.R. (5th) 41

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 BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC. (APPLICANTS)

Morawetz J.

Heard: December 11, 2009
Judgment: December 11, 2009
Written reasons: December 18, 2009
Docket: 09-8482-00CL

Counsel: Jay Swartz, Jim Bunting for Applicants
G. Moffat for Monitor, Deloitte & Touche Inc.
Joseph Bellissimo for Roynat Capital Inc.
Peter J. Osborne for R.N. Singh, Purchaser
Edmond Lamek for Toronto-Dominion Bank
D. Dowdall for Noteholders
D. Ullmann for Procom Consultants Group Inc.

Subject: Insolvency

Table of Authorities

Cases considered by *Morawetz J.*:

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered

MOTION by applicants for extension of stay and for approval of bid process and agreement.

***Morawetz J.*:**

1 At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

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2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

9 Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

10 The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

11 It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

12 Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

13 The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

14 The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

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15 Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16 Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17 I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

18 In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

19 In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

20 With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

21 For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

22 For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

23 The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

24 Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

25 An order shall issue to give effect to the foregoing.

Motion granted.

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TAB E

2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193 A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

In the Matter of the Plan of Arrangement and Compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Petitioners) v. Ernst & Young Inc. (Monitor) and Stadacona Limited Partnership, F. F. Soucy Limited Partnership and F. F. Soucy Inc. & Partners, Limited Partnership (Mises en cause) and Service d'impartition Industriel Inc., KSH Solutions Inc. and BD White Birch Investement LLC (Intervenant) and Sixth Avenue Investment Co. LLC, Dune Capital LLC and Dune Capital International Ltd. (Opposing parties)

Robert Mongeon, J.C.S.

Heard: 24 september 2010

Oral reasons: 24 september 2010 *
Written reasons: 15 october 2010
Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Corporation experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act — In context of its restructuring, corporation contemplated sale of all its assets — Bidding process was launched and several investors filed offers — Corporation entered into asset sale agreement with winning bidder — US bankruptcy court approved process without modifications — Court approved process with some modifications and set date of September 17, 2010, as limit to submit bid — On September 17, unsuccessful bidder filed new bid — At outcome of bidding process, corporation decided to sell its assets once again to winning bidder — On September 24, corporation brought motion seeking court's approval of sale — Motion granted — Evidence showed that no stakeholder objected to sale and that all parties agreed to participate in bidding process — Once bidding process was started, there was no turning back unless process was defective — Court was not convinced that winning bid should be set aside just because unsuccessful bidder lost — Court was of view that bidding process met criteria established by jurisprudence — In addition, monitor supported position of winning bidder — Therefore, sale should be approved as is.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

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Société a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la société a considéré vendre tous ses actifs — Processus d'appel d'offres a été lancé et plusieurs investisseurs ont déposé leurs offres — Société a signé une entente de vente d'actifs avec le soumissionnaire gagnant — Tribunal américain de faillite a approuvé le processus sans modifications — Tribunal a approuvé le processus avec quelques modifications et a fixé la date du 17 septembre 2010 comme étant la date limite pour soumettre une soumission — Soumissionnaire déçu a déposé une nouvelle offre le 17 septembre — Au terme du processus d'appel d'offres, la société a décidé de vendre ses actifs une fois de plus au soumissionnaire gagnant — Société a déposé, le 24 septembre, une requête visant à obtenir l'approbation de la vente par le tribunal — Requête accueillie — Preuve démontrait qu'aucune partie intéressée ne s'était opposée à la vente et que toutes les parties avaient convenu de participer au processus d'appel d'offres — Une fois le processus d'appel d'offres lancé, il n'était pas question de l'interrompre à moins que le processus ne s'avère déficient — Tribunal n'était pas convaincu que le soumissionnaire gagnant devrait être exclu simplement parce que le soumissionnaire déçu avait perdu — Tribunal était d'avis que le processus d'appel d'offres satisfaisait aux critères établis par la jurisprudence — De plus, le contrôleur était en faveur de la position défendue par le soumissionnaire gagnant — Par conséquent, la vente devrait être approuvée telle quelle.

Table of Authorities

Cases considered by *Robert Mongeon, J.C.S.*:

AbitibiBowater inc., Re (2010), 2010 QCCS 1742, 2010 CarswellQue 4082 (C.S. Que.) — considered

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 68 C.B.R. (5th) 233, 2010 CarswellOnt 3509, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) — considered

Cie Montréal Trust c. Jori Investments Inc. (1980), 1980 CarswellQue 85, 13 R.P.R. 116 (C.S. Que.) — referred to

Eugène Marcoux Inc. c. Côté (1990), [1990] R.D.I. 551, [1990] R.J.Q. 1221 (C.A. Que.) — referred to

Maax Corporation, Re (July 10, 2008), Doc. 500-11-033561-081 (C.S. Que.) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 224, 2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Code de procédure civile, L.R.Q., c. C-25
art. 689 — referred to

art. 730 — 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

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s. 36(3)(b) — considered

s. 36(3)(c) — considered

s. 36(3)(d) — considered

s. 36(3)(f) — considered

s. 36(6) — considered

MOTION by corporation seeking court's approval of sale.

***Robert Mongeon, J.C.S.*:**

BACKGROUND

1 On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

2 On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

3 On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process (« SISP ») for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

4 The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC (« BDWB »). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

5 BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

6 On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

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7 On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

8 My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010 [1] .

9 No appeal was lodged with respect to my decision of September 10, 2010.

10 On September 17, 2010, Sixth Avenue Investment Co. LLC (« Sixth Avenue ») submitted a qualified bid.

11 On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

12 BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.

13 Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

14 The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

15 On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

16 As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

17 BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also « Majority Lenders » under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

18 Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not « Majority Lenders » and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process [2] .

19 The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder [3] (Sixth Avenue).

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20 In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

21 Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the « Majority Lender » may direct the « Agents » to support such credit bid in favour of such « Majority Lenders ». Conversely, this position is not available to the « Minority Lenders ». This reasoning has not been seriously challenged before me.

22 The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

23 On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

REASONS (delivered orally on September 24, 2010)

24 I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a « Stalking Horse » bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a « Stalking Horse » bidder. In this context, a Motion to approve the « Stalking Horse » Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

25 I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever by any of the interested stakeholders except for the two construction lien holders KSH [4] and SIII [5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

26 The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

27 Today, the Motion of the Debtors is principally contested by a group which was identified as the « Sixth Avenue » bidders and more particularly, identified in paragraph 20 of the Motion now before me. The « Stalking Horse » bidder, of course, is the Black Diamond group identified as « BD White Birch Investment LLC ». The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the « Sixth Avenue » bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

28 Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the « Black Diamond » winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

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29 The main argument of « Sixth Avenue » as averred, sometimes referred to as the « bitter bidder », comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

30 If I take the comments of « Sixth Avenue », the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the « Black Diamond » bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> 24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the « DIP Agent ») and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent »), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law.

31 The words « and other applicable law » could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec. [6]

32 The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

> 13. « Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

33 I draw from these excerpts that when the « Stalking Horse » bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid [7]

34 Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

35 Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

36 Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the « Black Diamond » winning bid should prevail and the « Sixth Avenue » bid, the bitter bidder, should fail.

37 I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: « Well, we've got nothing to say now. We may have something to say later » and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

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38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

41 The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

42 It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

43 The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

45 I now wish to address the question of Section 36 CCAA.

46 In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

47 Section 36 CCAA reads 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.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (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;

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(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.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

(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.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

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.

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with

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it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one « Stalking Horse » bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words « preferable to a bankruptcy » must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

51 Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

52 In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

53 In *Nortel Networks Corp., Re*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), at paragraph 35):

The duties of the Court in reviewing a proposed sale of assets are as follows:

1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

2) It should consider the interests of all parties;

3) It should consider the efficacy and integrity of the process by which offers have been obtained;

4) and it should consider whether there has been unfairness in the working out of the process.

54 I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

55 I will make no comment as to the standing of the « bitter bidder ». Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

56 I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

57 There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the « Stalking Horse » bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the

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suggestion of « Sixth Avenue », to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

58 I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:

I believe, Mister Justice, that KSH and SIII have.........their satisfaction with the wording. I believe also that Dow Jones, who's present, ...their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:

Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:

I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

The Court:

Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is *granted,* in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of « Sixth Avenue » is *dismissed* without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is *granted*, without costs.

Motion granted.

Footnotes

* Leave to appeal refused at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.).

1 See my Order of September 10, 2010.

2 For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

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3 Sometimes referred to as the « bitter bidder » or « disgruntled bidder » See *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) (Gascon J.)

4 KSH Solutions Inc.

5 Service d'Impartition Industriel Inc.

6 The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:

689. The purchase price must be paid within five days, at the expiry of which time interest begins to run.

Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.

730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.

When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.

See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):

La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot « créance », contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi.

See, finally, *Cie Montréal Trust c. Jori Investments Inc.*, J.E. 80-220 (C.S. Que.) [1980 CarswellQue 85 (C.S. Que.)], *Eugène Marcoux Inc. c. Côté*, [1990] R.J.Q. 1221 (C.A. Que.)

7 The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.

See paragraphs 24, 25 and 26 of BDWB's Intervention.

As for the right to credit bid in a sale by auction under the CCAA, see *Maax Corporation, Re* (July 10, 2008), Doc. 500-11-033561-081 (C.S. Que.) (Buffoni J.)

See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

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TAB F

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

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Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

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Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

***Galligan J.A.* :**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

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6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual

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nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

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[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

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If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing

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with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

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In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

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50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price

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on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily

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determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

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72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results

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> in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

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85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

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91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

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101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser

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or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

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116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless

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waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

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TAB G

2009 CarswellOnt 4838
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4838, [2009] O.J. No. 4487, 56 C.B.R. (5th) 224

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

And In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Morawetz J.

Heard: July 28, 2009
Judgment: July 28, 2009
Docket: Toronto 09-CL-7950

Counsel: Mr. D. Tay, Ms J. Stam for Nortel Networks Corporation et al.
Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated
Mr. Arthur O. Jacques for Felske, Sylvain
S.R. Orzy for Noteholders
Ms S. Grundy, Mr. J. Galway for Telefonaktiebolaget LM Ericsson
Ms L. Williams, Ms K. Mahar for Flextronics
Mr. M. Zigler for Former Employees
Mr. L. Barnes for Board of the Directors of Nortel Networks Corporation, Nortel Networks Limited
Mr. A. MacFarlane for Official Committee of Unsecured Creditors
Ms T. Lie for Superintendent of Financial Services of Ontario
Mr. B. Wadsworth for CAW Canada
Mr. S. Bomhof for Nokia Siemens
Mr. R.B. Schwill for Nortel Networks UK Limited

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Table of Authorities

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

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, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002

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SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by telecommunications company for approval of asset sale agreement, vesting order, approval of intellectual property licence agreement, order declaring that ancillary agreements were binding and sealing order.

***Morawetz J.*:**

1 Nortel Networks Corporation ("NNC), Nortel Networks Limited (NNL), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation, (collectively the "Applicants"), bring this motion for an Order approving and authorizing the execution of the Asset Sale Agreement dated as of July 24, 2009, ("the Sale Agreement"), among Telefonaktiebolaget LM Ericsson (PUBL) (the "Purchaser"), as buyer, and NNL, NNC, Nortel Networks, Inc.) ("NNI) or ("Ericsson"), and certain of their affiliates as vendors, (collectively, the "Sellers"), in the form attached and as an Appendix to the Seventeenth Report of Ernst and Young Inc. in its capacity as Monitor in the CCAA proceedings.

2 The Applicants also request, among other things, a Vesting Order, an Order approving and authorizing the execution and compliance with the Intellectual Property Licence Agreement substantially in the form attached to the confidential appendix to the Seventeenth Report and the Trademark Licence Agreements substantially in the form attached to the appendix and an Order declaring that the Ancillary Agreements, (as defined in the Sale Agreement), including the IP Licences, shall be binding on the Applicants that are party thereto, and shall not be repudiated disclaimed or otherwise compromised in these proceedings, and that the intellectual property subject to the IP Licences shall not be sold, transferred, conveyed or assigned by any of the Applicants unless the buyer or assignee of such intellectual property assumes all of the obligations of NNL under the IP Licences and executes an assumption agreement in favour of the Purchaser in a form satisfactory to the Purchaser.

3 Finally, the Applicants seek an order sealing the Confidential Appendixes to the Seventeenth Report pending further order of this court.

4 This joint hearing is being conducted by way of video conference. His Honor Judge Gross is presiding over the hearing in the U.S. Court. This joint hearing is being conducted in accordance with the provisions of the Cross-Border Protocol, which has previously been approved by both the U.S. Court and this court.

5 The Applicants have filed two affidavits in support of the motion. The first is that of Mr. George Riedel, sworn July 25, 2009. Mr. Riedel is the Chief Strategy Officer of NNC and NNL. Mr. Riedel also swore an affidavit on June 23, 2009 in support of the motion to approve the Bidding Procedures. The second affidavit is that of Mr. Michael Kotrly which relates to an issue involving Flextronics which was resolved prior to this hearing.

6 The Monitor has also filed its Seventeenth Report with respect to this motion. The Monitor recommends that the requested relief be granted.

7 The Applicants' position is also enthusiastically supported by the Unsecured Creditors' Committee in the Chapter 11 proceedings and the Noteholders.

8 No party is opposed to the requested relief.

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9 On June 29, 2009 this court granted an Order approving the Bidding Procedures for a sale process for certain of Nortel's Code Division Multiple Access ("CMDA") business, and Long Term Evolution ("LTE") Access. The procedures were attached to the Order.

10 The Court also approved the Stalking Horse Agreement dated as of June 19, 2009 among Nokia Siemens Networks B.V. ("Nokia Siemens") and the Sellers (also referred to as the "Nokia Agreement") and accepted agreement for the purposes of conducting the Stalking Horse bidding process in accordance with the Bidding Procedures, including the Break-Up-Fee and Expense Reimbursement as both terms are defined in the Stalking Horse Agreement.

11 The order of this court was granted immediately after His Honor, Judge Gross, of the United States Bankruptcy Court for the District of Delaware, approved the Bidding Procedures in the Chapter 11 proceedings.

12 The Bidding Procedures contemplated a bid deadline of 4 p.m. on July 21, 2009. This gave interested parties 22 days to conduct due diligence and submit a bid.

13 By the Bid Deadline, three bids were acknowledged as "Qualified Bids" as contemplated by the Bidding Procedures. Qualified Bids were received from MPAM Wireless Inc., otherwise known as Matlin Patterson and Ericsson.

14 The Monitor also reports that on July 15, 2009 one additional party submitted a non-binding letter of intent and requested that it be deemed a Qualified Bidder. The Monitor further reports that upon receiving this request, the Applicants' provided such party with a form of Non-Disclosure Agreement substantially in the form as that previously executed by Nokia Siemens. This party declined to execute the Non Disclosure Agreement and was not deemed a Qualified Bidder. The Monitor further reports that it, the UCC and the Bondholder Group were all consulted in connection with the request of such party to be considered a Qualified Bidder.

15 The Monitor also reports that it is of the view that any party that wanted to bid for the business and complied with the Bidding Procedures was permitted to do so.

16 In the period up to July 21, 2009, the Monitor reports that it was kept apprised of all activity conducted between Nortel and the potential buyers. In addition, the Monitor participated in conference calls and meetings with the potential buyers, both with Nortel and independently. The Monitor further reports that it conducted its own independent review and analysis of materials submitted by the potential buyers.

17 On July 22, 2009, in accordance with the Bidding Procedures, copies of both the MPAM bid and the Ericsson bid were provided to Nokia Siemens, MPAM and Ericsson were both notified that three Qualified Bids had been received.

18 After consultation with the Monitor and representatives of the UCC and the Bondholder Group, the Sellers determined that the highest offer amongst the three bids was submitted by Ericsson and accordingly on July 22, 2009, the three Qualified Bidders were informed that the Ericsson bid had been selected as the starting bid pursuant to the Bidding Procedures. Copies of the Ericsson bid were distributed to Nokia Siemens and MPAM.

19 The Monitor reports that the auction was held in New York on July 24, 2009.

20 Pursuant to the Bidding Procedures the auction went through several rounds of bidding. The Sellers finally determined that the Ericsson bid submitted in the sixth round should be declared the Successful Bid and that the Nokia Siemens bid submitted in the fifth round should be an Alternate Bid. The Monitor reports that these determinations were made in accordance with consultations with the Monitor and representatives of UCC and the Bondholder group held during the seventh round adjournment.

21 The Monitor reports that the terms and conditions of the Successful Bid are substantially the same as the Nokia Agreement described in the Fourteenth Report with the significant differences being as follows:

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1) The purchase price has been increased from U.S. $650 million to U.S. $1.13 billion plus the obligation of the Purchaser to pay, perform and discharge the assumed liabilities. The Purchaser made a good faith deposit of U.S. $36.5 million.

2) The Termination Date has been extended to September 30, 2009 or in the event that closing has not occurred solely because regulatory approvals have not yet been obtained, October 31, 2009 as opposed to August 31 and September 30, respectively, for the Nokia Agreement.

3) The provisions in the Nokia Agreement with respect to the Break-Up Fee and Expense Reimbursement have been deleted.

22 Further, I note that the Nokia Agreement provided for a commitment to take at least 2,500 Nortel employees worldwide. Under the Sale Agreement, the Purchaser has also committed to make employment offers to at least 2,500 Nortel employees worldwide.

23 The Nokia Agreement provided for a payment of a Break-Up Fee of $19.5 million and the Expense Reimbursement to a maximum of $3 million, upon termination of the Nokia Agreement. The Monitor reports that if both this court and the U.S. Court approve the Successful Bid, the Applicants are of the view that the Break-Up Fee and the Expense Reimbursement will be payable and in accordance with the order of June 29, 2009, the company intends to make such a payment. The Monitor reports that it is currently contemplated that 50% of the amount will be funded by NNL and 50% by NNI.

24 The assets to be transferred by the Applicants and the U.S. Debtors pursuant to the successful bid are to be transferred free and clear of all liens of any kind. The Monitor is of the understanding that no leased assets are being conveyed as part of this transaction.

25 The Monitor also reports that at the request of the Purchaser, the proposed Approval and Vesting Orders specifically approves Intellectual Property Licence Agreement and Trademark Licence Agreement, collectively, (the "IP Licences"), entered into between NNL and the Purchaser in connection with the Successful Bid.

26 The Monitor also reports that subject to court approval, closing is anticipated to occur in September 2009.

27 The Bidding Procedures provide that the Seller may seek approval of the next highest or otherwise best offer as the Alternate Bid. If the closing of the transaction contemplated fails to occur the Sellers would then be authorized, but not directed, to proceed to effect a Sale Pursuant to the terms of the Alternate Bid without further court approval. The Sellers, in consultation with the Monitor, the UCC and the Bondholders, determined that the bids submitted by Nokia Siemens in the fifth round with a purchase price of $1,032,500,000 is the next highest and best offer and has been deemed to be the Alternative Bid. Accordingly, the company is seeking court approval of the alternative bid pursuant to the Bidding Procedures.

28 The Monitor reports that, as noted in its Fourteenth Report, the CMDA division and the LTE business are not operated through a dedicated legal entity or stand alone division. The Applicants have an interest in intellectual property of the CMDA business and the LTE business which is subject to various inter-company licensing agreements with other Nortel legal entities around the world, in some cases on an exclusive basis and in other cases, on a non-exclusive basis. The Monitor is of the view that the task of allocating sale proceeds stemming from the Successful Bid amongst the various Nortel entities and the various jurisdictions is complex. Further, as set out in the Fifteenth Report, the Applicants, the U.S. Debtors, and certain of the Europe, Middle East, Asia entities, ("EMEA") through their U.K. Administrators entered into the Interim Funding and Settlement Agreement, the IFSA, which was approved by this court on June 29, 2009. Pursuant to the IFSA, each of the Applicants, U.S. Debtors and EMEA Debtors agreed that the execution of definitive documentation with a purchaser of any material Nortel assets was not conditional upon reaching an agreement regarding the allocation of sale proceeds or binding procedures for the allocation of the sale proceeds. The Monitor reports that the parties agreed to negotiate in good faith and attempt to reach an agreement on a protocol for resolving disputes concerning the allocation of sale proceeds but, as of the current date, no agreement has been reached regarding the allocation of any sales proceeds. Accordingly, the Selling Debtors

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have determined that the proceeds are to be deposited in an escrow account. The issue of allocation of sale proceeds will be addressed at a later date.

29 The Monitor expects that the Company will return to court prior to the closing of the transaction to seek approval of the escrow agreement and a protocol for resolving disputes regarding the allocation of sale proceeds.

30 In his affidavit, Mr. Riedel concludes that the sale process was conducted by Nortel with consultation from its financial advisor, the Monitor and several of its significant stakeholders in accordance with the Bidding Procedures and that the auction resulted in a significantly increased purchase price on terms that are the same or better than those contained in the Stalking Horse Agreement. He is of the view that the proposed transaction, as set out in the Sale Agreement, is the best offer available for the assets and that the Alternate Bid represents the second best offer available for the Assets.

31 The Monitor concludes that the company's efforts to market the CMDA Business and the LTE Business were comprehensive and conducted in accordance with the Bidding Procedures and is further of the view that the Section 363 type auction process provided a mechanism to fully determine the market value of these assets. The Monitor is satisfied that the purchased priced constitutes fair consideration for such assets and, as a result, the Monitor is of the view that the Successful Bid represents the best transaction for the sale of these assets and the Monitor therefore recommends that the court approve the Applicants' motion.

32 A number of objections have been considered by the U.S. Court and they have been either resolved or overruled. I am satisfied that no useful purpose would be served by adding additional comment on this issue.

33 Turning now to whether it is appropriate to approve the transaction, I refer back to my Endorsement on the Bidding Procedures motion. At that time, I indicated that counsel to the Applicants had emphasized that Nortel would aim to satisfy the elements established by the court for approval as set out in the decision of *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), which, in turn, accepts certain standards as set out by this court in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

34 Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding. For authority see *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.) .

35 The duties of the court in reviewing a proposed sale of assets are as follows:

1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;

2) It should consider the interests of all parties;

3) It should consider the efficacy and integrity of the process by which offers have been obtained; and

4) It should consider whether there has been unfairness in the working out of the process.

36 I am satisfied that the unchallenged record clearly establishes that the sale process has been conducted in accordance with the Bidding Procedures and with the principles set out in both *Soundair*, and *Crown Trust*. All parties are of the view that the purchase price represents fair consideration for the assets included in the Sale Agreement. I accept these submissions. The consideration provided by Ericsson pursuant to the Sale Agreement, in my view, constitutes reasonably equivalent value and fair consideration for the assets.

37 In my view, it is appropriate to approve the Sale Agreement as between the Sellers and Purchaser. I am also satisfied that it is appropriate to grant the relief relating to the Vesting Order, the IP Licences, the Ancillary Agreement and the Alternate Bid, all of which are approved.

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38 The Applicants also requested an order sealing the Confidential Appendixes to the Seventeenth Report pending further order. In considering this request I referred to the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order. The Supreme Court of Canada held that such orders should only be granted when:

> 1) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;
>
> 2) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

39 I have reviewed the Confidential Appendixes to the Seventeenth Report. I am satisfied that the Appendixes contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that the request for a sealing order is appropriate and it is so granted.

40 Other than with respect to the payment and reimbursement of amounts in respect of the Bid Protections nothing in this endorsement or the formal order is meant to modify or vary any of the Selling Debtors' (as such term is defined in the ISFA) rights and obligations under the ISFA. It is further acknowledged that Nortel has advised that the Interim Sales Protocol shall be subject to approval by the court.

41 An order shall issue in the form presented, as amended, to give effect to the foregoing reasons.

Motion granted.

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TAB H

2010 ONSC 2870
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 3509, 2010 ONSC 2870, 189 A.C.W.S. (3d) 598, 68 C.B.R. (5th) 233

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

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

Pepall J.

Judgment: May 21, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Betsy Putnam for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders Syndicate
M.P. Gottlieb, J.A. Swartz for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
Robert Chadwick, Logan Willis for 7535538 Canada Inc.
Deborah McPhail for Superintendant of Financial Services (FSCO)
Thomas McRae for Certain Canwest Employees

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous

Companies' Creditors Arrangement Act — Sale and investor solicitation process — In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application granted — AHC transaction was approved — Proposed disposition of assets met criteria in s. 36 of Companies' Creditors Arrangement Act and common law — Process was reasonable — Sufficient efforts were made to attract best possible bid — AHC bid was better than support transaction — Effect of proposed sale on interested parties was positive.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Procedure — Court approved commencement of sale and investor solicitation process (SISP) in earlier order — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — LP entities brought application for order approving amended claims procedure, authorizing them to call meeting of unsecured creditors to vote on AHC plan, and amending

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SISP procedures so LP entities could advance AHC transaction, among other relief — Application granted — Requested claims procedure order was approved — Because AHC plan was approved, scope of process had to be expanded to ensure as many creditors as possible could participate in meeting to consider AHC plan — Meeting order to convene meeting of unsecured creditors to vote on AHC plan was granted — On consent, SISP was amended to extend date for closing of AHC transaction and to permit proposed dual track procedure — Amendments were warranted as practical matter and to procure best available going concern outcome for stakeholders and LP entities.

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

In earlier order, court approved support agreement between LP entities and senior lenders (support transaction) and commencement of sale and investor solicitation process (SISP) — AHC bid was only superior offer as defined in SISP — AHC bid would allow for full payout of debt owed to secured lenders and provide additional value to be available for unsecured creditors — AHC transaction would be implemented pursuant to plan of compromise or arrangement — LP entities brought application for order authorizing them to enter into asset purchase agreement based on AHC bid and conditionally sanctioning support transaction, among other relief — Application granted — It was prudent for LP entities to simultaneously advance AHC transaction and support transaction — Support transaction was conditionally sanctioned — Excess of required majorities of senior lenders voted in favour of support transaction — Absent closing of AHC transaction, support transaction was fair and reasonable as between LP entities and creditors — There were no available commercial going concern alternatives to support transaction — There had been strict compliance with statutory requirements.

Table of Authorities

Cases considered by *Pepall J.*:

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.) — followed

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

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, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 6 — referred to

s. 6(3) — referred to

s. 6(5) — referred to

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s. 6(6) — referred to

s. 11 — referred to

s. 36 — considered

APPLICATION by LP entities for various relief relating to *Companies' Creditors Arrangement Act* proceedings.

***Pepall J.*:**

Endorsement

Relief Requested

1 The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

AHC Bid

2 Dealing firstly with approval of the AHC Bid, in my Initial Order of January 8, 2010, I approved the Support Agreement between the LP Entities and the Administrative Agent for the Senior Lenders and authorized the LP Entities to file a Senior Lenders' Plan and to commence a sale and investor solicitation process (the SISP). The objective of the SISP was to test the market and obtain an offer that was superior to the terms of the Support Transaction.

3 On January 11, 2010, the Financial Advisor, RBC Capital Markets, commenced the SISP. Qualified Bids (as that term was defined in the SISP) were received and the Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid was a Superior Cash Offer and that none of the other bids was a Superior Offer as those terms were defined in the SISP.

4 The Monitor recommended that the LP Entities pursue the AHC Transaction and the Special Committee of the Board of Directors accepted that recommendation.

5 The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of $1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional $150 million in value which will be available for the unsecured creditors of the LP Entities.

6 The purchase price will consist of an amount in cash that is equal to the sum of the Senior Secured Claims Amount (as defined in the AHC Asset Purchase Agreement), a promissory note of $150 million (to be exchanged for up to 45% of the common shares of Holdco) and the assumption of certain liabilities of the LP Entities.

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7 The Ad Hoc Committee has indicated that Holdco has received commitments for $950 million of funded debt and equity financing to finance the AHC Bid. This includes $700 million of new senior funded debt to be raised by Opco LP and $250 million of mezzanine debt and equity to be raised including from the current members of the Ad Hoc Committee.

8 Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

9 The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of $1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of $150 million less the amounts paid to the $1,000 unsecured creditors. Ultimately, affected unsecured creditors with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

10 The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

• the Senior Lenders will received 100 cents on the dollar;

• the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;

• the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;

• the AHC Bid contemplates that the transaction will be implemented through a Plan under which $150 million in cash or shares will be available for distribution to unsecured creditors;

• unlike the Support Transaction, there is no option *not* to assume certain pension or employee benefits obligations.

11 The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

12 Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* [1] decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable

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and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

Claims Procedure Order and Meeting Order

14 Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

SISP Amendment

15 It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under section 11 of the CCAA to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

Dual Track and Sanction of Senior Lenders' CCAA Plan

16 In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

17 The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

18 The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' CCAA Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Canadian Airlines Corp., Re*[2] has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

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Conclusion

19 In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole. As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people - creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

Application granted.

Footnotes

1 [1991] O.J. No. 1137 (Ont. C.A.).

2 2000 ABQB 442 (Alta. Q.B.), leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

End of Document

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TAB I

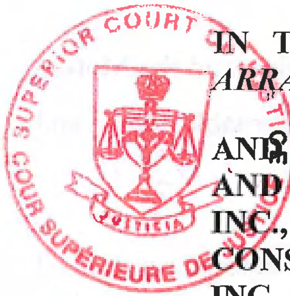
Court File No. CV-15-10950-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE REGIONAL	)	MONDAY, THE 11TH
	)	
SENIOR JUSTICE MORAWETZ	)	DAY OF MAY, 2015



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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF ARMTEC INFRASTRUCTURE INC., ARMTEC HOLDINGS LIMITED, DURISOL CONSULTING SERVICES INC., ARMTEC US LIMITED, INC. AND ARMTEC LIMITED PARTNER CORP.

Applicants

APPROVAL AND VESTING ORDER

THIS MOTION, made by Armtec Infrastructure Inc., Armtec Holdings Limited, Durisol Consulting Services Inc., Armtec US Limited, Inc. and Armtec Limited Partner Corp. (collectively, the "**Applicants**" and with Armtec Limited Partnership, the "**Armtec Companies**") for an order approving the sale transaction (the "**Transaction**") contemplated by an asset purchase agreement dated April 29, 2015 (the "**APA**"), between the Armtec Companies and Armtec Operating LP (now legally known as Armtec LP and referred to herein as the "**Canadian Purchaser**") and appended to the affidavit of Mark Caiger sworn April 29, 2015 (the "**Caiger Affidavit**"), and vesting: (i) in the Canadian Purchaser all of the right, title and interest of Armtec Holdings Limited, Durisol Consulting Services Inc., Armtec Limited Partner Corp. and Armtec Limited Partnership (collectively, the "**Canadian Vendors**") in and to the Purchased Assets; and (ii) in Armtec US LLC (the "**U.S. Purchaser**", and collectively with the Canadian Purchaser, the "**Purchaser**") all of the right, title and interest of Armtec US Limited, Inc. (the

"**U.S. Vendor**") in and to the Purchased Assets, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Caiger Affidavit, the affidavit of Mark Anderson sworn April 28, 2015 (the "**Anderson Affidavit**"), the First Report of Ernst & Young Inc. in its capacity as the Court-appointed monitor (the "**Monitor**") dated May 7, 2015 and on hearing the submissions of counsel for the Armtec Companies, the Monitor, the Purchaser, certain holders of the 8.875% senior unsecured notes issued by Armtec Holdings Limited (the "**Participating Noteholders**") and such other counsel who were present and wished to be heard, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Sydney Young sworn May 1, 2015, filed:

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

2. THIS COURT ORDERS that, unless otherwise indicated or defined herein, capitalized terms used in this Order shall have the meaning given to them in the APA.

3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and the execution of the APA by the Armtec Companies is hereby authorized and approved, with such minor amendments as the Armtec Companies may deem necessary and the Purchaser may agree to. The Armtec Companies are hereby authorized and, subject to section 9.1(e) of the APA, directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser and/or one or more permitted assignees or designees pursuant to the APA, and to Armtec GP Inc., as applicable.

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Armtec Companies and the Purchaser substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), (i) all of the Canadian Vendors' right, title and interest in and to the Purchased Assets shall vest absolutely in the Canadian Purchaser and/or one or more permitted assignees or designees pursuant to the APA, provided that, registered title to the real property described in Schedule B hereto shall vest absolutely in Armtec GP Inc., the

general partner of the Canadian Purchaser, and (ii) all of the U.S. Vendor's right, title and interest in and to the Purchased Assets shall vest absolutely in the U.S. Purchaser and/or one or more permitted assignees or designees pursuant to the APA, in each case, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts, or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, options, rights of offer or first refusal, real property licences, encumbrances, conditional sale arrangements, leasing arrangements or other similar restrictions of any kind, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Regional Senior Justice Morawetz dated April 29, 2015; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Registre des droits personnels et réels mobiliers* (Québec) or any other personal property registry system, or recorded with the Canadian Intellectual Property Office pursuant to the *Trade-Marks Act* (Canada); and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "**Encumbrances**"), provided that the "Claims" and the "Encumbrances" referred to herein shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D hereto and shall not include any Assumed Liabilities (as defined in the APA). For greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

5. THIS COURT ORDERS AND DIRECTS that:

(a) upon the registration in the Land Registry Office for the applicable Registry Division of the Province of Ontario of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*, the Land Registrar is hereby directed to enter Armtec GP Inc. as the registered owner of the properties located in Ontario listed in Schedule B hereto (the "**Ontario Properties**") in fee simple, and is hereby directed to delete and expunge from title to the Ontario Properties all of the Encumbrances listed in Schedule C hereto relating to each of the Ontario Properties;

(b) upon presentation of the Monitor's Certificate and a certified copy of this Order and the registration of a Request/Transmission in the form prescribed by *The Real Property Act*, C.C.S.M. c. R90, as duly executed by the Monitor or Applicant(s) or Armtec GP Inc. in the Winnipeg Land Titles Office ("**WLTO**") and upon payment of the prescribed fees, the District Registrar of the WLTO (the "**WLTO Registrar**") is hereby directed to issue title in the name of Armtec GP Inc. as the registered owner of the real property located in Manitoba and described in Schedule B hereto (the "**Manitoba Properties**") in fee simple, and is hereby directed to delete and expunge from title to the Manitoba Properties all of the Encumbrances listed in Schedule C hereto relating to each of the Manitoba Properties, if any. This Court further orders that this Order shall be entered by the WLTO Registrar regardless of whether the appeal period in respect of this Order has elapsed;

(c) upon presentation of the Monitor's Certificate and a certified copy of this Order and accompanied by the required application for registration and upon payment of the prescribed fees, the Land Registrar of the Land Registry Office for the Registration Division of SAINT-JEAN for the Province of Quebec (the "**Saint-Jean Registry Office**") is hereby ordered to publish this Order and (i) to proceed with an entry on the index of immovables showing Armtec GP Inc. as the owner of the immovable properties more fully described in Schedule B hereto and located in the municipality of SAINT-JEAN-SUR-RICHELIEU (the "**Saint-Jean Property**"); and (ii) to proceed with the removal and cancellation of those Encumbrances relating to the Saint-Jean Property listed in Schedule C and registered at the Saint-Jean Registry Office in order to allow the transfer of the Saint-Jean Property to Armtec GP Inc. free and clear of such Encumbrances. Legal counsel for the Applicants or the Purchaser and any agents appointed by such counsel may, immediately following the closing of the transaction proceed with the cancellation of the Encumbrances relating to the Saint-Jean Property listed in Schedule C hereto, if any;

(d) upon presentation of the Monitor's Certificate and a certified copy of this Order and accompanied by the required application for registration and upon payment of

the prescribed fees, the Land Registrar of the Land Registry Office for the Registration Division of PORTNEUF for the Province of Quebec (the "**Portneuf Registry Office**") is hereby ordered to publish this Order and (i) to proceed with an entry on the index of immovables showing Armtec GP Inc. as the owner of the immovable properties more fully described in Schedule B hereto and located in the municipality of SAINT-AUGUSTIN-DE-DESMAURES (the "**St. Augustin Property**"); and (ii) to proceed with the removal and cancellation of those Encumbrances relating to the St. Augustin Property listed in Schedule C and registered at the Portneuf Registry Office in order to allow the transfer of the St. Augustin Property to Armtec GP Inc. free and clear of such Encumbrances. Legal counsel for the Applicants or the Purchaser and any agents appointed by such counsel may, immediately following the closing of the transaction proceed with the cancellation of the Encumbrances relating to the St. Augustin Property listed in Schedule C hereto, if any;

(e) upon presentation of the Monitor's Certificate and a certified copy of this Order and accompanied by the required application for registration and upon payment of the prescribed fees, the Land Registrar of the Land Registry Office for the Registration Division of VAUDREUIL for the Province of Quebec (the "**Vaudreuil Registry Office**") is hereby ordered to publish this Order and (i) to proceed with an entry on the index of immovables showing Armtec GP Inc. as the owner of the immovable properties more fully described in Schedule B hereto and located in the municipality of SAINT-CLET (the "**Saint-Clet Properties**"); and (ii) to proceed with the removal and cancellation of those Encumbrances relating to the Saint-Clet Properties listed in Schedule C and registered at the Vaudreuil Registry Office in order to allow the transfer of the Saint-Clet Property to Armtec GP Inc. free and clear of such Encumbrances. Legal counsel for the Applicants or the Purchaser and any agents appointed by such counsel may, immediately following the closing of the transaction proceed with the cancellation of those Encumbrances relating to the Saint-Clet Properties listed in Schedule C hereto, if any;

(f) upon the delivery of the Monitor's Certificate, and upon the filing of a certified copy of this Order and upon payment of any applicable registration fees, the Registrar of Land Titles of Alberta (the "**Alberta Registrar**") is hereby authorized, requested, and directed to cancel the existing Certificates of Title listed in Schedule B hereto for those real properties located in Alberta listed in Schedule B hereto (the "**Alberta Properties**"), and to issue new Certificates of Title for the Alberta Properties in the name of Armtec GP Inc. and to register such transfers, discharges, discharge statements of conveyances, as may be required to convey clear title to the Alberta Properties to Armtec GP Inc., which Certificates of Title shall be subject only to those encumbrances listed on Schedule D hereto relating to each of the Alberta Properties. This Order shall be registered by the Alberta Registrar notwithstanding the requirements of section 191(1) of the *Land Titles Act,* RSA 2000, c. L-4 and regardless of whether the appeal period in respect of this Order has elapsed;

(g) upon registration of a certified copy of this Order and a Monitor's Certificate substantially in the form of the certificate attached as Schedule A hereto, and upon payment of the prescribed fees, the Registrar of the applicable Land Titles Office for the Province of British Columbia is hereby directed to convey, transfer and vest with Armtec GP Inc. the indefeasible title to the real properties located in British Columbia listed in Schedule B hereto, together with all plants, buildings, structures, improvements, appurtenances and fixtures forming part thereof, or held or enjoyed appurtenant thereto (the "**British Columbia Properties**"), as the registered owner thereof in fee simple, and is hereby directed to discharge, cancel and release from title to the British Columbia Properties all of the Encumbrances listed in Schedule C relating to each of the British Columbia Properties;

(h) upon the presentation for registration in the Land Titles Office for the District of New Brunswick of a certified copy of this Order and a Transfer/Deed of Land in the form prescribed by the *Land Titles Act* (New Brunswick) duly executed by the Monitor or Armtec Holdings Limited, the Land Registrar is hereby directed to enter Armtec GP Inc. as the owner of the real property located in New Brunswick listed in Schedule B hereto (the "**New Brunswick Property**") in fee simple, and

is hereby directed to delete and expunge from title to the New Brunswick Property all of the Encumbrances listed in Schedule C hereto relating to the New Brunswick Property, if any;

(i) upon the registration in the Land Registry Office for the Registry Division of Colchester of the Province of Nova Scotia (the "**Colchester LRO**") of a Deed duly executed by the Monitor or Applicant(s):

(i) the Registrar for the Colchester LRO shall enter Armtec GP Inc. as the registered owner in fee simple of the real property located in Nova Scotia listed in Schedule B hereto (the "**Nova Scotia Property**"); and

(ii) the Encumbrances listed in Schedule C hereto recorded in the parcel register for the Nova Scotia Property, and the interest of all persons in the Nova Scotia Property arising from or through the Encumbrances, be and are hereby forever barred and foreclosed; and

(iii) the Registrar for the Colchester LRO shall delete all registrations in the parcel register for the Nova Scotia Property in respect of the Encumbrances listed in Schedule C relating to the Nova Scotia Property, if any; and

(j) upon the registration in the Registry of Deeds for the Province of Newfoundland and Labrador of a Deed of Conveyance in accordance with the *Registration of Deeds Act, 2009* (Newfoundland and Labrador) duly executed by the Monitor or Applicant(s), all right, title and interest of Armtec Holdings Limited in and to the real property located in Newfoundland and Labrador listed in Schedule B hereto (the "**Newfoundland Property**") shall vest and is hereby vested in and to Armtec GP Inc., absolutely and forever, in fee simple.

6. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof to the Armtec Companies and the Purchaser.

7. THIS COURT ORDERS that the Monitor may rely on written notice from the Armtec Companies and the Purchaser regarding the satisfaction of the Purchase Price and the fulfillment of conditions to closing under the APA and shall incur no liability with respect to the delivery of the Monitor's Certificate.

8. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Armtec Companies are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Armtec Companies' records pertaining to the Armtec Companies' past and current employees in Canada. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Armtec Companies.

9. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Armtec Companies and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Armtec Companies;

the entering into of the APA and the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Armtec Companies and shall not be void or voidable by creditors of the Armtec Companies, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent legislation in any other Canadian jurisdiction in which all or any part of the Purchased Assets are located.

11. THIS COURT ORDERS that: (i) on or after the Closing Date, the Armtec Companies are hereby permitted to execute and file articles of amendment or such other documents or instruments as may be required to change their respective legal names in accordance with section 7.13 of the APA, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective and shall be accepted by the applicable Governmental Authority without the requirement (if any) of obtaining director or shareholder approval pursuant to any federal or provincial legislation; and (ii) upon the official change to the legal names of the Applicants that is to occur on or promptly following the Closing Date in accordance with section 7.13 of the APA, the names of the Applicants in the within title of proceedings shall be deleted and replaced with the new legal names of the Applicants, and any document filed thereafter in these proceedings (other than the Monitor's Certificate) shall be filed using such revised title of proceedings.

12. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, and all courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable, to recognize and give effect to this Order and to assist: (i) the Monitor and its agents in carrying out the terms of this Order; and (ii) the Purchaser in giving effect to the transfer of title pursuant to the APA, as approved herein, and the vesting provided for herein, and in making any registrations in respect of same under applicable title registries for real or personal property.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 1 1 2015

Schedule A – Form of Monitor's Certificate

Court File No. CV-15-10950-00CL

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 AND ARRANGEMENT OF ARMTEC INFRASTRUCTURE INC., ARMTEC HOLDINGS LIMITED, DURISOL CONSULTING SERVICES INC., ARMTEC US LIMITED, INC. AND ARMTEC LIMITED PARTNER CORP.

Applicants

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Regional Senior Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated April 29, 2015, Ernst & Young Inc. was appointed as the monitor (the "**Monitor**") of the Applicants and Armtec Limited Partnership (collectively, the "**Armtec Companies**").

B. Pursuant to an Order of the Court dated ●, 2015 (the "**Approval and Vesting Order**"), the Court approved the asset purchase agreement made as of April 29, 2015 (the "**APA**") between the Armtec Companies and Armtec Operating LP (now legally known as Armtec LP, and together with Armtec US LLC, the "**Purchaser**") and provided for the vesting in the Purchaser, Armtec GP. Inc. and/or one or more of permitted assignees or designees pursuant to the APA, as applicable, of all of the Armtec Companies' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the satisfaction of the Purchase Price for the Purchased Assets by the Purchaser in accordance with the APA; (ii) that

the conditions to Closing as set out in the APA have been satisfied or waived by the Armtec Companies and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the APA.

THE MONITOR CERTIFIES the following:

1. The Purchaser has satisfied the Purchase Price for the Purchased Assets in accordance with the APA;

2. The conditions to Closing as set out in the APA have been satisfied or waived by the Armtec Companies and the Purchaser;

3. The Transaction has been completed to the satisfaction of the Monitor; and

4. This Certificate was delivered by the Monitor at ________ ● **[p.m.]** on _______ ●, 2015.

Ernst & Young Inc., in its capacity as Monitor of the Armtec Companies, and not in its personal capacity

Per: ________________________________

Name:

Title:

Schedule B – Real Property

ONTARIO PROPERTIES

Municipal Address	PIN and Short Legal Description	Land Titles Office No.
0 Elizabeth Street, Comber	75062-0376 (LT) PT N1/2 LT 7 CON SMR TILBURY PT 2, 3 12R11820; LAKESHORE	LRO 12, Essex
21 Stephenson Road East, Huntsville	48124-0619 (LT) PT LT 30-31 CON 11 STEPHENSON; PT LT 30-31 CON 12 STEPHENSON PT 4 35R4608, PT 1 - 3 35R8613 & PT 1 & 2 RD2015 EXCEPT PT 2 35R4116; PT RDAL BTN LOTS 30 & 31 CON 11 STEPHENSON; PT RDAL BTN LOTS 30 & 31 CON 12 STEPHENSON (CLOSED BY DM156974) PT 2, 35R7134; S/T DM166463, ST4562, ST4565; HUNTSVILLE ; THE DISTRICT MUNICIPALITY OF MUSKOKA	LRO 35, Muskoka
33 Centennial Road, Orangeville	34005-0180 (LT) PT LT 68, RCP 335, PTS 2,3,4,5, PL 7R-4056, S/T MF98604, MF98606, ORANGEVILLE;	LRO 7, Dufferin
33 Centennial Road, Orangeville	34005-0181 (LT) PT LT 68, RCP 335, PT 1 PL 7R-4056, ORANGEVILLE.	LRO 7, Dufferin
35 Rutherford Road, Brampton	14032-0050 (LT) PT BLK L PL 518 BRAMPTON EXCEPT PTS 1 TO 3, 43R11820 ; S/T VS149099E BRAMPTON	LRO 43, Peel
35 Rutherford Road, Brampton	14032-0061 (LT) PT LT 11 PL 644 BRAMPTON; PT LT 12 PL 644 BRAMPTON AS IN VS176591; T/W BR42908 ; BRAMPTON	LRO 43, Peel

Municipal Address	PIN and Short Legal Description	Land Titles Office No.
41 George Street, Guelph	71319-0050 (LT) LOT 3 WEST SIDE GEORGE ST, PLAN 18 ; PT LOT 4 WEST SIDE GEORGE ST, PLAN 18 , PT 9, 61R2969 ; GUELPH	LRO 61, Wellington
44 George Street, Guelph	71310-0091 (LT) PT LOTS 38 & 39, PLAN 215 , PT 1 61R2969 ; GUELPH	LRO 61, Wellington
44 George Street, Guelph	71319-0037 (LT) PT LOTS 32, 36 & 37, PLAN 215, & PT CLARENCE ST, CLOSED BY CS12835, PLAN 18; LOTS 33, 34 & 35, PLAN 215; LOTS 6 EAST SIDE OF CLARENCE ST, 7 EAST SIDE CLARENCE ST, 8 EAST SIDE CLARENCE STREET & 9 EAST SIDE CLARENCE ST PLAN 18; LOTS 6 WEST SIDE GEORGE ST, 7 WEST SIDE GEORGE ST, 8 WEST SIDE GEORGE STREET & 9 WEST SIDE GEORGE ST, PLAN 18, ALL BEING PT 2 61R2969, T/W ROS564528; GUELPH	LRO 61, Wellington
44 George Street, Guelph	71319-0093 (LT) LOTS 7 EAST SIDE GEORGE ST, 8 EAST SIDE GEORGE STREET & 9 EAST SIDE GEORGE ST, PLAN 18 , T/W ROS564528 ; GUELPH	LRO 61, Wellington
857 Concession 14 West, R.R. #3, Walkerton	33228-0142 (LT) PT LT 19 CON 14 CULROSS PT 1 3R8728; SOUTH BRUCE	LRO 3, Bruce
901 Pattullo Avenue, Woodstock	00076-0003 (LT) LT 17 PL 1654 T/W 257829; S/T EO11216; WOODSTOCK	LRO 41, Oxford

Municipal Address	PIN and Short Legal Description	Land Titles Office No.
1110 Dundas Street, Woodstock	00108-0026 (LT) PT LT 1-2 PL 491 AS IN 449068; S/T 289136, A19785; S/T A77781; WOODSTOCK	LRO 41, Oxford
5598 Power Road, Ottawa	04326-0055 (LT) PT LT 26 CON 5RF GLOUCESTER PTS 2 & 3, 5R455 ; GLOUCESTER	LRO 4, Ottawa-Carleton
5602 Doncaster Road, Ottawa	04326-0071 (LT) PT LT 26 CON 5RF GLOUCESTER AS IN N754462 ; GLOUCESTER	LRO 4, Ottawa-Carleton
5605 Doncaster Road, Ottawa	04326-0064 (LT) PT LT 26 CON 5RF GLOUCESTER AS IN CT112621 ; GLOUCESTER	LRO 4, Ottawa-Carleton
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	26576-0069 (LT) PCL CON 6-23-3, SEC WHITBY; PT LT 23, CON 6, TOWNSHIP OF WHITBY, PT 2 40R16611 ; WHITBY	LRO 40, Durham
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	26576-0071 (LT) PT LT 23 CON 6 TOWNSHIP OF WHITBY PT 1, 40R16611; WHITBY	LRO 40, Durham
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	26576-0281 (LT) FIRSTLY: PT LT 23 CON 6 TOWN OF WHITBY, PTS 3 & 4 ON PL 40R16611; SECONDLY: PT LT 23 CON 6 TOWN OF WHITBY, PTS 5 & 6 ON PL 40R16611, SAVE AND EXCEPT PTS 1 & 2 ON PL 40R23112; WHITBY, REGIONAL MUNICIPALITY OF DURHAM, S/T LT742254	LRO 40, Durham

Municipal Address	PIN and Short Legal Description	Land Titles Office No.
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	26576-0291 (LT) PT LT 23 CON 6 TOWNSHIP OF WHITBY, PT 1 PL 40R18581, SAVE & EXCEPT PT 4 PL 40R23112 & SAVE & EXCEPT PT 1 ON EXPROPRIATION PL DR542132, WHIT BY, REGIONAL MUNICIPALITY OF DURHAM	LRO 40, Durham
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	26576-0293 (LT) PT LT 23 CON 6 TOWNSHIP OF WHITBY, PT 7 PL 40R16611 SAVE & EXCEPT PT 3 PL 40R23112 & SAVE & EXCEPT PT 1 ON EXPROPRIATION PL DR542133, WHITBY, REGIONAL MUNICIPALITY OF DURHAM	LRO 40, Durham
7010 Windsor Avenue, Comber	75062-0355 (LT) LT 37-39 PL 383 TILBURY WEST; LAKESHORE	LRO 12, Essex
7010 Windsor Avenue, Comber	75062-0391 (LT) LT 34-36 PL 383 TILBURY WEST; PT N1/2 LT 7 CON SMR TILBURY AS IN R930538 SECONDLY, THIRDLY(E & N OF 12R1041); LAKESHORE	LRO 12, Essex
13310 County Road 9 (formerly Smith Road), Chesterville	66149-0320 (LT) PT BLK U PL 35 PT 3, 4, 5, 6, 8R698; S/T CH1789, CH2013, DR40114, DRB6257; NORTH DUNDAS	LRO 8, Dundas
18599 Yonge Street, East Gwillimbury	03427-0530 (LT) PT LT 103 CON 1 E YONGE ST EAST GWILLIMBURY AS IN B30316B, A58338A, A54070A ; EAST GWILLIMBURY	LRO 65, York Region

Municipal Address	PIN and Short Legal Description	Land Titles Office No.
R.R. #2 Cooper Road, Hwy 11-17, Thunder Bay	62295-0694 (LT) PCL 16068 SEC TBF SRO; PT LT 7 CON 2 NKR PAIPOONGE PT 3, 4, 5 & 6, 55R1487; OLIVER PAIPOONGE	LRO 55, Thunder Bay

MANITOBA PROPERTIES

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
2455 Dugald Road, Winnipeg, Manitoba	**Title No. 2033088** Parcel "A" Plan 13031 WLTO IN S ½ of 5-11-4 EPM	Winnipeg
2500 Ferrier Street, Winnipeg, Manitoba	**Title No. 2257084** Lot 2 Plan 33206 WLTO in RL 23 and 24 Parish of Kildonan	Winnipeg

QUEBEC PROPERTIES

Municipal Address	Legal Description	Land Registry Office, Registration Division of:
800 Pierre-Tremblay Boulevard, Saint-Jean-sur-Richelieu, Québec J2W 4W8	An emplacement located in the City of Saint-Jean-sur-Richelieu, Province of Québec, known and designated as being composed of lot numbers FOUR MILLION FORTY-THREE THOUSAND ONE HUNDRED AND EIGHTY-TWO, FOUR MILLION ONE HUNDRED EIGHTY-SIX THOUSAND SIX HUNDRED and FOUR MILLION FORTY-THREE THOUSAND TWO HUNDRED AND SEVENTY-ONE (4 043 182, 4 186 600 and 4 043 271), all of the Cadastre of Québec, Registration Division of SAINT-JEAN. With a building thereon erected bearing civic number 800 Pierre-Tremblay Boulevard, Saint-Jean-sur-Richelieu, Québec J2W 4W8.	Saint-Jean

Municipal Address	Legal Description	Land Registry Office, Registration Division of:
85 de Rotterdam Street, Saint-Augustin-de-Desmaures, Québec G3A 1T1	An emplacement located in the City of Saint-Augustin-de-Desmaures, Province of Québec, known and designated as lot number THREE MILLION FIFTY-FIVE THOUSAND FOUR HUNDRED AND SEVENTY-NINE (3 055 479), of the Cadastre of Québec, Registration Division of PORTNEUF. With a building thereon erected bearing civic number 85 de Rotterdam Street, Saint-Augustin-de-Desmaures, Québec G3A 1T1.	Portneuf
665 and 669 Route 201 and 100 Michel Street, Saint-Clet, Québec, J0P 1S0	An emplacement located in the Municipality of Saint-Clet, Province of Québec, known and described as being comprised of lot numbers TWO MILLION THREE HUNDRED NINETY-SIX THOUSAND SIX HUNDRED AND SEVENTY-SEVEN and TWO MILLION SEVEN HUNDRED SEVENTY-FIVE THOUSAND TWO HUNDRED AND SEVENTY-NINE (2 396 677 and 2 775 279), both of the Cadastre of Québec, Registration Division of VAUDREUIL. With the buildings thereon erected bearing civic numbers 665 and 669 Route 201 and 100 Michel Street, Saint-Clet, Québec, J0P 1S0.	Vandreuil

ALBERTA PROPERTIES

Municipal Address	Title No. and Legal Description	Land Registry Office of:
58th Street and 46th Avenue, Redwater, Alberta	**Title No. 012 252 798** Plan 6648NY Block A Excepting thereout all mines and minerals. Area: 8.92 Hectares (22.04 Acres) more or less	Alberta Land Titles Office

Municipal Address	Title No. and Legal Description	Land Registry Office of:
4300-50th Avenue S.E., Calgary, Alberta	**Title No. 051 472 649** Plan 667AD Block C Excepting thereout: Plan Number Hectares Acres more or less Road 7911105 Subdivision 9810128 9.929 24.53 Excepting thereout all mines and minerals and the right to work the same	Alberta Land Titles Office

BRITISH COLUMBIA PROPERTIES

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
1848 Schoolhouse Road, Nanaimo, British Columbia	Parcel Identifier 000 130 915 Lot A, Section 14, Range 6, Cranberry District Plan 26748 SUBJECT TO EXCEPTIONS AND RESERVATIONS CONTAINED IN CROWN GRANT, FILED DD 52017W	British Columbia Land Title Office
	Parcel Identifier 000 130 923 Lot B, Section 14, Range 6, Cranberry District Plan 26748 SUBJECT TO EXCEPTIONS AND RESERVATIONS CONTAINED IN CROWN GRANT, FILED DD 52017W	British Columbia Land Title Office
	Parcel Identifier 000 130 931 Lot C, Section 14, Range 6, Cranberry District Plan 26748 SUBJECT TO EXCEPTIONS AND RESERVATIONS CONTAINED IN CROWN GRANT, FILED DD 52017W THIS TITLE MAY BE AFFECTED BY A PERMIT UNDER PART 26 OF THE MUNICIPAL ACT, SEE EN40595	British Columbia Land Title Office
7900 Nelson Road, Richmond, British Columbia	Parcel Identifier: 003 555 551 Parcel "A" (statutory right of way Plan 51742) of Parcel "10" (Bylaw plan 27262) Lot 13, Sections 17 and 20, Block 4, North Range 4 West New Westminster, District Plan 26614 ZONING REGULATION AND PLAN UNDER THE AERONAUTICS ACT (CANADA) FILED 10.02.1981 UNDER NO. T 17084 PLAN NO. 61216	British Columbia Land Title Office

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
	Parcel Identifier: 004 248 902 Lot 22 Except: Part outlined red on Plan 51742, secondly, except Plan BCP18196 Sections 17 and 20 Block 4 North Range 4 West New Westminster, District Plan 27693 THIS TITLE MAY BE AFFECTED BY A PERMIT UNDER PART 26 OF THE MUNICIPAL ACT, SEE BN254784 HERETO IS ANNEXED EASEMENT BX245268 OVER LOT A PLAN BCP18196 ZONING REGULATION AND PLAN UNDER THE AERONAUTICS ACT (CANADA) FILED 10.02.1981 UNDER NO. T17084 PLAN NO. 61216	British Columbia Land Title Office

NEW BRUNSWICK PROPERTY

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
21 Crescent St, Sackville NB	Parcel Identifier: 963488 ALL that certain lot, piece or parcel of land and premises situate, lying and being at the Town of Sackville, in the Parish of Sackville, in the County of Westmorland and Province of New Brunswick, being more particularly described as Lands of Armtec Limited/Armtec Limitée, located on the south side of Crescent Street, in the Town of Sackville, in the Parish of Sackville and County of Westmorland and filed in and for the County of Westmorland on October 25, 2001 as Number 13101325.	District of New Brunswick

NOVA SCOTIA PROPERTY

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
283 Main Street, Bible Hill, Nova Scotia	PID: 20400792 All that certain lot, piece or parcel of land situate, lying and being on the west boundary of Main Street and the south boundary of Park Street at Bible Hill, in the County of Colchester, Province of Nova Scotia and being Lot 00-E1 as shown on a plan of subdivision showing lands of Canadian National Railway Company dated December 12, 2000 signed by Ernest C. Blackburn, NSLS subdivision approval dated December 21, 2000 bounded and described as follows: Beginning at a survey marker on the west boundary of Main Street being the southeast corner of Parcel F lands of Canadian National Railway Company and also being South 77 degrees 52 minutes 22 seconds West a distance of 18.261 meters from NS	Colchester

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
	Control Monument 420; Thence along the west boundary of Main Street South 31 degrees 09 minutes 01 seconds East a distance of 68.821 meters to a survey marker; Thence continuing along the west boundary of Main Street South 29 degrees 46 minutes 31 seconds East a distance of 172.518 meters to a survey marker; Thence dividing the lands of the grantor South 60 degrees 13 minutes 29 seconds West a distance of 10.114 meters to a survey marker; Thence dividing the lands of the grantor South 7 degrees 20 minutes 21 seconds East a distance of 23.236 meters to a survey marker; Thence dividing the lands of the grantor South 60 degrees 13 minutes 29 seconds West a distance of 33.145 meters to a survey marker; Thence dividing the lands of the grantor following a curve to the left having a radius of 3756.032 meters and an arc distance of 119.903 meters (by chord North 35 degrees 30 minutes 08 seconds West a distance of 119.898 meters) to a survey marker; Thence dividing the lands of the grantor North 36 degrees 25 minutes 00 seconds West a distance of 150.582 meters to a survey marker on the south boundary of Park Street; Thence along the south boundary of Park Street North 55 degrees 49 minutes 51 seconds East a distance of 67.606 meters to a survey marker being the southwest corner of Parcel F lands of Canadian National Railway Company; Thence along the south boundary of Parcel F, South 77 degrees 39 minutes 35 seconds East a distance of 16.782 meters to a survey marker and place of beginning. Containing 17,572.6 square meters. Bearings are grid (1979) referable to Zone 5 with Central Meridian 64 degrees 30 minutes West (ATS77). Being and intended to be the same lands conveyed to 3051060 Nova Scotia Limited by Deed recorded at the Registry of Deeds Office at Truro, NS on January 11, 2001 in book 971 at page 871 as document 176.	

NEWFOUNDLAND PROPERTY

Municipal Address	PIN and Short Legal Description	Land Registry Office of:
23-29 Exploits Avenue, Bishops Falls, Newfoundland	**FIRSTLY:** ALL THAT piece or parcel of land situate and being at Bishops Falls, in the Province of Newfoundland, and being abutted and bounded as follows, that is to say: Beginning at a point on the south side of a road and at the intersection of a line drawn 50 feet west and parallel to the west side of a dressing-room (shown on the plan attached to the Deed of Conveyance dated November 30, 1987, and registered on December 15, 1987 in Roll 455, Frame 1055 as No. 519234) and running thence northerly by said roadside a distance of approximately 205 feet to its intersection with the Canadian National Railway right-of-way, thence in an easterly direction by said right-of-way 160 feet to the edge of a brook running into the Exploits River, thence by and along the westerly bank of said brook some 440 feet to the north bank of the Exploits River, thence by the said north bank of the Exploits River a distance of approximately 242 feet to the intersection with the line described above as drawn (50 feet west and parallel to the dressing-room), from the road to the north bank of the Exploits River thence along the said line 308 feet to the point of commencement containing 2 1/2 acres more or less, and being more clearly shown outlined on the plan attached to said Instrument No. 519234. **SECONDLY:** ALL THAT piece or parcel of land situate and being on the south side of Exploits Avenue in the Municipality of Bishops Falls, Province of Newfoundland, Canada, bounded and abutted as follows, that is to say by a line commencing at a point said point being a distance of 223.2 feet measured in a north easterly direction from the place of intersection of the southern limit of Exploits Avenue with the eastern limit of land of Joseph Butt, thence turning and running by the southern limits of Exploits Avenue north sixty-two degrees forty-eight minutes (N 62 48 E) east a distance of two hundred and thirty-eight decimal zero (238.0) feet, thence by other lands of Armco Canada Limited south thirty-three degrees twenty-three minutes (S 33 23 W) west a distance of eighteen decimal four (18.4) feet, south twenty-six degrees thirty-two minutes (S 26 32 E) east a distance of two hundred and eighty-nine decimal zero (289.0) feet, thence by a Reservation on the Exploits River south seventy-five degrees twenty-six minutes (S 75 26 W) west a distance of two hundred and twenty-four decimal zero (224.0) feet, and thence by land now or formerly in the name of Bishops Falls Lions Club Playground north twenty-seven degrees twelve minutes (N 27 12 W) west a distance of two hundred and forty-nine decimal zero (249.0) feet more or less to the point of commencement and containing in all an area of one decimal three eight six (1.386) acres more or less. All bearings are referred to the Magnetic Meridian.	Registry of Deeds for Province of Newfoundland and Labrador

Schedule C – Claims

Claims other than Claims affecting Real Property:

1. All liabilities, obligations and related guarantees under the 6.50% convertible unsecured subordinated debentures due June 30, 2017 issued by Armtec Infrastructure Inc. in an original aggregate principal amount of $40,000,000 including all accrued and accruing interest, fees, costs and expenses thereunder (the "**Convertible Debentures**");

2. All liabilities and obligations under the convertible debenture indenture entered into by Armtec Infrastructure Income Fund and Computershare Trust Company of Canada, as trustee, dated as of June 30, 2010 and the first supplemental indenture entered into by Armtec Infrastructure Income Fund, Armtec Infrastructure Inc. and Computershare Trust Company of Canada, as trustee, dated as of January 1, 2011, which govern the Convertible Debentures;

3. All liabilities, obligations and related guarantees under the 8.875% senior unsecured guaranteed notes due September 22, 2017 issued by Armtec Holdings Limited in an original aggregate principal amount of $150,000,000 including all accrued and accruing interest, fees, costs and expenses thereunder (the "**Senior Notes**");

4. All liabilities and obligations under the indenture entered into by Armtec Holdings Limited, Armtec Infrastructure Inc. and certain subsidiaries of Armtec Holdings Limited, as guarantors, and Computershare Trust Company, as trustee, dated as of September 22, 2010, which governs the Senior Notes, and any guarantees or security given by Armtec Holdings Limited, Armtec Infrastructure Inc. and such subsidiaries relating to same;

5. All liabilities and obligations directly or indirectly associated with the action commenced, but not served, on May 8, 2014 in the Court of Queen's Bench of Alberta, by Trevcon Enterprises Ltd. against Armtec Limited Partnership;

6. All liabilities and obligations directly or indirectly associated with the actions commenced between 2005 and 2008 by various AMC Theatres entities against Pre-Con Inc., including liabilities and obligations under the terms of any negotiated settlement; and

7. All liabilities and obligations directly or indirectly associated with the action commenced on March 5, 2014 in the Supreme Court of the State of New York, County of Albany by the State of New York et. al. against Armtec Infrastructure, Inc. a/k/a Armtec Infrastructure Income Fund, f/k/a Clearford Industries, Inc., f/k/a Brooklin Concrete, Inc.

Claims affecting Real Property:

ONTARIO PROPERTIES

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to be removed from title:
0 Elizabeth Street, Comber	**75062-0376 (LT)** PT N1/2 LT 7 CON SMR TILBURY PT 2, 3 12R11820; LAKESHORE	LRO 12, Essex	**CE295101** registered 2007/09/28 being a **Notice** between Armtec Holdings Limited and The Bank of Nova Scotia
13310 County Road 9 (formerly Smith Road), Chesterville	**66149-0320 (LT)** PT BLK U PL 35 PT 3, 4, 5, 6, 8R698; S/T CH1789, CH2013, DR40114, DRB6257; NORTH DUNDAS	LRO 8, Dundas	**DR122843** registered 2007/10/01 being a **Notice of Agreement Amending Debenture** between Armtec Holdings Limited and The Bank of Nova Scotia

MANITOBA PROPERTIES

None.

LAND REGISTRY OFFICE (QUEBEC)

None.

REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS (QUEBEC)

None.

ALBERTA PROPERTIES

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to be discharged:
58th Street and 46th Avenue, Redwater, Alberta	**Title No. 012 252 798** Plan 6648NY Block A Excepting thereout all mines and minerals. Area: 8.92 Hectares (22.04	Alberta Land Titles Office	Registration Number: 142 077 486 Date: 14/03/2014 BUILDER'S LIEN LIENOR - R & R MILLWRIGHTS LTD. AMOUNT: $17,912

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to be discharged:
	Acres) more or less		

BRITISH COLUMBIA PROPERTIES

None.

NEW BRUNSWICK PROPERTY

None.

NOVA SCOTIA PROPERTY

None.

NEWFOUNDLAND PROPERTY

Municipal Address	Legal Description	Land Registry Office of:	Encumbrances to be Discharged:
23-29 Exploits Avenue, Bishops Falls, Newfoundland	**FIRSTLY:** ALL THAT piece or parcel of land situate and being at Bishops Falls, in the Province of Newfoundland, and being abutted and bounded as follows, that is to say: Beginning at a point on the south side of a road and at the intersection of a line drawn 50 feet west and parallel to the west side of a dressing-room (shown on the plan attached to the Deed of Conveyance dated November 30, 1987, and registered on December 15, 1987 in Roll 455, Frame 1055 as No. 519234) and running thence northerly by said roadside a distance of approximately 205 feet to its intersection with the Canadian National Railway right-of-way, thence in an easterly direction by said right-of-way 160 feet to the edge of a brook running into the Exploits River, thence by and along the westerly bank of said brook some 440 feet to the north bank of the Exploits River, thence by the said north bank of the Exploits River a distance of approximately 242 feet to the intersection with the line described above as drawn (50 feet west and parallel to the dressing-room), from the road to the north bank of the	Registry of Deeds for Province of Newfoundland and Labrador	Debenture dated July 27, 2004 and registered as Registration No. 12421 at the Registry of Deeds for Province of Newfoundland and Labrador on July 27, 2004 from Armtec Holdings Limited to The Bank of Nova Scotia in the principal amount of $60,000,000. Amending Agreement dated September 28, 2007 and registered as Registration No. 214029 at the Registry of Deeds for Province of Newfoundland and Labrador on October 2, 2007 between Armtec Holdings Limited and The Bank of Nova Scotia.

Municipal Address	Legal Description	Land Registry Office of:	Encumbrances to be Discharged:
	Exploits River thence along the said line 308 feet to the point of commencement containing 2 1/2 acres more or less, and being more clearly shown outlined on the plan attached to said Instrument No. 519234. **SECONDLY:** ALL THAT piece or parcel of land situate and being on the south side of Exploits Avenue in the Municipality of Bishops Falls, Province of Newfoundland, Canada, bounded and abutted as follows, that is to say by a line commencing at a point said point being a distance of 223.2 feet measured in a north easterly direction from the place of intersection of the southern limit of Exploits Avenue with the eastern limit of land of Joseph Butt, thence turning and running by the southern limits of Exploits Avenue north sixty-two degrees forty-eight minutes (N 62 48 E) east a distance of two hundred and thirty-eight decimal zero (238.0) feet, thence by other lands of Armco Canada Limited south thirty-three degrees twenty-three minutes (S 33 23 W) west a distance of eighteen decimal four (18.4) feet, south twenty-six degrees thirty-two minutes (S 26 32 E) east a distance of two hundred and eighty-nine decimal zero (289.0) feet, thence by a Reservation on the Exploits River south seventy-five degrees twenty-six minutes (S 75 26 W) west a distance of two hundred and twenty-four decimal zero (224.0) feet, and thence by land now or formerly in the name of Bishops Falls Lions Club Playground north twenty-seven degrees twelve minutes (N 27 12 W) west a distance of two hundred and forty-nine decimal zero (249.0) feet more or less to the point of commencement and containing in all an area of one decimal three eight six (1.386) acres more or less. All bearings are referred to the Magnetic Meridian.		

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(Unaffected by the Vesting Order)

1. Encumbrances given by the Armtec Companies as security to a public utility or any Governmental Authority when required in the ordinary course of the Business but only insofar as they relate to any amounts not due as at the Closing Date;

2. Reservations, limitations, provisos and conditions, if any, expressed in any original grants of land by a Governmental Authority and any statutory limitations, exceptions, reservations and qualifications on real property;

3. Statutory liens for current Taxes, assessments or other governmental charges not yet due and payable or for Taxes the validity or amount of which is being contested in good faith by appropriate action, provided that an appropriate reserve has been established therefor on the books of the Business;

4. Minor discrepancies in the legal description of the Real Property or any adjoining real or immovable property which would be disclosed in an up- to-date survey which do not materially adversely affect the use, marketability or value of the Real Property (based on the current use of such affected property) affected thereby, and any registered servitudes, easements, restrictions or covenants that run with the Real Property;

5. Rights-of-way for or reservations or rights of others for, sewers, drains, water lines, gas lines, electric lines, railways, telegraph, tele-communications and telephone lines, or cable conduits, poles, wires and cables, and other similar utilities, or zoning by-laws, ordinances or other restrictions as to the use of real or immoveable property, which do not in the aggregate materially detract from the value of any affected property of the Armtec Companies or materially impair the use of any property used in the Business;

6. Encumbrances imposed by Applicable Law which rank in priority to the Encumbrances for the Brookfield Facility including, but not limited to, Encumbrances of mechanics, labourers, workmen, builders, contractors, suppliers of material or architects or other similar Encumbrances incidental to construction, maintenance or repair operations, provided such Encumbrances secure amounts which are not yet due or delinquent and have not been registered on title to any Real Property or written notice thereof has not been received by the Armtec Companies or New Armtec;

7. Encumbrances associated with, and financing statements evidencing, the rights of equipment lessors under any of the Personal Property Leases;

8. Encumbrances securing the Revolving Facility;

9. Encumbrances securing the Bonding Facility;

10. Encumbrances listed on Exhibit 1;

11. The Encumbrances listed on Exhibit “A” to Schedule “E” of the DIP Term Sheet dated as of April 29, 2015 among Armtec Holdings Limited, as borrower, the other Armtec Companies, as guarantors, and Brookfield Capital Partners Fund III L.P., as lender; and

12. Such other Permitted Encumbrances (as defined in the APA) as may be agreed to by the Armtec Companies and the Purchaser prior to the Closing Date.

Defined Terms

For the purposes of this Schedule D only, capitalized terms used herein shall have the following meanings:

"**APA**" means the asset purchase agreement dated as of April 29, 2015, between the Armtec Companies and New Armtec;

"**Applicable Law**" means any domestic or foreign statute, law (including the common law), ordinance, rule, regulation, restriction, by-law (zoning or otherwise), order, or any consent, exemption, approval or licence of any Governmental Authority, that applies in whole or in part to the Transaction, the Armtec Companies, New Armtec, the Business or any of the Purchased Assets or Assumed Liabilities;

"**Armtec Companies**" means, collectively, Armtec Infrastructure Inc., Armtec Holdings Limited, Durisol Consulting Services Inc., Armtec US Limited, Inc., Armtec Limited Partner Corp. and Armtec Limited Partnership;

"**Assumed Liabilities**" has the meaning given to such term in the APA;

"**Bonding Facility**" means the secured bonding facility provided to the Armtec Infrastructure Inc. by the Trisura Guarantee Insurance Company on a "cost to complete" basis in an aggregate amount of up to $50,000,000 pursuant to a letter agreement dated December 21, 2012, as amended, supplemented or otherwise modified to the date hereof;

"**Brookfield Facility**" means the amended and restated senior term facility entered into by Armtec Holdings Limited, as borrower, Armtec Infrastructure Inc., as parent, certain other Armtec Companies, as guarantors, and Brookfield Capital Partners Fund III L.P., as lender, dated as of December 21, 2012, as amended by (i) the waiver and first amendment to the loan agreement dated as of June 26, 2014, (ii) the waiver and second amendment to the loan agreement dated as of October 31, 2014 and (iii) the extension, waiver and sale process agreement dated as of February 25, 2015, as it may be further amended, supplemented or otherwise modified;

"**Business**" has the meaning given to such term in the APA;

"**Closing Date**" means June 1, 2015, or such later date as the Armtec Companies and New Armtec may agree, acting reasonably;

"**Encumbrance**" means any security interest, lien, prior claim, charge, hypothec, hypothecation, reservation of ownership, pledge, encumbrance, mortgage or adverse claim of any nature or kind other than licences of Intellectual Property;

"**Governmental Authority**" means any government, regulatory authority, governmental department, agency, commission, bureau, court, judicial body, arbitral body or other law, rule or regulation-making entity:

(i) having jurisdiction over the Armtec Companies, New Armtec, the Purchased Assets or the Assumed Liabilities on behalf of any country, province, state, locality or other geographical or political subdivision thereof; or

(ii) exercising or entitled to exercise any administrative, judicial, legislative, regulatory or Taxing Authority or power;

"**Intellectual Property**" means all right, title and interest of the Armtec Companies to all intellectual property used in or relating to the Business;

"**Personal Property Leases**" means all leases of personal or moveable property that relate to the Business, including all benefits, rights and options pursuant to such leases and all leasehold improvements forming part thereof;

"**Purchased Assets**" has the meaning given to such term in the APA;

"**Real Property**" means all real or immoveable property owned by the Sellers and used in the Business, and all plants, buildings, structures, improvements, appurtenances and fixtures (including fixed machinery and fixed equipment) thereon, forming part thereof or benefiting such real or immoveable property;

"**Revolving Facility**" means the asset-based revolving credit facility entered into by Armtec Holdings Limited, as borrower, Armtec Infrastructure Inc., as parent, the remaining Armtec Companies, as subsidiary guarantors, Canadian Imperial Bank of Commerce, as agent, and certain lenders dated as of December 21, 2012, as amended by (i) the first amending agreement dated as of February 28, 2014, (ii) the second amending agreement dated as of June 26, 2014, (iii) the third amending agreement dated as of October 31, 2014, (iv) the fourth amending agreement dated as of December 23, 2014, and (v) the fifth amending agreement dated as of March 6, 2015 as it may be further amended, supplemented or otherwise modified;

"**Tax**" and "**Taxes**" means any and all:

(i) taxes, duties, fees, excises, premiums, assessments, imposts, levies and other charges or assessments of any kind whatsoever imposed by any Governmental Entity, including those with respect to goods and services, harmonized sales, transfer, land transfer, use, real or personal property, and registration fees; and

(ii) all interest, penalties, fines, additions to tax or other additional amounts imposed by any Governmental Entity on or in respect of amounts of the type described in clause (i) above or this clause (ii);

"**Taxing Authority**" means any Governmental Authority, domestic or foreign, having jurisdiction over the assessment, determination, collection, or other imposition of any Tax; and

"**Transaction**" means, collectively, the of sale and purchase of the Purchased Assets pursuant to the APA and all other transactions contemplated by the APA that are to occur contemporaneously with the sale and purchase of the Purchased Assets.

EXHIBIT 1 – See Attached

ONTARIO PROPERTIES

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
0 Elizabeth Street, Comber	**75062-0376 (LT)** PT N1/2 LT 7 CON SMR TILBURY PT 2, 3 12R11820; LAKESHORE	LRO 12, Essex	**R449585** registered 1969/09/10 being an **Order** under The Planning Act designating certain lands as areas of subdivision control **CE483519** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **CE553386** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
21 Stephenson Road East, Huntsville	**48124-0619 (LT)** PT LT 30-31 CON 11 STEPHENSON; PT LT 30-31 CON 12 STEPHENSON PT 4 35R4608, PT 1 - 3 35R8613 & PT 1 & 2 RD2015 EXCEPT PT 2 35R4116; PT RDAL BTN LOTS 30 & 31 CON 11 STEPHENSON; PT RDAL BTN LOTS 30 & 31 CON 12 STEPHENSON (CLOSED BY DM156974) PT 2, 35R7134; S/T DM166463, ST4562, ST4565; HUNTSVILLE ; THE DISTRICT MUNICIPALITY OF MUSKOKA	LRO 35, Muskoka	**ST4562** registered 1948/09/15 being a **Transfer Easement** in favour of The Bell Telephone Company of Canada, as described in thumbnail description **ST4565** registered 1948/09/15 being a **Transfer Easement** in favour of The Bell Telephone Company of Canada, as described in thumbnail description **DM70301** registered 1969/06/09 being an **Order** – Subdivision Control By-Law **DM166463** registered 1982/05/20 being a **Transfer Easement** in favour of Bell Canada, as described in thumbnail description **DM221772** registered 1988/09/13 being a **Notice of Claim** in favour of Bell Canada **DM221773** registered 1988/09/13 being a **Notice of Claim** in favour of Bell Canada **DM232027** registered 1989/07/31 being an **Agreement** with the Town of Huntsville **DM319522** registered 2000/01/31 being an **Agreement** with the Town of Huntsville **LT249358** registered 2005/02/10 being a **Land Registrar's Order** to amend thumbnail exception to PT 2 35R4116 **LT250977** registered 2005/04/05 being a **Land Registrar's Order** to delete PT 1 35R4608 from PIN **MT100237** registered 2011/07/25 being a **Land Registrar's Order** to amend owners field by removing duplicate entry of firm name Armtec Limited Partnership

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			MT101379 registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000.00 **MT122476** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000.00
33 Centennial Road, Orangeville	**34005-0180 (LT)** PT LT 68, RCP 335, PTS 2,3,4,5, PL 7R-4056, S/T MF98604, MF98606, ORANGEVILLE;	LRO 7, Dufferin	**MF35908** registered 1969/07/16 being a **Transfer Easement** in favour of United Extrusions Limited **MF98606** registered 1979/08/13 being a **Transfer Easement** in favour of The Corporation of the Town of Orangeville, as described in thumbnail description **MF112884** registered 1982/06/01 being a **Provisional Certificate of Approval Under The Environmental Protection Act** allowing certain lands to be used for a waste disposal site. **MF210157** registered 1994/03/10 being an **Agreement** with the Town of Orangeville **DC123366** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DC137947** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
33 Centennial Road, Orangeville	**34005-0181 (LT)** PT LT 68, RCP 335, PT 1 PL 7R-4056, ORANGEVILLE.	LRO 7, Dufferin	**MF210157** registered 1994/03/10 being an **Agreement** with The Town of Orangeville **DC123366** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DC137947** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
35 Rutherford Road, Brampton	**14032-0050 (LT)** PT BLK L PL 518 BRAMPTON EXCEPT PTS 1 TO 3, 43R11820 ;	LRO 43, Peel	**VSW4231** registered 1966/03/04 being a **By-Law** **VS149099E** registered 1970/09/01 being a **Transfer Easement** in favour of The

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
	S/T VS149099E BRAMPTON		Corporation of the Town of Brampton, as described in thumbnail description **R0882777** registered 1989/02/14 being an **Agreement** with The City of Brampton **LT2057426** registered 2000/03/27 being a **Notice** for Pearson Airport Zoning Regulations **PR1886807** registered 2010/09/03 being a **Land Registrar's Order** to amend owners field to include reference to the name of Armtec Limited Partnership, Capacity – Firm. **PR2058568** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **PR2328200** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
35 Rutherford Road, Brampton	**14032-0061 (LT)** PT LT 11 PL 644 BRAMPTON; PT LT 12 PL 644 BRAMPTON AS IN VS176591; T/W BR42908 ; BRAMPTON	LRO 43, Peel	**BR42908** registered 1961/12/14 being an **Agreement** with The Corporation of the Town of Brampton **VS4231** registered 1966/03/04 being a **By-Law** **R0882777** registered 1989/02/14 being an **Agreement** with the City of Brampton **LT2057426** registered 2000/03/27 being a **Notice** of Pearson Airport Zoning Regulation **PR696121** registered 2004/08/11 being a **Notice** by the Corporation of the City of Brampton **PR1886807** registered 2010/09/03 being a **Land Registrar's Order** to amend owners field to include reference to the name of Armtec Limited Partnership, Capacity – Firm. **PR2058568** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **PR2328200** registered 2013/01/31 being a

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			Charge by Partnership in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
41 George Street, Guelph	**71319-0050 (LT)** LOT 3 WEST SIDE GEORGE ST, PLAN 18 ; PT LOT 4 WEST SIDE GEORGE ST, PLAN 18 , PT 9, 61R2969 ; GUELPH	LRO 61, Wellington	**WC320183** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **WC365482** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
44 George Street, Guelph	**71310-0091 (LT)** PT LOTS 38 & 39, PLAN 215 , PT 1 61R2969 ; GUELPH	LRO 61, Wellington	**MS57023** registered 1966/07/08 being a **By-Law** **MS59544** registered 1966/10/20 being a **By-Law** **WC320183** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **WC365482** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
44 George Street, Guelph	**71319-0037 (LT)** PT LOTS 32, 36 & 37, PLAN 215, & PT CLARENCE ST, CLOSED BY CS12835, PLAN 18; LOTS 33, 34 & 35, PLAN 215; LOTS 6 EAST SIDE OF CLARENCE ST, 7 EAST SIDE CLARENCE ST, 8 EAST SIDE CLARENCE STREET & 9 EAST SIDE CLARENCE ST PLAN 18; LOTS 6 WEST SIDE GEORGE ST, 7 WEST SIDE GEORGE ST, 8 WEST SIDE GEORGE STREET & 9 WEST SIDE GEORGE ST, PLAN 18, ALL BEING PT 2 61R2969,	LRO 61, Wellington	**WC70036** registered 2004/07/20 being a **Land Registrar's Order** to amend thumbnail by moving PT 2 61R2969 to the end of the description as PT 2 61R2969 is all of the PIN and to delete description notice. **WC320183** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **WC365482** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
	T/W ROS564528; GUELPH		
44 George Street, Guelph	**71319-0093 (LT)** LOTS 7 EAST SIDE GEORGE ST, 8 EAST SIDE GEORGE STREET & 9 EAST SIDE GEORGE ST, PLAN 18 , T/W ROS564528 ; GUELPH	LRO 61, Wellington	**ROS164794** registered 1975/11/20 being an **Agreement** with the Grand River Conservation Authority Re: Flooding **WC320183** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **WC365482** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
857 Concession 14 West, R.R. #3, Walkerton	**33228-0142 (LT)** PT LT 19 CON 14 CULROSS PT 1 3R8728; SOUTH BRUCE	LRO 3, Bruce	**BR20334** registered 2008/10/03 being a **Notice** between Armtec Holdings Limited and Triax Inc. re: Drainage Agreement **BR56530** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **BR73525** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
901 Pattullo Avenue, Woodstock	**00076-0003 (LT)** LT 17 PL 1654 T/W 257829; S/T EO11216; WOODSTOCK	LRO 41, Oxford	**E011216** registered 1947/07/09 being a **Transfer Easement** in favour of The Bell Telephone Company of Canada, as described in the thumbnail description **A24178** registered 1959/08/12 being a **By-Law** with The Corporation of the Township of East Oxford **321001** registered 1987/04/06 being a **Notice of Claim** by Bell Canada **356216** registered 1990/09/27 being an **Agreement** between Big 'O' Inc. and The Corporation of the City of Woodstock **361633** registered 1991/05/23 being an **Agreement** between Big 'O' Inc. and The Corporation of the City of Woodstock

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			437236 registered 2000/01/14 being an **Agreement** between Big 'O' Inc. and The Corporation of the City of Woodstock **CO5725** registered 2006/05/19 being a **Land Registrar's Order** Re: A24178 **CO80020** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **CO100850** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
1110 Dundas Street, Woodstock	**00108-0026 (LT)** PT LT 1-2 PL 491 AS IN 449068; S/T 289136, A19785; S/T A77781; WOODSTOCK	LRO 41, Oxford	**A19785** registered 1958/12/05 being an **Agreement of Right of Way**, as described in the thumbnail description **A77781** registered 1966/07/21 being a **Transfer Easement** in favour of The Corporation of the City of Woodstock, as described in the thumbnail description **289136** registered 1983/06/23 being an **Agreement of Right of Way**, as described in the thumbnail description **427019** registered 1998/10/15 being a **Notice** with Union Gas Limited re: Instrument No. A19785 **CO80021** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **CO100849** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
5598 Power Road, Ottawa	**04326-0055 (LT)** PT LT 26 CON 5RF GLOUCESTER PTS 2 & 3, 5R455 ; GLOUCESTER	LRO 4, Ottawa-Carleton	**GL75634** registered 1964/11/12 being a **By-Law** **OC172966** registered 2003/02/26 being a **Notice** between Boucher Pre-Cast Concrete Limited and the City of Ottawa **OC361091** registered 2004/07/27 being a **Notice** between Boucher Pre-Cast Concrete Limited/Boucher Pre-Cast Concrete Ltd. and the City of Ottawa **OC714070** registered 2007/05/02 being a

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			Notice between the City of Ottawa and Boucher Pre-Cast Concrete Limited **OC1133223** registered 2010/07/12 being a **Notice** between the City of Ottawa and Armtec Holdings Limited/Armtec Limited Partnership **OC1272578** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **OC1449960** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
5602 Doncaster Road, Ottawa	**04326-0071 (LT)** PT LT 26 CON 5RF GLOUCESTER AS IN N754462 ; GLOUCESTER	LRO 4, Ottawa-Carleton	**GL75634** registered 1964/11/12 being a **By-Law** **OC1272578** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **OC1449960** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
5605 Doncaster Road, Ottawa	**04326-0064 (LT)** PT LT 26 CON 5RF GLOUCESTER AS IN CT112621 ; GLOUCESTER	LRO 4, Ottawa-Carleton	**GL75634** registered 1964/11/12 being a **By-Law** **OC361091** registered 2004/07/27 being a **Notice** between Boucher Pre-Cast Concrete Limited/Boucher Pre-Cast Concrete Ltd. and the City of Ottawa **OC714070** registered 2007/05/02 being a **Notice** between the City of Ottawa and Boucher Pre-Cast Concrete Limited **OC882123** registered 2008/07/30 being an **Application (General)** by Boucher Pre-Cast Concrete Limited to amend legal description **OC1133223** registered 2010/07/12 being a **Notice** between the City of Ottawa and Armtec Holdings Limited/Armtec Limited Partnership **OC1272578** registered 2011/08/19 being a

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			Charge by Partnership in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **OC1449960** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	**26576-0069 (LT)** PCL CON 6-23-3, SEC WHITBY; PT LT 23, CON 6, TOWNSHIP OF WHITBY, PT 2 40R16611 ; WHITBY	LRO 40, Durham	**D112348** registered 1980/09/08 being a **Notice Agreement** with The Corporation of the Town of Whitby **LT368792Z** registered 1988/01/22 being an **Application to Register Restrictive Covenant** in favour of Central Lake Ontario Conservation Authority relating to Part Lot 23, Concession 6, Whitby designated as Part 1 and 2 on Plan 40R-10974. The following is the registered covenant: "The registered owner covenants and agrees that no filling, grading, alteration to a watercourse or construction is to occur without the prior written approval of the Central Lake Ontario Conservation Authority." **LT665615** registered 1994/01/05 being a **Notice of Lease** in favour of Bell Mobility Cellular Inc. **LT742181** registered 1995/12/19 being a **Notice Agreement** with the Corporation of the Town of Whitby **LT742256** registered 1995/12/20 being a **Notice Agreement** with The Regional Municipality of Durham **DR276050** registered 2004/05/13 being an **Application to Change Name – Instrument** from Bell Mobility Cellular Inc. to Bell Mobility Inc. Re: LT665615 **DR276061** registered 2004/05/13 being a **Notice to Change Address – Instrument** by Bell Mobility Inc. Re: LT665615 **DR431857** registered 2005/09/28 being a **Notice** for Airport Zoning Regulations **DR1018602** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			$300,000,000.00 **DR1155587** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	**26576-0071 (LT)** PT LT 23 CON 6 TOWNSHIP OF WHITBY PT 1, 40R16611; WHITBY	LRO 40, Durham	**CO232979** registered 1972/12/20 being an **Agreement** with the Corporation of the Town of Whitby **D425450** registered 1994/01/05 being a **Notice of Lease** relating to Parts 1-5 on Plan 40R14867 between Robert Alexander McCoy, as landlord and Bell Mobility Cellular Inc., as tenant, for a term of 10 years from August 1993, expiring July 31, 2003 with a renewal option of 1 term of 5 years each. **D512793** registered 1998/04/06 being a **By-Law** by The Regional Municipality of Durham Re: Sewers **DR431857** registered 2005/09/28 being a **Notice** for Airport Zoning Regulations **DR1018602** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DR1155587** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	**26576-0281 (LT)** FIRSTLY: PT LT 23 CON 6 TOWN OF WHITBY, PTS 3 & 4 ON PL 40R16611; SECONDLY: PT LT 23 CON 6 TOWN OF WHITBY, PTS 5 & 6 ON PL 40R16611, SAVE AND EXCEPT PTS 1 & 2 ON PL 40R23112; WHITBY, REGIONAL MUNICIPALITY OF DURHAM, S/T	LRO 40, Durham	**D112348** registered 1980/09/08 being a **Notice Agreement** with The Corporation of the Town of Whitby **LT368792Z** registered 1988/01/22 being an **Application to Register Restrictive Covenant** in favour of Central Lake Ontario Conservation Authority relating to Part Lot 23, Concession 6, Whitby designated as Part 1 and 2 on Plan 40R-10974. The following is the registered covenant: "The registered owner covenants and agrees that no filling, grading, alteration to a watercourse or construction is to occur without the prior written approval of the Central Lake Ontario Conservation

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
	LT742254		Authority." **LT742181** registered 1995/12/19 being a **Notice Agreement** with The Corporation of the Town of Whitby **LT742254** registered 1995/12/20 being a **Transfer Easement** with The Regional Municipality of Durham **LT742255** registered 1995/12/20 being a **Notice Agreement** with The Regional Municipality of Durham **DR439513** registered 2005/10/20 being a **Notice** for Airport Zoning Regulations **DR1018602** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DR1155587** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	**26576-0291 (LT)** PT LT 23 CON 6 TOWNSHIP OF WHITBY, PT 1 PL 40R18581, SAVE & EXCEPT PT 4 PL 40R23112 & SAVE & EXCEPT PT 1 ON EXPROPRIATION PL DR542132, WHIT BY, REGIONAL MUNICIPALITY OF DURHAM	LRO 40, Durham	**DR228987** registered 2003/11/19 being a **Notice** between The Corporation of the Town of Whitby and R. McCoy Holdings Limited **DR439513** registered 2005/10/20 being a **Notice** for Airport Zoning Regulations **DR1018602** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DR1155587** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
6760 Baldwin Street North, Columbus Road and Baldwin Street North, Whitby	**26576-0293 (LT)** PT LT 23 CON 6 TOWNSHIP OF WHITBY, PT 7 PL 40R16611 SAVE & EXCEPT PT 3 PL 40R23112 & SAVE & EXCEPT PT 1 ON	LRO 40, Durham	**D112348** registered 1980/09/08 being a **Notice Agreement** with of The Corporation of the Town of Whitby **LT368792Z** registered 1988/01/22 being a an **Application to Register Restrictive Covenant** in favour of Central Lake Ontario Conservation Authority relating to Part Lot 23, Concession 6, Whitby

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
	EXPROPRIATION PL DR542133, WHITBY, REGIONAL MUNICIPALITY OF DURHAM		designated as Part 1 and 2 on Plan 40R-10974. The following is the registered covenant: "The registered owner covenants and agrees that no filling, grading, alteration to a watercourse or construction is to occur without the prior written approval of the Central Lake Ontario Conservation Authority." **LT742181** registered 1995/12/19 being a **Notice Agreement** with of The Corporation of the Town of Whitby **LT742256** registered 1995/12/20 being a **Notice Agreement** with The Regional Municipality of Durham **DR439513** registered 2005/10/20 being a **Notice** for Airport Zoning Regulations **DR1018602** registered 2011/08/19 being a **Charge by Partnership** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DR1155587** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
7010 Windsor Avenue, Comber	**75062-0355 (LT)** LT 37-39 PL 383 TILBURY WEST; LAKESHORE	LRO 12, Essex	**CE483519** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **CE553386** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
7010 Windsor Avenue, Comber	**75062-0391 (LT)** LT 34-36 PL 383 TILBURY WEST; PT N1/2 LT 7 CON SMR TILBURY AS IN R930538 SECONDLY, THIRDLY(E & N OF 12R1041); LAKESHORE	LRO 12, Essex	**R449585** registered 1969/09/10 being an **Order** under The Planning Act designating certain lands as areas of subdivision control **CE483519** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **CE553386** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
13310 County	**66149-0320 (LT)**	LRO 8, Dundas	**CH1789** registered 1942/10/15 being a

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
Road 9 (formerly Smith Road), Chesterville	PT BLK U PL 35 PT 3, 4, 5, 6, 8R698; S/T CH1789, CH2013, DR40114, DRB6257; NORTH DUNDAS		**Transfer Easement** in favour of The Bell Telephone Company of Canada, as described in thumbnail description **CH2013** registered 1947/06/06 being a **Transfer Easement** in favour of The Bell Telephone Company of Canada, as described in thumbnail description **DRB6257** registered 1964/03/13 being a **Transfer Easement** in favour of Lakeland Natural Gas Limited, as described in thumbnail description **DR40114** registered 1980/10/17 being a **Transfer Easement** in favour of The Corporation of the Village of Chesterville, as described in thumbnail description **DR43641** registered 1982/07/07 being a **Notice of Claim** in favour of The Bell Telephone Company **DR56771** registered 1987/05/21 being a **Notice of Claim** in favour of Bell Canada **DR100829** registered 2001/06/29 being a **Notice of Assignment of Easement** in favour of Hydro One Networks Inc. **DR110154** registered 2004/03/08 being a **Notice of Claim** in favour of Union Gas Limited **DU7897** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **DU12554** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
18599 Yonge Street, East Gwillimbury	**03427-0530 (LT)** PT LT 103 CON 1 E YONGE ST EAST GWILLIMBURY AS IN B30316B, A58338A, A54070A ; EAST GWILLIMBURY	LRO 65, York Region	**R740805** registered 1999/05/13 being a **Site Plan Agreement** between Brooklin Concrete Products Limited and The Town of East Gwillimbury **YR308818** registered 2003/06/03 being a **Notice** by The Regional Municipality of York **YR1172160** registered 2008/06/04 being a **Notice of Lease** between Clearford Industries Inc. and Fido Solutions Inc. **YR1698555** registered 2011/08/19 being a **Charge by Partnership** in favour of

Municipal Address	PIN and Short Legal Description	Land Titles Office No.	Registered Encumbrances to remain on Title:
			Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **YR1863520** registered 2012/07/31 being an **Application (General)** from Fido Solutions Inc. to Fido Solutions Inc. re: Lease Amending and Extension Agreement **YR1940661** registered 2013/01/31 being a **Charge by Partnership** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00
RR 2 Cooper Road, Hwy 11-17, Thunder Bay	**62295-0694 (LT)** PCL 16068 SEC TBF SRO; PT LT 7 CON 2 NKR PAIPOONGE PT 3, 4, 5 & 6, 55R1487; OLIVER PAIPOONGE	LRO 55, Thunder Bay	**F2106** registered 1989/11/17 being a **Notice** by The Corporation of the Municipality of Paipoonge **TY125347** registered 2011/08/19 being a **Charge** in favour of Brookfield Special Situations Partners Ltd., in the original principal amount of $300,000,000.00 **TY153927** registered 2013/01/31 being a **Charge** in favour of Canadian Imperial Bank of Commerce, in the original principal amount of $300,000,000.00

MANITOBA PROPERTIES

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
2455 Dugald Road, Winnipeg, Manitoba	**Title No. 2033088** Parcel "A" Plan 13031 WLTO IN S ½ of 5-11-4 EPM	Winnipeg	Registration No. **4114122/1** being a **Mortgage** registered 2011-08-22 in favour of Brookfield Special Situations Partnership in the amount of $300,000,000.00 Registration No. **4330095/1** being a **Mortgage** registered 2013-02-28 in favour of Canadian Imperial Bank of Commerce in the amount of $300,000,000.00
2500 Ferrier Street, Winnipeg, Manitoba	**Title No. 2257084** Lot 2 Plan 33206 WLTO in RL 23 and 24 Parish of Kildonan	Winnipeg	Registration No. **1138397/1** being a **Caveat** registered 1989-03-31 by The City of Winnipeg re: Certain Conditions re: Section 600(1) City Wpg. Act Registration No. **1993462/1** being a **Caveat** registered 1996-02-15 by MTS Netcom

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
			giving notice of an **Easement** Registration No. **1993463/1** being a Caveat registered 1996-02-15 by The City of Winnipeg giving notice of a **Subdivision Agreement** Registration No. **4114122/1** being a **Mortgage** registered 2011-08-22 in favour of Brookfield Special Situations Partnership in the amount of $300,000,000.00 Registration No. **4330095/1** being a **Mortgage** registered 2013-02-28 in favour of Canadian Imperial Bank of Commerce in the amount of $300,000,000.00

QUEBEC PROPERTIES

QUEBEC LAND REGISTRY OFFICE

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
800 Pierre-Tremblay Boulevard, Saint-Jean-sur-Richelieu, Québec J2W 4W8	**[Property A]** An emplacement located in the City of Saint-Jean-sur-Richelieu, Province of Québec, known and designated as being composed of lot numbers FOUR MILLION FORTY-THREE THOUSAND ONE HUNDRED AND EIGHTY-TWO, FOUR MILLION ONE HUNDRED EIGHTY-SIX THOUSAND SIX HUNDRED and FOUR MILLION FORTY-THREE THOUSAND TWO HUNDRED AND SEVENTY-ONE (4 043 182, 4 186 600 and 4 043 271) all of the Cadastre of Québec, Registration Division of	Saint-Jean (and before September 9, 1988, the Registration Division of Iberville)	Servitude granted between Groupe Tremca Inc. and Ville de Saint-Jean-sur Richelieu following the registration at the Land Registry Office for the Registration Division of Saint-Jean of a deed on March 25, 2004 under the number **11 171 329** (amended following the registration at the Land Registry Office for the Registration Division of Saint-Jean of a deed on April 27, 2006 under the number **13 227 275**); and Servitude granted between Group Tremca Inc. and Ville de Saint-Jean-sur Richelieu following the registration at the Land Registry Office for the Registration Division of Saint-Jean of a deed on October 25, 2005 under the number **12 791 245** (amended following the registration at the Land Registry Office for the Registration Division of Saint-Jean of deed on April 27, 2006 under the number **13 227 275**); Servitude granted in favour of Hydro-Québec following the registration at the Land Registry Office for the Registration Division

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
	SAINT-JEAN. With a building thereon erected bearing civic number 800 Pierre-Tremblay Boulevard, Saint-Jean-sur-Richelieu, Québec J2W 4W8.		of Iberville of a deed on March 23, 1978 under the number **103 794** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on October 29, 1964 under the number **77 865** Servitude of view and of right of way granted following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on September 30, 1963 under the number **76 555** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on May 2, 1963 under the number **76 038** Servitude of view granted following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on July 20, 1962 under the number **75 079** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on June 21, 1949 under the number **62 431** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on June 4, 1949 under the number **62 391** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on March 25, 1949 under the number **62 145** Servitude granted in favour of Southern

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
			Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on March 25, 1949 under the number **62 144** Servitude granted in favour of Southern Canada Power Company, Limited following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on March 12, 1949 under the number **62 120** Servitude granted in favour of Edouard Goyette et uxor following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on September 26, 1941 under the number **56 509** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on March 26, 1940 under the number **55 565** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on November 30, 1934 under the number **55 563** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Iberville of a deed on July 31, 1919 under the number **44 630** Hypothec affecting the universality of the immovable properties granted in favour of Brookfield Special Situations Partners Ltd. in the amount of $180,000,000.00 by Armtec Holdings Limited and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration Division of Saint-Jean of a deed on August 12, 2011 under the number **18 390 667** Hypothec affecting the universality of the immovable properties granted in favour of Canadian Imperial Bank of Commerce in the amount of $100,000,000.00 by Armtec

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
			Holdings Limited and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration Division of Saint-Jean of a deed on January 30, 2013 under the number **19 711 646**
85 de Rotterdam Street, Saint-Augustin-de-Desmaures, Québec G3A 1T1	**[Property B]** An emplacement located in the City of Saint-Augustin-de-Desmaures, Province of Québec, known and designated as lot number THREE MILLION FIFTY-FIVE THOUSAND FOUR HUNDRED AND SEVENTY-NINE (**3 055 479**), of the Cadastre of Québec, Registration Division of PORTNEUF. With a building thereon erected bearing civic number 85 de Rotterdam Street, Saint-Augustin-de-Desmaures, Québec G3A 1T1.	Portneuf	Servitude granted by Armtec Holdings Limited in favour of Société en commandite Gaz Metro following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on February 11, 2009 under the number **15 948 092** Servitude granted by Armtec Limited in favour of Hydro-Quebec et al. following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on April 28, 2003 under number **10 362 171** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on March 3, 1948 under the number **115 348** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on November 19, 1947 under the number **114 684** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on October 10, 1947 under the number **114 174** Hypothec affecting the universality of the immovable properties granted in favour of Brookfield Special Situations Partners Ltd. in the amount of $180,000,000.00 by Armtec Holdings Limited and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on August 12, 2011 under the number **18 390 784** Hypothec affecting the universality of the immovable properties granted in favour of Canadian Imperial Bank of Commerce in the

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
			amount of $100,000,000 by Armtec Holdings Limited and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration Division of Portneuf of a deed on January 30, 2013 under the number **19 711 646**
665 and 669 Route 201, and 100 Michel Street, Saint-Clet, Québec, J0P 1S0	**[Property C]** An emplacement located in the Municipality of Saint-Clet, Province of Québec, known and designated as being composed of lot numbers TWO MILLION THREE HUNDRED NINETY-SIX THOUSAND SIX HUNDRED AND SEVENTY-SEVEN and TWO MILLION SEVEN HUNDRED SEVENTY-FIVE THOUSAND TWO HUNDRED AND SEVENTY-NINE (2 396 677 and 2 775 279), both of the Cadastre of Québec, Registration Division of VAUDREUIL. With the buildings thereon erected bearing civic numbers 665 and 669 Route 201 and 100 Michel Street, Saint-Clet, Québec, J0P 1S0.	Vandreuil	Servitude granted by Plasti-Drain ltée in favour of Société en commandite Gaz Metro following the registration at the Land Registry Office for the Registration Division of Vaudreuil of a deed on February 8, 1994 under number **294 561** Servitude granted in favour of the Corporation municipal du Village St-Clet following the registration at the Land Registry Office for the Registration Division of Vaudreuil of a deed on October 16, 1968 under the number **55 598** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Vaudreuil of a deed on November 22, 1946 under the number **38 776** Servitude granted in favour of The Bell Telephone Co. following the registration at the Land Registry Office for the Registration Division of Vaudreuil of a deed on December 2, 1929 under the number **31 071** Hypothec affecting the universality of the immovable properties granted in favour of Brookfield Special Situations Partners Ltd. in the amount of $180,000,000.00 by Armtec Holdings Limited and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration Division of Vaudreuil of a deed on August 12, 2011 under the number **18 390 019** Hypothec affecting the universality of the immovable properties granted in favour of Canadian Imperial Bank of Commerce in the amount of $100,000,000.00 by Armtec Holdings Limted and Armtec Limited Partnership, following the registration at the Land Registry Office for the Registration

Municipal Address	Legal Description	Land Registry Office, Registration Division of:	Registered Encumbrances to remain on title:
			Division of Vaudreuil of a deed on January 30, 2013 under the number **19 711 646**

REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS (QUEBEC)

All Encumbrances registered at the Register of Personal and Movable Real Rights (Quebec)

ALBERTA PROPERTIES

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
58th Street and 46th Avenue, Redwater, Alberta	**Title No. 012 252 798** Plan 6648NY Block A Excepting thereout all mines and minerals. Area: 8.92 Hectares (22.04 Acres) more or less	Alberta Land Titles Office	Registration Number: 2211HQ Date: 07/09/1950 UTILITY RIGHT OF WAY GRANTEE - THE IMPERIAL PIPE LINE COMPANY, LIMITED. GRANTEE - ALBERTA OIL SANDS PIPELINE LTD. Registration Number: 3199MT Date: 27/08/1962 CAVEAT CAVEATOR - RAMPARTS ENERGY LTD. Registration Number: 5467ND Date: 25/03/1963 CAVEAT CAVEATOR - RAMPARTS ENERGY LTD. Registration Number: 112 264 501 Date: 24/08/2011 MORTGAGE MORTGAGEE - BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. ORIGINAL PRINCIPAL AMOUNT: $300,000,000 Registration Number: 132 032 074 Date: 01/02/2013 MORTGAGE MORTGAGEE - CANADIAN IMPERIAL BANK OF COMMERCE. ORIGINAL PRINCIPAL AMOUNT: $300,000,000

Municipal Address	Title No. and Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
4300-50th Avenue S.E., Calgary, Alberta	**Title No. 051 472 649** Plan 667AD Block C Excepting thereout: Plan Number Hectares Acres more or less Road 7911105 Subdivision 9810128 9.929 24.53 Excepting thereout all mines and minerals and the right to work the same	Alberta Land Titles Office	Registration Number: 71KZ Date: 08/01/1971 UTILITY RIGHT OF WAY GRANTEE - THE CITY OF CALGARY AS TO PORTION OR PLAN:6487JK Registration Number: 72KZ Date: 08/01/1971 CAVEAT CAVEATOR - THE CITY OF CALGARY. Registration Number: 771 147 064 Date: 20/10/1977 ZONING REGULATIONS SUBJECT TO CALGARY INTERNATIONAL AIRPORT ZONING REGULATIONS Registration Number: 921 014 171 Date: 21/01/1992 CAVEAT RE : DEFERRED SERVICES AGREEMENT CAVEATOR - THE CITY OF CALGARY. Registration Number: 921 014 172 Date: 21/01/1992 CAVEAT RE : SEE CAVEAT CAVEATOR - THE CITY OF CALGARY Registration Number: 111 216 652 Date: 24/08/2011 MORTGAGE MORTGAGEE - BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. ORIGINAL PRINCIPAL AMOUNT: $300,000,000 Registration Number: 131 028 831 Date: 01/02/2013 MORTGAGE MORTGAGEE - CANADIAN IMPERIAL BANK OF COMMERCE. ORIGINAL PRINCIPAL AMOUNT: $300,000,000

BRITISH COLUMBIA PROPERTIES

Municipal Address	PIN and Legal Description	Land Registry Office of:	Legal Notations and Registered Encumbrances to remain on Title:
1848 Schoolhouse Road, Nanaimo, British Columbia	**Parcel Identifier 000 130 915** Lot A, Section 14, Range 6, Cranberry District Plan 26748	British Columbia Land Title Office	**LEGAL NOTATIONS:** Subject to Exceptions and Reservations Contained in Crown Grant, Filed DD 52017W **CHARGES, LIENS AND INTERESTS:** Nature: RESTRICTIVE COVENANT Registration Number: B68191 Registration Date and Time: 1973-08-10 Registered Owner: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA Remarks: DD B68191 INTER ALIA Nature: RIGHT OF WAY Registration Number: C43505 Registration Date and Time: 1974-04-17 Registered Owner: BRITISH COLUMBIA HYDRO AND POWER AUTHORITY Remarks: INTER ALIA Nature: MORTGAGE Registration Number: BB4008750 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: BB4008751 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: MORTGAGE Registration Number: CA2975609 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: CA2975610 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA
	Parcel Identifier 000 130 923 Lot B, Section 14, Range 6, Cranberry	British Columbia Land Title Office	**LEGAL NOTATIONS:** Subject to Exceptions and Reservations Contained in Crown Grant, Filed DD 52017W

Municipal Address	PIN and Legal Description	Land Registry Office of:	Legal Notations and Registered Encumbrances to remain on Title:
	District Plan 26748		**CHARGES, LIENS AND INTERESTS:** Nature: RESTRICTIVE COVENANT Registration Number: B68191 Registration Date and Time: 1973-08-10 Registered Owner: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA Remarks: DD B68191 INTER ALIA Nature: RIGHT OF WAY Registration Number: C43505 Registration Date and Time: 1974-04-17 Registered Owner: BRITISH COLUMBIA HYDRO AND POWER AUTHORITY Remarks: INTER ALIA Nature: MORTGAGE Registration Number: BB4008750 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: BB4008751 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: MORTGAGE Registration Number: CA2975609 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: CA2975610 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA
	Parcel Identifier 000 130 931 Lot C, Section 14, Range 6, Cranberry District Plan 26748	British Columbia Land Title Office	**LEGAL NOTATIONS:** Subject to Exceptions and Reservations Contained in Crown Grant, Filed DD 52017W This Title may be affected by a Permit under Part 26 of the Municipal Act, See EN40595 **CHARGES, LIENS AND INTERESTS:** Nature: RESTRICTIVE COVENANT Registration Number: B68191 Registration Date and Time: 1973-08-10

Municipal Address	PIN and Legal Description	Land Registry Office of:	Legal Notations and Registered Encumbrances to remain on Title:
			Registered Owner: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA Remarks: DD B68191 INTER ALIA Nature: RIGHT OF WAY Registration Number: C43505 Registration Date and Time: 1974-04-17 Registered Owner: BRITISH COLUMBIA HYDRO AND POWER AUTHORITY Remarks: INTER ALIA Nature: MORTGAGE Registration Number: BB4008750 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: BB4008751 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: MORTGAGE Registration Number: CA2975609 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: CA2975610 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA
7900 Nelson Road, Richmond, British Columbia	**Parcel Identifier: 003 555 551** Parcel "A" (statutory right of way Plan 51742) of Parcel "10" (Bylaw plan 27262) Lot 13, Sections 17 and 20, Block 4, North Range 4 West New Westminster, District Plan 26614	British Columbia Land Title Office	**LEGAL NOTATIONS:** Zoning Regulation and Plan under the Aeronautics Act (Canada) Filed 10 02 1981 under No. T 17084 Plan No. 61216 **CHARGES, LIENS AND INTERESTS:** Nature: MORTGAGE Registration Number: BB4008750 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS

Municipal Address	PIN and Legal Description	Land Registry Office of:	Legal Notations and Registered Encumbrances to remain on Title:
			Registration Number: BB4008751 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: MORTGAGE Registration Number: CA2975609 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: CA2975610 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA
	Parcel Identifier: 004 248 902 Lot 22 Except: Part outlined red on Plan 51742, secondly, except Plan BCP18196 Sections 17 and 20 Block 4 North Range 4 West New Westminster, District Plan 27693	British Columbia Land Title Office	**LEGAL NOTATIONS:** the Title may be Affected by a Permit Under Part 26 of the Municipal Act See BN254784 Hereto is Annexed Easement BX245268 Over Lot A Plan CP18196 Zoning Regulation and Plan Under the Aeronautics Act (Canada) Filed 10 02 181 Under No. T17084 Plan No. 61216 **CHARGES, LIENS AND INTERESTS:** Nature: STATUTORY RIGHT OF WAY Registration Number: 302241C Registration Date and Time: 1961-05-16 Registered Owner: BRITISH COLUMBIA HYDRO AND POWER AUTHORITY Remarks: PART ANCILLARY RIGHTS INTER ALIA TRANSFERRED TO BG449911 Nature: STATUTORY RIGHT OF WAY Registration Number: RD124525 Registration Date and Time: 1980-08-25 Registered Owner: TOWNSHIP OF RICHMOND Remarks: PART PLAN 56031 ANCILLARY RIGHTS Nature: STATUTORY RIGHT OF WAY Registration Number: BG449911 Registration Date and Time: 1993-12-14 Registered Owner: BC GAS UTILITY LTD. Remarks: INTER ALIA ANCILLARY RIGHTS TRANSFER OF 302241C REC'D

Municipal Address	PIN and Legal Description	Land Registry Office of:	Legal Notations and Registered Encumbrances to remain on Title:
			16.05.1961 Nature: MORTGAGE Registration Number: BB4008750 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: BB4008751 Registration Date and Time: 2011-08-19 Registered Owner: BROOKFIELD SPECIAL SITUATIONS PARTNERS LTD. Remarks: INTER ALIA Nature: MORTGAGE Registration Number: CA2975609 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL BANK OF COMMERCE Remarks: INTER ALIA Nature: ASSIGNMENT OF RENTS Registration Number: CA2975610 Registration Date and Time: 2013-01-31 Registered Owner: CANADIAN IMPERIAL

NEW BRUNSWICK PROPERTY

Municipal Address	Parcel Identifier:	Land Registry Office of:	Registered Encumbrances to remain on Title:
21 Crescent St, Sackville NB	**Parcel Identifier: 963488** ALL that certain lot, piece or parcel of land and premises situate, lying and being at the Town of Sackville, in the Parish of Sackville, in the County of Westmorland and Province of New Brunswick, being more particularly described as Lands of Armtec Limited/Armtec Limitée, located on the south side of Crescent Street, in the Town of Sackville, in the Parish	District of New Brunswick	Agreement Town of Sackville Registration Number: 177965 Date: 1948-07-14 Agreement Town of Sackville Registration Number 221656 Date: 1958-01-24 Easement Aliant Telecom Incorporated Registration Number: 13294989 Date: 2001-11-26 Easement New Brunswick Power Corporation Registration Number: 13294989 Date: 2001-11-26

Municipal Address	Parcel Identifier:	Land Registry Office of:	Registered Encumbrances to remain on Title:
	of Sackville and County of Westmorland and filed in and for the County of Westmorland on October 25, 2001 as Number 13101325.		Debenture Brookfield Special Situations Partners Ltd. Registration Number: 30491824 Date: 2011-08-19 Debenture Canadian Imperial Bank of Commerce Debenture Registration Number: 32386071 Date: 2013-01-31

NOVA SCOTIA PROPERTY

Municipal Address	Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
283 Main Street, Bible Hill, Nova Scotia	PID: 20400792 All that certain lot, piece or parcel of land situate, lying and being on the west boundary of Main Street and the south boundary of Park Street at Bible Hill, in the County of Colchester, Province of Nova Scotia and being Lot 00-E1 as shown on a plan of subdivision showing lands of Canadian National Railway Company dated December 12, 2000 signed by Ernest C. Blackburn, NSLS subdivision approval dated December 21, 2000 bounded and described as follows: Beginning at a survey marker on the west boundary of Main Street being the southeast corner of Parcel F lands of Canadian National Railway Company and also being South 77 degrees 52 minutes 22 seconds West a distance of 18.261 meters from NS Control Monument 420; Thence along the west boundary of Main Street South 31 degrees 09 minutes 01 seconds East a distance of 68.821 meters to a survey marker; Thence continuing along the west boundary of Main Street South 29 degrees 46 minutes 31 seconds East a distance of 172.518 meters to a survey	Colchester	Interest Holder Name: Subject to Restrictive Covenants Interest Type: Covenant Holder (Burden) Document Reference: 81063696 Instrument Type: Request by Owner for Rect. Interest Holder Name: Canadian Imperial Bank of Commerce Interest Type: Debenture Holder Document Reference: 102405678 dated 2013-01-31 Instrument Type: Debenture Interest Holder Name: Brookfield Situations Partners Ltd. Interest Type: Debenture Holder Document Reference: 98952048 dated 2011-08-19 Instrument Type: Debenture

Municipal Address	Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
	marker; Thence dividing the lands of the grantor South 60 degrees 13 minutes 29 seconds West a distance of 10.114 meters to a survey marker; Thence dividing the lands of the grantor South 7 degrees 20 minutes 21 seconds East a distance of 23.236 meters to a survey marker; Thence dividing the lands of the grantor South 60 degrees 13 minutes 29 seconds West a distance of 33.145 meters to a survey marker; Thence dividing the lands of the grantor following a curve to the left having a radius of 3756.032 meters and an arc distance of 119.903 meters (by chord North 35 degrees 30 minutes 08 seconds West a distance of 119.898 meters) to a survey marker; Thence dividing the lands of the grantor North 36 degrees 25 minutes 00 seconds West a distance of 150.582 meters to a survey marker on the south boundary of Park Street; Thence along the south boundary of Park Street North 55 degrees 49 minutes 51 seconds East a distance of 67.606 meters to a survey marker being the southwest corner of Parcel F lands of Canadian National Railway Company; Thence along the south boundary of Parcel F, South 77 degrees 39 minutes 35 seconds East a distance of 16.782 meters to a survey marker and place of beginning. Containing 17,572.6 square meters. Bearings are grid (1979) referable to Zone 5 with Central Meridian 64 degrees 30 minutes West (ATS77). Being and intended to be the same lands conveyed to 3051060 Nova Scotia Limited by Deed recorded at the		

Municipal Address	Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
	Registry of Deeds Office at Truro, NS on January 11, 2001 in book 971 at page 871 as document 176.		

NEWFOUNDLAND PROPERTY

Municipal Address	Legal Description	Land Registry Office of:	Registered Encumbrances to remain on Title:
23-29 Exploits Avenue, Bishops Falls, Newfoundland	**FIRSTLY:** ALL THAT piece or parcel of land situate and being at Bishops Falls, in the Province of Newfoundland, and being abutted and bounded as follows, that is to say: Beginning at a point on the south side of a road and at the intersection of a line drawn 50 feet west and parallel to the west side of a dressing-room (shown on the plan attached to the Deed of Conveyance dated November 30, 1987, and registered on December 15, 1987 in Roll 455, Frame 1055 as No. 519234) and running thence northerly by said roadside a distance of approximately 205 feet to its intersection with the Canadian National Railway right-of-way, thence in an easterly direction by said right-of-way 160 feet to the edge of a brook running into the Exploits River, thence by and along the westerly bank of said brook some 440 feet to the north bank of the Exploits River, thence by the said north bank of the Exploits River a distance of approximately 242 feet to the intersection with the line described above as drawn (50 feet west and parallel to the dressing-room), from the road to the north bank of the Exploits River thence along the said line 308 feet to the point of commencement containing 2 1/2 acres more or less, and being more clearly shown outlined on the plan attached to said Instrument No. 519234. **SECONDLY:** ALL THAT piece or parcel of land	Registry of Deeds for Province of Newfoundland and Labrador	Debenture dated January 29, 2013 and registered as Registration No.578039 at the Registry of Deeds for Province of Newfoundland and Labrador on January 31, 2013 from Armtec Holdings Limited to Canadian Imperial Bank of Commerce in the principal amount of $300,000,000.00 Debenture dated August 4, 2011 and registered as Registration No.578039 at the Registry of Deeds for Province of Newfoundland and Labrador on August 19, 2011 from Armtec Holdings Limited to Brookfield Special Situations Partners Ltd. in the principal amount of $300,000.000.00

Municipal Address	**Legal Description**	**Land Registry Office of:**	**Registered Encumbrances to remain on Title:**
	situate and being on the south side of Exploits Avenue in the Municipality of Bishops Falls, Province of Newfoundland, Canada, bounded and abutted as follows, that is to say by a line commencing at a point said point being a distance of 223.2 feet measured in a north easterly direction from the place of intersection of the southern limit of Exploits Avenue with the eastern limit of land of Joseph Butt, thence turning and running by the southern limits of Exploits Avenue north sixty-two degrees forty-eight minutes (N 62 48 E) east a distance of two hundred and thirty-eight decimal zero (238.0) feet, thence by other lands of Armco Canada Limited south thirty-three degrees twenty-three minutes (S 33 23 W) west a distance of eighteen decimal four (18.4) feet, south twenty-six degrees thirty-two minutes (S 26 32 E) east a distance of two hundred and eighty-nine decimal zero (289.0) feet, thence by a Reservation on the Exploits River south seventy-five degrees twenty-six minutes (S 75 26 W) west a distance of two hundred and twenty-four decimal zero (224.0) feet, and thence by land now or formerly in the name of Bishops Falls Lions Club Playground north twenty-seven degrees twelve minutes (N 27 12 W) west a distance of two hundred and forty-nine decimal zero (249.0) feet more or less to the point of commencement and containing in all an area of one decimal three eight six (1.386) acres more or less. All bearings are referred to the Magnetic Meridian.		

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

Court File No: CV-15-10950-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF ARMTEC INFRASTRUCTURE INC., ARMTEC HOLDINGS LIMITED, DURISOL CONSULTING SERVICES INC., ARMTEC US LIMITED, INC. AND ARMTEC LIMITED PARTNER CORP.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Applicants

6429195

6429195

TAB J

Court File No. CV12-9767-00CL

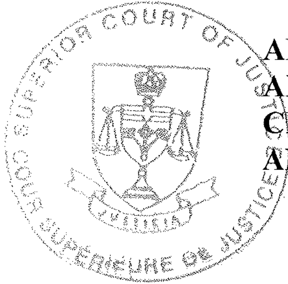
ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	THURSDAY, THE 12TH
	)	
JUSTICE MORAWETZ	)	DAY OF JULY, 2012

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



AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND COMPANIES LISTED IN SCHEDULE "A"

Applicants

APPROVAL AND VESTING ORDER

THIS MOTION, made by Cinram International Inc. ("**CII**"), Cinram International Income Fund ("**Cinram Fund**"), CII Trust and the companies listed in Schedule "A" hereto (collectively, the "**Applicants**") for an order:

(i) approving the sale of substantially all of the property and assets used in connection with the business carried on by Cinram Fund and its direct and indirect subsidiaries (collectively, "**Cinram**") in North America contemplated by an asset purchase agreement (the "**Asset Purchase Agreement**") between CII and Cinram Acquisition, Inc. (the "**Purchaser**") dated June 22, 2012, and appended to the affidavit of Mark Hootnick sworn June 23, 2012 (the "**Hootnick Affidavit**") as Exhibit "A";

(ii) approving the sale of the shares of Cooperatie Cinram Netherlands UA (the "**Purchased Shares**") pursuant to the binding purchase offer dated June 22, 2012 (the "**Purchase Offer**") provided by the Purchaser to CII and 1362806 Ontario Limited

(together with CII, the "**Share Sellers**") appended to the Hootnick Affidavit as Exhibit "B";

(iii) authorizing CII to enter into the Asset Purchase Agreement and the Share Sellers to enter into the Purchase Offer;

(iv) authorizing CII, Cinram Inc., Cinram Retail Services LLC, One K Studios, LLC, Cinram Distribution LLC and Cinram Manufacturing LLC (collectively, the "**Asset Sellers**", together with the Share Sellers, the "**Sellers**") to complete the transactions contemplated by the Asset Purchase Agreement (the "**Asset Sale Transaction**");

(v) authorizing the Share Sellers to complete the transactions contemplated by the Purchase Offer (the "**Share Sale Transaction**", together with the Asset Sale Transaction, the "**Sale Transaction**"), including, without limitation, entering into a share purchase agreement in the form attached as Exhibit A to the Purchase Offer (the "**Share Purchase Agreement**") upon due exercise of the Purchase Offer; and

(vi) upon delivery of Monitor's Certificates (as defined below) by the Monitor (as defined below) to the Purchaser, vesting all of the Asset Sellers' right, title and interest in and to the Purchased Assets (as defined in the Asset Purchase Agreement) and the Share Sellers' right, title and interest in and to the Purchased Shares in the Purchaser or its nominees, free and clear of all interests, liens, charges and encumbrances, other than permitted encumbrances, as set out in the Approval and Vesting Order,

was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of John Bell sworn June 23, 2012, (the "**Bell Affidavit**"), the Hootnick Affidavit, the First Report of FTI Consulting Canada Inc. in its capacity as Court-appointed Monitor (the "**Monitor**") dated July 9, 2012 (the "**Monitor's Report**"), and on hearing the submissions of counsel for the Applicants, the Monitor, the Purchaser, the Administrative Agent under the Credit Agreements (as defined in the Bell Affidavit) and the DIP Agent under the DIP Credit Agreement (each as defined in the Bell Affidavit), no one appearing and making submissions for any other person served with the Motion Record, although properly served as appears from the affidavit of Caroline Descours sworn June 27, 2012, filed:

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

2. THIS COURT ORDERS AND DECLARES that the Asset Sale Transaction is hereby approved, and the execution of the Asset Purchase Agreement by CII is hereby authorized and approved, with such minor amendments as CII may deem necessary with the approval of the Monitor. The Asset Sellers are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Asset Sale Transaction and for the conveyance of the Purchased Assets to the Purchaser and/or one or more entities nominated by the Purchaser to take title to the Purchased Assets in accordance with the Asset Purchase Agreement (each an "**Asset Purchaser Nominee**").

3. THIS COURT ORDERS AND DECLARES that the Share Sale Transaction is hereby approved, and the Share Sellers are hereby authorized to execute the Purchase Offer, with such minor amendments as the Share Sellers may deem necessary with the approval of the Monitor. The Share Sellers are hereby authorized and directed to take such additional steps and execute such additional documents, including, without limitation, the Share Purchase Agreement, as may be necessary or desirable for the completion of the Share Sale Transaction and for the conveyance of the Purchased Shares to the Purchaser or an entity nominated by the Purchaser to take title to the Purchased Shares (the "**Share Purchaser Nominee**").

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "**Monitor's Asset Sale Transaction Certificate**"), all of the Asset Sellers' right, title and interest in and to the Purchased Assets shall vest absolutely in the Purchaser and/or the Asset Purchaser Nominee, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Morawetz dated June 25, 2012; (ii) all charges, security interests or claims

evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**") or any other personal property registry system; and (iii) those Claims listed on Schedule "D" hereto (all of which are collectively referred to as the "**Encumbrances**", which Claims and Encumbrances shall not include the Permitted Encumbrances (as defined in the Asset Purchase Agreement), which Permitted Encumbrances include the encumbrances, easements and restrictive covenants listed on Schedule "E") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

5. THIS COURT ORDERS that with respect to the U.S. Applicants (as defined in the Bell Affidavit) only, this Order is subject to the issuance of an order by the United States Bankruptcy Court for the District of Delaware authorizing the sale and transfer of the Purchased Assets that are located within the territorial jurisdiction of the United States, free and clear of and from any Claims and Encumbrances.

6. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "F" hereto (the "**Monitor's Share Sale Transaction Certificate**", together with the Monitor's Asset Sale Transaction Certificate, the "**Monitor's Certificates**"), all of the Share Sellers' right, title and interest in and to the Purchased Shares shall vest absolutely in the Purchaser or the Share Purchaser Nominee, free and clear of and from any and all Claims and Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Shares are hereby expunged and discharged as against the Purchased Shares.

7. THIS COURT ORDERS that upon the registration in the Land Titles Division of the Toronto Registry Office an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the real property identified in Schedule "C" hereto (the "**Real Property**"), the Land Registrar is hereby directed to enter the Purchaser or the Asset Purchaser Nominee as the owner of the Real Property in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule "D" hereto.

8. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall be paid to the Monitor and shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Asset Sale Transaction Certificate all Claims and Encumbrances relating to the Purchased Assets shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

9. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Shares shall be paid to the Monitor and shall stand in the place and stead of the Purchased Shares, and that from and after the delivery of the Monitor's Share Sale Transaction Certificate all Claims and Encumbrances relating to the Purchased Shares shall attach to the net proceeds from the sale of the Purchased Shares with the same priority as they had with respect to the Purchased Shares immediately prior to the sale, as if the Purchased 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.

10. THIS COURT ORDERS that the Monitor may rely on written notice from the Sellers and the Purchaser regarding fulfillment of conditions to closing under the Asset Purchase Agreement, the Purchase Offer and the Share Purchase Agreement and shall incur no liability with respect to delivery of the Monitor's Asset Sale Transaction Certificate and the Monitor's Share Sale Transaction Certificate.

11. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Asset Sale Transaction Certificate and a copy of the Monitor's Share Sale Transaction Certificate, forthwith after delivery thereof.

12. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Sellers are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Sellers' records pertaining to the Sellers' past and current employees, including personal information of those employees listed on Schedule 8.7(a) to the Asset Purchase Agreement. The

Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Sellers.

13. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Applicants or Cinram International Limited Partnership (together with the Applicants, the "**CCAA Parties**") and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the CCAA Parties;

the vesting of the Purchased Assets in the Purchaser and/or the Asset Purchaser Nominee and the Purchased Shares in the Purchaser or the Share Purchaser Nominee pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the CCAA Parties and shall not be void or voidable by creditors of the CCAA Parties, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

14. THIS COURT ORDERS AND DECLARES that the Sale Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

15. THIS COURT ORDERS that the confidential information relating to the Sale Transaction and Schedules 2.1(i), 4.3 and 4.6 to the Asset Purchase Agreement and Schedule I.3 to Exhibit I to the Asset Purchase Agreement contained in the confidential supplement of the Applicants be sealed, kept confidential and not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

16. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States or in any other foreign jurisdiction to give effect to this Order and to assist the CCAA Parties and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties as may be necessary or desirable to give effect to this Order or to assist the CCAA Parties and their agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 12 2012

SCHEDULE "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holding's Inc.

Cinram, Inc.

IHC Corporation

Cinram Manufacturing LLC

Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B" – Form of Monitor's Asset Sale Transaction Certificate

Court File No. CV12-9767-00CL

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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND COMPANIES LISTED IN SCHEDULE "A"

Applicants

MONITOR'S ASSET SALE TRANSACTION CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated June 25, 2012, FTI Consulting Canada Inc. was appointed as the Monitor (the "**Monitor**") of the Applicants and Cinram International Limited Partnership (together with the Applicants, the "**CCAA Parties**").

B. Pursuant to an Order of the Court dated **[DATE]** (the "**Approval and Vesting Order**"), the Court approved the asset purchase agreement made as of June 22, 2012 (the "**Asset Purchase Agreement**") between Cinram International Inc. ("**CII**") and Cinram Acquisition, Inc. (the "**Purchaser**") and provided for the vesting in the Purchaser and/or the Asset Purchaser Nominee of the Asset Sellers' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in Article 7 of the Asset Purchase Agreement have been satisfied or waived by CII and the Purchaser; and (iii) the Asset Sale Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Asset Purchase Agreement or the Approval and Vesting Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Asset Purchase Agreement;

2. The Monitor has received written confirmation from the Purchaser and CII that the conditions to Closing as set out in Article 7 of the Asset Purchase Agreement have been satisfied or waived by CII and the Purchaser;

3. The Asset Sale Transaction has been completed to the satisfaction of the Monitor; and

4. This Certificate was delivered by the Monitor at **[TIME]** on **[DATE]**.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity

Per: ______________________________

Name:

Title

Schedule "C" – Real Property

2255 Markham Road, Toronto, Ontario

Firstly:

PIN 06079-0067 (LT)

Part of Lot 18, Concession 3 Scarborough, designated as Parts 2 and 3 on Plan 64R6927 and Part 1 on Plan 64R7116, confirmed by 64B1990, subject to SC574898, Toronto, City of Toronto

Secondly:

PIN 06079-0280 (LT)

Part of Lot 18, Concession 3 Scarborough, designated as Parts 2 and 3 on Plan 66R23795, subject to an easement over Part 3 on Plan 66R23795 as in SC574898, City of Toronto

Being the whole of the said PINs.

Land Titles Division of the Toronto Registry No. 66.

Schedule "D" – Claims to be deleted and expunged from title to Real Property

1. Charge in favour of JPMorgan Chase Bank, N.A. registered on May 8, 2006 as Instrument No. AT1131509;
2. Charge in favour of JPMorgan Chase Bank, N.A. registered on December 7, 2010 as Instrument No. AT2570745;
3. Charge in favour of JPMorgan Chase Bank, N.A. registered on April 11, 2011 as Instrument No. AT2663576;
4. Notice in favour of JPMorgan Chase Bank, N.A. registered on April 11, 2011 as Instrument No. AT2663577;
5. Charge in favour of JPMorgan Chase Bank, N.A. registered on January 16, 2012 as Instrument No. AT2920218; and
6. Charge in favour of JPMorgan Chase Bank, N.A. registered on January 16, 2012 as Instrument No. AT2920219.

Schedule "E" – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

1. Those matters referred to in Subsection 44(1) of the Land Titles Act, except paragraph 11 and 14, provincial succession duties and escheats or forfeiture to the Crown;
2. The rights of any person who would, but for the Land Titles Act, be entitled to the land or any part of it through length of adverse possession, prescription, misdescription or boundaries settled by convention;
3. Any lease to which subsection 70(2) of the Registry Act applies;
4. Transfer Easement registered on September 13, 1978 as Instrument No. SC574898;
5. Boundaries Act Plan registered on August 27, 1982 as Instrument No. 64BA1990;
6. Agreement registered on May 2, 1986 as Instrument No. TB318366;
7. Agreement registered on October 15, 1987 as Instrument No. TB454937;
8. Agreement registered on June 15, 1989 as Instrument No. TB611216;
9. Notice registered on November 3, 2005 as Instrument No. AT970042; and
10. Notice registered on July 24, 2006 as Instrument No. AT1205222.

Schedule "F" – Form of Monitor's Share Sale Transaction Certificate

Court File No. CV12-9767-00CL

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 CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND COMPANIES LISTED IN SCHEDULE "A"

Applicants

MONITOR'S SHARE SALE TRANSACTION CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated June 25, 2012, FTI Consulting Canada Inc. was appointed as the Monitor (the "**Monitor**") of the Applicants and Cinram International Limited Partnership (together with the Applicants, the "**CCAA Parties**").

B. Pursuant to an Order of the Court dated **[DATE]** (the "**Approval and Vesting Order**"), the Court approved the purchase offer made as of June 22, 2012 (the "**Purchase Offer**") by Cinram Acquisition, Inc. (the "**Purchaser**") to Cinram International Inc. ("**CII**"), 1362806 Ontario Limited (together with CII, the "**Share Sellers**") and provided for the vesting in the Purchaser or the Share Purchaser Nominee the Share Sellers' right, title and interest in and to the Purchased Shares, which vesting is to be effective with respect to the Purchased Shares upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Shares; (ii) that the conditions to Closing as set out in Section 6 of the Purchase Offer and Article 6 of the Share Purchase Agreement have

been satisfied or waived by the Share Sellers and the Purchaser; and (iii) the Share Sale Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Purchase Offer or the Approval and Vesting Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received the Purchase Price for the Purchased Shares payable on the Closing Date pursuant to the Purchase Offer;

2. The Monitor has received written confirmation from the Share Sellers and the Purchaser that the conditions to Closing as set out in Section 6 of the Purchase Offer and Section 6.3 of the Share Purchase Agreement and the deliveries set out in Section 6.2 of the Share Purchase Agreement have been satisfied or waived by the Share Sellers and the Purchaser;

3. The Share Sale Transaction has been completed to the satisfaction of the Monitor; and

4. This Certificate was delivered by the Monitor at **[TIME]** on **[DATE]**.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity

Per: ______________________________

Name:

Title

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

Court File No: CV12-9767-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

GOODMANS LLP
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Lawyers for the Applicants

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TAB K

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

Commercial Division

File: No: 500-11-033561-081

Montreal, July 10, 2008

Present: The Honourable Jean-François Buffoni, J.C.S.

Le 10 juillet 2008
8.16.12
Hon. Jean-François Buffoni j.c.s.
Requête accueillie suivant le jugement écrit signé en Cour.
Voir jugement.
D. Bilz, g.a.s.

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

MAAX CORPORATION,

MAAX CANADA INC.,

MAAX SPAS (ONTARIO) INC.,

4200217 CANADA INC. AND

MAAX CABINETS INC.

Petitioners

And

MAAX KSD LLC,

Aker Plastics Company Inc.,

MAAX Spas (Arizona), Inc.

MAAX-Hydro Swirl Manufacturing Corp.

MAAX Midwest, Inc.

Pearl Baths LLC

Additional Petitioners

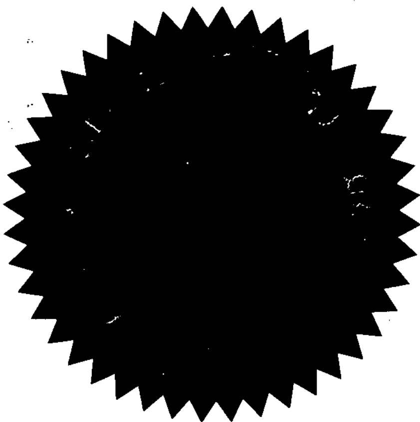
And

ALVAREZ & MARSAL CANADA ULC

Monitor

And

BROOKFIELD BRIDGE LENDING FUND INC.



Registrar of the Land Registry Office of the Province of Quebec for the Registration Division of Beauce,

Registrar of the Register of Personal and Movable Real Rights of Quebec,

Land Title and Survey Authority of BC (Kamloops Land Title Office),

South Alberta Land Registration District (Land Titles Office),

Mis en cause

SALE AND VESTING ORDER

SEEING the Petitioners' Motion for Approval of the Sale of Assets and Vesting Order (the "**Motion**"), reading the affidavit of Mark Belanger sworn June 11, 2008 (the "**Affidavit**") in support thereof and the Monitor's Report dated June 25, 2008 (the "**Monitor's Report**"), and hearing the submissions of counsel for the Petitioners, the Buyer (as defined herein) and Alvarez & Marsal Canada ULC (the "**Monitor**");

GIVEN the Order rendered this day by this Honourable Court extending the CCAA protection to the Additional Petitioners (the Petitioners and the Additional Petitioners collectively hereinafter referred as the "**Petitioners**"); and

GIVEN the provisions of the CCAA.

WHEREFORE THE COURT:

[1] **GRANTS** the present Motion;

[2] **ORDERS** that the time for service of the Motion and the Monitor's Report be and is hereby abridged and that the Motion is properly presentable and declares that the service of the Motion constitutes good and sufficient service on all persons and further declares that the Petitioners are relieved of any further requirements for service of the Motion;

[3] **ORDERS** that the First Report of the Monitor be and is hereby accepted and approved and the actions and activities of the Monitor described therein be and are hereby approved;

[4] **ORDERS AND DECLARES** that the Asset Purchase Agreement between, *inter alia*, the Petitioners and Brookfield Bridge Lending Fund Inc. ("**BBLF**") made as of June 11, 2008 (the "**Purchase Agreement**"), and the sale of Petitioners' assets contemplated therein (the "**Transaction**") are hereby approved and ratified, and that same are commercially reasonable and in the best interests of the Petitioners and their stakeholders;

[5] **ORDERS** that the Petitioners are authorized and hereby directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance (the "**Conveyance**") of the Purchased Assets (as defined in the Purchase Agreement) to BBLF, its assignee(s) or such other person as may be directed by BBLF in accordance with the Purchase Agreement (the "**Buyer**");

[6] **ORDERS AND DECLARES** that upon delivery to the Buyer of a Monitor's certificate substantially in the form attached hereto as Schedule "A" (the "**Monitor's Certificate**"), all of the Petitioners' right, title and interest in and to the Purchased Assets shall vest absolutely, exclusively and forever with the Buyer, free and clear of and from any and all encumbrances, rights, claims, titles, interests, prior claims, pledges, security interests (whether contractual, statutory, or otherwise), hypothecs, hypothecations, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, judgments, writs of seizure and sale, options, adverse claims, levies, charges, priorities, or other financial or monetary claims, whether or not they have been rendered opposable against third persons or have attached or been perfected, registered or filed and whether

secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing, any Claims in respect of: (i) all hypothecs, charges, security interests or claims evidenced or perfected by registrations pursuant to any movable or personal property registry system including the Register of Personal and Movable Real Rights of Quebec (the "**RPMRR**"); (ii) the 9.75% Senior Subordinated Notes due 2012 issued by MAAX Corporation (the "**Notes**"), iii) any guarantees of such Notes granted by any of the Petitioners or their affiliates; and (iv) those Claims listed on Schedule "B" attached hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, servitudes, easements and restrictive covenants listed in Schedule "C" attached hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged, radiated and discharged as against the Purchased Assets and **DECLARES** that the Buyer is authorized to file such financing change statements under the Personal Property Security Act (Ontario) or any equivalent legislation in any province or territory to record the discharges granted herein;

[7] **ORDERS** that with respect to the Additional Petitioners only, this Order is subject to the issuance of a final Order of a U.S. court of appropriate jurisdiction authorizing the transfer of any of the Purchased Assets that are located within the territorial jurisdiction of the United States, free and clear of all Encumbrances (as defined herein) .

[8] **ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof to the Buyer;

[9] **ORDERS AND DIRECTS** the Monitor to issue and deliver to the Buyer the Monitor's Certificate upon written confirmation by Petitioners and the Buyer that all conditions precedent to the closing of the Transaction have been satisfied or waived;

[10] **ORDERS** that upon the registration in the applicable land registry office of a deed of transfer or equivalent document in the applicable prescribed forms, duly executed by the Petitioners, and of an application for registration of vesting order in the applicable prescribed form, the applicable land registrar or equivalent official is hereby ordered and directed to enter the Buyer as the owner of the subject immovable or real property identified in Schedule "D" attached hereto (the "**Immovable Property**") and is hereby directed to delete, radiate and discharge from title to the Immovable Property all of the Claims listed in Schedule "B" attached hereto;

[11] **ORDERS AND DIRECTS** the Registrar of the Land Registry Office of the Province of Quebec for the Registration Division of Beauce, the Registrar of the RPMRR, the Land Title and Survey Authority of BC (Kamloops Land Title Office) and the South Alberta Land Registration District (Land Titles Office) to accept, upon payment of the prescribed fees, a true copy of this Order and a signed copy of the Monitor's Certificate for registration on title to the Immovable Property and further orders that such registration shall take place without a certificate attesting that no appeal of this Order has been taken, this Order being good and sufficient authority for so doing;

[12] **ORDERS AND DIRECTS** the Registrar for the Land Registry Office of the Province of Quebec for the Registration Division of Beauce, the Registrar of the RPMRR, the Land Title and Survey Authority of BC (Kamloops Land Title Office) and the South Alberta Land Registration District (Land Titles Office), upon payment of the prescribed fees and the filing of a true copy of this Order and a signed copy of the Monitor's Certificate to proceed with the cancellation, radiation and discharge of any and all Claims listed in Schedule "B" attached hereto;

[13] **ORDERS AND DIRECTS** the Registrar of the RPMRR, upon payment of the prescribed fees and the filing of a true copy of this Order and a signed copy of the

Monitor's Certificate to proceed with the cancellation, radiation and discharge of any and all Claims listed in Schedule B attached hereto.

[14] **DECLARES** that upon the delivery of the Monitor's Certificate to the Buyer, the Transaction contemplated pursuant to the Purchase Agreement and any other document to be executed for the purposes of the Transaction, shall have the same effect as a forced sale by a public officer acting under judicial authority as per the provisions of the *Code of Civil Procedure*.

[15] **DECLARES** that the Transaction shall have the same effect as a sale by judicial authority as per the provisions of the *Civil Code of Quebec*.

[16] **EXEMPTS** the Petitioners, from the requirement (if any) to seek and obtain shareholders' approval pursuant to any Federal or Provincial legislation with regard to the Purchase Agreement, the consummation of the Transaction and the Conveyance.

[17] **DECLARES** that the Order sought constitutes the only authorization required by the Petitioners to proceed with the Transaction and the Conveyance.

[18] **AUTHORIZES** each of the Petitioners to file articles of amendment or any other document that may be required in order to change each of Petitioners' names and any business names used by said Petitioners, containing any mention of "MAAX" without the requirement (if any) of obtaining director or shareholders' approval pursuant to any Federal or Provincial Legislation;

[19] **ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Petitioners are authorized and permitted to disclose and transfer to the Buyer all human resources and payroll information in their records pertaining to their past and current employees. The Buyer shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided

to it in a manner which is in all material respects identical to the prior use of such information by the Petitioners;

[20] **ORDERS** that, notwithstanding:

a) the pendency of these proceedings;

b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Petitioners and any bankruptcy order issued pursuant to any such applications; and

c) any assignment in bankruptcy made in respect of the Petitioners;

the vesting of the Purchased Assets in the Buyer pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Petitioners and shall not be void or voidable by creditors of the Petitioners, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation;

[21] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Petitioners and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners as may be necessary or desirable to give effect to this Order or to assist the Petitioners and their agents in carrying out the terms of this Order;

[22] **ORDERS** the provisional execution of this Order to be rendered notwithstanding any appeal and without the necessity of furnishing security.

Honourable Jean-François Buffoni, J.C.S.

COPIE CONFORME
TRUE COPY

OFFICIER AUTORISÉ
AUTHORIZED OFFICER

SCHEDULE "A"
Monitor's Certificate

SCHEDULE "B"
Copy of the List of Claims

1. Agreement of Lease dated March 6, 2003 between 955 Mearns Associates, L.P. and MAAX KSD Corporation for 955 Mearns Road, Warminster, Pennsylvania

2. See Attachment A

SCHEDULE "C"
Copy of the List of permitted encumbrances

SCHEDULE "D"
Immovable Property description

SCHEDULE "A"

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-

SUPERIOR COURT
Commercial Division

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO MAAX CORPORATION, MAAX CANADA INC., MAAX SPAS (ONTARIO INC.), 4200217 CANADA INC. AND MAAX CABINETS INC.

Petitioners

and

ALVAREZ & MARSAL CANADA ULC,

Monitor

CERTIFICATE OF THE MONITOR

WHEREAS MAAX Corporation ("**MAAX Corp.**"), MAAX Canada Inc. ("**MAAX Canada**"), MAAX Spas (Ontario) Inc. ("**MAAX Spas**"), 4200217 Canada Inc. ("**4200217**") and MAAX Cabinets Inc. ("**MAAX Cabinets**") are collectively referred to herein as the "**Petitioners**", have sought the protection of the *Companies' Creditors Arrangement Act* ("**CCAA**") and obtained an Initial Order on •, 2008 as same may be renewed and extended (the "**Initial Order**");

WHEREAS Alvarez & Marsal Canada ULC has been appointed as Monitor of the Petitioners (the "**Monitor**");

WHEREAS the Petitioners filed a Motion for Approval of the Sale of Assets and Vesting Order (the "**Motion**");

WHEREAS by order rendered on June •, 2008, the Motion was granted by this Honourable Court (the "**Order**");

WHEREAS the Order provides for the filing of a Monitor's Certificate (as defined in the Order) by the Monitor upon the occurrence of certain events;

THE MONITOR DECLARES THAT:

The Petitioners and the Buyer (as defined in the Purchase Agreement) have each confirmed to the Monitor in writing that all matters to be completed prior to the consummation of the transactions contemplated by the Purchase Agreement have been satisfied or waived and that the Closing (as defined in the Purchase Agreement) took place on [**DATE**].

MONTREAL, June •, 2008

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ALVAREZ & MARSAL CANADA ULC

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SCHEDULE "B"

List of Claims

1. Agreement of Lease dated March 6, 2003 between 955 Mearns Associates, L.P. and MAAX KSD Corporation for 955 Mearns Road, Warminster, Pennsylvania

2. See Attachment A

Attachment A

PERSONAL PROPERTY SECURITY REGISTER (BRITISH COLUMBIA)							
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX Canada Inc.	Deragon Location Inc.	965206B	October 4, 2004	A specifically described motor vehicle.		October 4, 2009
2.	MAAX Canada Inc.	Deragon Location Inc.	385458C	June 3, 2005	A specifically described motor vehicle.		June 3, 2010
3.	MAAX Canada Inc.	Deragon Location Inc.	971632C	April 28, 2006	A specifically described motor vehicle.		April 28, 2011
4.	MAAX Canada Inc.	Leavitt Machinery General Partnership	238414D	September 14, 2006	A specifically described motor vehicle. From the collateral, all proceeds including, accounts, money, chattel, paper, intangibles, goods, documents of title, licences, instruments, securities, substitutions, trade ins, insurance proceeds and any other form of proceeds.	Registration no 239986 to register a debtor transfer from MAAX Canada Inc. to MAAX Canada Inc.	September 14, 2011
5.	MAAX Canada Inc.	Leavitt Machinery General Partnership	239912D	September 15, 2006	A specifically described motor vehicle. From the collateral, all proceeds including, accounts, money, chattel paper, intangibles, goods, documents of title, licences, instruments, securities, substitutions, trade ins, insurance proceeds and any other form of proceeds.		September 15, 2010

PERSONAL PROPERTY SECURITY REGISTER (ONTARIO)							
	DEBTOR(S)	SECURED PARTY(IES)	FILE NUMBER/ REGISTRATION NUMBER	DATE	CURRENT COLLATERAL CLASSIFICATION	CURRENT GENERAL COLLATERAL DESCRIPTION COMMENTS/OTHER PARTICULARS	EXPIRY DATE
1.	MAAX Canada Inc.	Deragon Location Inc.	603676368 / 20040310 1455 1530 1770 20040401 1955 1531 0628	March 10, 2004	Equipment and motor vehicle (as amended).	A specifically described motor vehicle. Amount: $23,308	March 10, 2009

PERSONAL PROPERTY SECURITY REGISTER (NOVA SCOTIA)							
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX CANADA INC.	Deragon Location Inc.	7856901	February 18, 2004	Specifically described motor vehicle		February 18, 2009
2.	MAAX Corporation	MAAX Canada Inc.	8329597	June 11, 2004	A security interest is taken in a promissory note as described.		June 11, 2014

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX Canada Inc. (Lachine) (lessee)	Oldham Batteries Canada Inc. (lessor)	06-0493910-0001 / Rights resulting from a lease	Aug. 25, 2006	n/a	Specifically described equipment.		July 26, 2011
2.	MAAX Canada Inc. (lessee)	IBM Canada Limitée (original lessor/assignor) Relational Funding Canada Corp. (assignee)	06-0089352-0002 / Rights resulting from a lease	Feb. 22, 2006	n/a	The proceeds that the lessee leased from the lessor, the whole as more fully described in the registration.	This registration is a global registration under section 2961.1 of the Civil Code of Québec. A partial assignment of rights was registered on Sept. 28, 2006 under number 06-0563938-0001 by IBM Canada Limited in favor of Relational Funding Canada Corp.	Feb. 22, 2016
3.	MAAX Canada Inc. (lessee)	IBM Canada Limitée (original lessor/assignor) Relational Funding Canada Corp. (assignee)	06-0089352-0001 / Rights resulting from a lease	Feb. 22, 2006	n/a	The proceeds that the lessee leased from the lessor, the whole as more fully described in the registration.	This registration is a global registration under section 2961.1 of the Civil Code of Québec. A partial assignment of rights was registered on Sept. 28, 2006 under number 06-0563938-0001 by IBM Canada Limited in favor of Relational Funding Canada Corp.	Feb. 22, 2016

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
4.	MAAX Canada Inc.	AXA Assurances Inc.	05-0558062-0032 / Conv. hyp. without delivery	Sept. 29, 2005	$10,000,000	The universality of the debtor's claims held against any person, the whole as more fully described in the registration.	A voluntary reduction was registered on July 4, 2006 under number 06-0382873-0001 regarding specifically described property of Cuisine Expert - C.E. Cabinets Inc. A modification of a published right was registered on September 5, 2006 under number 06-0510746-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as debtor.	
5.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	05-0465969-0009 / Rights resulting from a lease	Aug. 12, 2005	n/a	Specifically described motor vehicle.		Jul. 10, 2012
6.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	05-0370973-0002 / Rights resulting from a lease	June, 27, 2005	n/a	Specifically described motor vehicle.		June 8, 2012
7.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	04-0700495-0001 / Rights resulting from a lease	Dec. 6, 2004	n/a	Specifically described motor vehicle.		Dec. 1, 2011
8.	MAAX Canada Inc. (buyer)	Protectron Inc. (vendor)	04-0030442-0001 / Reservation of ownership (Instalment sale)	Jan. 21, 2004	n/a	Specifically described movable property.		Jan. 19, 2009
9.	MAAX Canada Inc. (lessee) (further to the amendment bearing number 02-0158528-0001)	Alter Moneta Trust (lessor)	01 0062080 0001 / Rights of ownership under a leasing agreement	Feb. 28, 2001	n/a	Specifically described equipment.	This registration is affected by a hypothec registered in favour of QSPE-AMC Trust under the number 01-0116702-0005. An amendment was registered under the number 03-0335705-0003, in order to rectify the text under the heading "Autres Biens".	Feb. 27, 2011

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT.	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
10.	MAAX Canada Inc. (lessee) (further to the amendment bearing number 02-0158528-0001)	Alter Moneta Trust (lessor)	00 0304298 0001 / Rights of ownership under a leasing agreement	Oct. 10, 2000	n/a	Specifically described movable property.	This registration is affected by a hypothec registered in favour of Rocket Trust under the number 00-0344163-0001. An assignment of a universality of claims was registered with Rocket Trust (represented by Trust Co. of Bank of Montreal, as trustee), as assignor, and QSPE-AMC/R Trust (represented by 146888 Ontario Inc., as trustee), as assignee, under the number 01-0175106-0001. An amendment was registered under the number 01-0251917-0001, in order to rectify the name of the assignee in the assignment of a universality of claims. An amendment was registered under the number 02-0379179-0001, in order to rectify the text under the heading "Référence à l'inscription visée". A voluntary reduction was registered on February 8, 2005 under number 05-0064073-0001 regarding specifically property of the debtor Fiducie Alter Moneta in the hypothec described above.	Oct. 9, 2010

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
11.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	03-0279474-0005 / Rights resulting from a lease	June 3, 2003	n/a	Specifically described motor vehicles.	An amendment was registered on March 3, 2005 under number 05-0114065-0002 in order to rectify the text under the heading "Autres Mentions". A voluntary reduction was registered on March 11, 2005 under number 05-0132074-0002 regarding specifically described property of Cuisine Expert – C.E. Cabinets Inc. A modification of a published right was registered on October 28, 2005 under number 05-0614175-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as lessee.	June 3, 2013
12.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	03-0279474-0004 / Rights resulting from a lease	June 3, 2003	n/a	Specifically described motor vehicles.	A modification of a published right was registered on October 28, 2005 under number 05-0614175-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as lessee.	June 3, 2013
13.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	03-0279474-0001 / Rights resulting from a lease	June 3, 2003	n/a	Specifically described motor vehicle.	A modification of a published right was registered on October 28, 2005 under number 05-0614175-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as lessee.	June 3, 2013

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
14.	MAAX Corporation	MAAX Canada Inc.	04-0333177-0003 / Conv. hyp. without delivery	June 7, 2004	$350, 000,0 00	The promissory note dated as of June 4, 2004, made by MAAX Canada Holco in favour of 3087053 Nova Scotia Company ("NSULC"), as assigned and transferred by NSULC to the debtor and as amended and restated prior to the date hereof, and as further amended and restated as of the date hereof by the debtor and the secured party, all amounts payable thereunder, all contracts and other rights and benefits which are now or may hereafter be vested in the debtor in respect of or as security for the amounts paid or payable thereunder, and all proceeds arising therefrom.		June 7, 2014
15.	MAAX Corporation	MAAX Canada Inc.	04-0333177-0002 / Conv. hyp. without delivery	June 7, 2004	$350, 000,0 00	All of secured party's rights in and proceeds payable to it from the Forward Purchase Agreement entered by the secured party with Beauceland Corporation made as of June 4, 2004.		June 7, 2014
16.	MAAX Cabinets Inc. (lessee)	Citicorp Vendor Finance, Ltd. (lessor) Citicorp Finance Vendeur Ltee (lessor)	06-0065580-0006 / Rights of ownership under a leasing agreement	Feb. 9, 2006	n/a	Specifically described movable property with all attachments, accessories and proceeds thereof including insurance proceeds and indemnities.	Lease Term: 66 months Monthly Lease Payment: $348	Aug. 8, 2011

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
17.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	05-0621801-0003 / Rights resulting from a lease	Nov. 1, 2005	n/a	Specifically described motor vehicles.		Nov. 1, 2015
18.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	05-0621801-0002 / Rights resulting from a lease	Nov. 1, 2005	n/a	Specifically described motor vehicles.		Nov. 1, 2015
19.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	05-0621801-0001 / Rights resulting from a lease	Nov. 1, 2005	n/a	Specifically described motor vehicles.		Nov. 1, 2015
20.	MAAX Cabinets Inc. (lessee)	Deragon Location Inc. (lessor)	05-0457526-0002 / Rights resulting from a lease	Aug. 9, 2005	n/a	Specifically described motor vehicle.		Aug. 1, 2012
21.	MAAX Cabinets Inc. (lessee)	XTRA LLC (lessor)	05-0340175-0002/ Rights resulting from a lease	June 10, 2005	n/a	Specifically described motor vehicle.		June 10, 2008
22.	MAAX Cabinets Inc. (lessee)	XTRA LLC (lessor)	05-0277050-0001/ Rights resulting from a lease	May 13, 2005	n/a	Specifically described motor vehicles.		May 13, 2008 **[NTD: confirm if renewed.]**

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
23.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	03-0279474-0005 / Rights resulting from a lease	June 3, 2003	n/a	Specifically described motor vehicles.	An amendment was registered on March 3, 2005 under number 05-0114065-0002 in order to rectify the text under the heading "Autres Mentions". A voluntary reduction was registered on March 11, 2005 under number 05-0132074-0002 regarding specifically described property of Cuisine Expert – C.E. Cabinets Inc. A modification of a published right was registered on October 28, 2005 under number 05-0614175-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as lessee.	June 3, 2013
24.	MAAX Cabinets Inc. (lessee)	Location de Camions Maxim, a division of Maxim Transportation services Inc. (lessor) Maxim Transportation Services Inc. (lessor)	03-0279474-0004 / Rights resulting from a lease	June 3, 2003	n/a	Specifically described motor vehicles.	A modification of a published right was registered on October 28, 2005 under number 05-0614175-0001 in order to remove Cuisine Expert – C.E. Cabinets Inc. as lessee.	June 3, 2013
25.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd. (lessor)	06-0682574-0031 / Rights resulting from a lease	Nov. 24, 2006	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Oct. 11, 2012

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
26.	MAAX Canada Inc. (assignor)	Maple Trade Finance Inc. (assignee)	07-0051834-0001 Assignment of a universality of claims	January 31, 2007	n/a	The universality of those debts, monies, receivables, claims and choses in action that are due, owing to or owned or assigned by the Assignor which are, or have been, or will be assigned by the Assignor to the Assignee from time to time pursuant to the factoring agreement dated January 18, 2007 between the Assignor and the Assignee and any future amendment, modification, restatement and renewal thereof.		n/a
27.	MAAX Corporation	Banque Nationale du Canada	07-0240536-0004 Conventional hypothec without delivery	May 3, 2007	$40,0 00	The sums which now are or may in the future be to the credit of the account specifically described, or any other account in replacement.		March 26, 2017
28.	MAAX Canada Inc. (purchaser)	Solus Sécurité Inc. (vendor)	08-0166571-0001 Reservation of ownership (instalment sale)	March 31, 2008	n/a	The universality of movable property sold and/or put in consignment by vendor at purchaser.		August 28, 2017
29.	MAAX Canada Inc. (purchaser)	Solus Sécurité Inc. (vendor)	08-0110088-0002 Reservation of ownership (instalment sale)	February 29, 2008	n/a	The universality of movable property sold and/or put in consignment by vendor at purchaser.	Assignment of a universality of claims.	August 28, 2017
30.	Pearl Baths, Inc.	MAAX Inc.	98 0154733 0001 / Security published in a foreign country	Nov. 11, 1998	$125, 000,0 00	The universality of all movable property.	A security agreement registered by way of financing statements filed with appropriate American authorities (State and Federal) under uniform commercial code provisions on April 10, 1998, with the Minnesota secretary of State under number 202772 and on April 13, 1998,	May 19, 2008

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUEBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
							with the Hennepin county recorder, Minnesota under number 1131986.	

SCHEDULE "C"

Permitted Encumbrances

1. Landlord Access and Consent Agreement entered into between 124260 Canada Inc. and Royal Bank of Canada, as administrative agent to the Credit Agreement dated as of June 4, 2004, among, *inter alia*, MAAX Corporation and the Royal Bank of Canada, as amended, in connection with the Agreement of Lease dated April 1, 1998 between 124260 Canada Inc. and Shostal Ltd. for 160 St. Joseph Boul., Lachine, Québec, as assigned by a Memorandum of Agreement dated May 20, 1998 between Shostal Ltd. and MAAX Spartan Inc. and extended by an agreement dated June 20, 2002 between MAAX Canada Inc. (formerly MAAX Spartan Inc.), MAAX Inc. and 124260 Canada Inc.

2. Notice of Contamination (Section 31.58 of the Environment Quality Act) registered under number 11 972 262 with regards to Part of lots 199 and 200 and lot 200-6 of the cadastre of the Parish of Saint-Frederic, Registration Division of Beauce owned by MAAX Canada Inc.

3. See Attachment A

Attachment A

	PERSONAL PROPERTY SECURITY REGISTER (BRITISH COLUMBIA)						
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX Canada Inc.	HSBC Bank of Canada I R L Idealease Ltd.	907865B	August 31, 2004	A specifically described motor vehicle. Vehicle Finance Lease Agreement dated July 27, 2004.		August 31, 2009
2.	MAAX Canada Inc.	De Lage Landen Financial Services Canada Inc.	938023C	April 10, 2006	All goods supplied by the Secured party pursuant to a lease between the Debtor and the Secured party more specifically described, without limitation, as 2006 Jungheinrich EFG218K, serial FN333981 and 2006 Jungheinrich EFG218K, Serial FN333983, together with all parts and accessories thereto and accession thereto and all replacements or substitutions for such goods and proceeds thereto (proceeds as defined in the Personal Property Security Act (BC)) and any insurance proceeds resulting therefrom.		April 10, 2010
3.	MAAX Canada Inc.	Deragon Location Inc.	940032C	April 11, 2006	A specifically described motor vehicle.		April 11, 2011
4.	MAAX Canada Inc.	Deragon Location Inc.	971632C	April 28, 2006	A specifically described motor vehicle.		April 28, 2011
5.	MAAX Canada Inc.	Leavitt Machinery General Partnership	238414D	September 14, 2006	A specifically described motor vehicle. From the collateral, all proceeds including, accounts, money, chattel paper, intangibles, goods, documents of title, licences, instruments, securities, substitutions, trade ins, insurance proceeds and any other form of proceeds.	Registration no 239986 to register a debtor transfer from MAAX Canada Inc. to MAAX Canada Inc.	September 14, 2011
6.	MAAX Canada Inc.	Leavitt Machinery General Partnership	239912D	September 15, 2006	A specifically described motor vehicle. From the collateral, all proceeds including, accounts, money, chattel paper, intangibles, goods, documents of title, licences, instruments, securities,		September 15, 2010

PERSONAL PROPERTY SECURITY REGISTER (BRITISH COLUMBIA)							
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
					substitutions, trade ins, insurance proceeds and any other form of proceeds.		
7.	MAAX Canada Inc	Xerox Canada Ltd	310542D	October 24, 2006	All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the Secured party or any affiliate thereof. Classifications: Equipment, Other		October 24, 2012
8.	MAAX Canada Inc	Xerox Canada Ltd	278332D	October 5, 2006	Equipment, other, all present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof. Equipment, Other		October 5, 2012
9.	MAAX Canada Inc.	Deragon Location Inc.	992732D	October 22, 2007	A specifically described motor vehicle.		October 22, 2012

PERSONAL PROPERTY SECURITY REGISTER (ALBERTA)							
	DEBTOR(S)	SECURED PARTY (IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	TYPE OF LIEN/ COMMENTS	EXPIRY DATE
1.	MAAX Canada Inc	De Lage Landen Financial Services Canada Inc.	06091913274/SA	September 19, 2006	A specifically described motor vehicle. All goods supplied by the Secured party pursuant to a Lease between the Debtor and the Secured party together with all parts and accessories thereto and accessions thereto and all replacements or substitutions for such goods and proceeds thereof (proceeds as defined in the Personal Proeprty Security Act (AB)) and any insurance proceeds resulting therefrom. All goods supplied by the secured party to the debtor, together with all attachments, accessories, accessions, replacements, substitutions, additions and improvements to the foregoing. Proceeds: goods, chattel paper, securities, accounts, inventory, documents of title, instruments, money, crops, licences and intangibles.		September 19, 2010
2.	MAAX Canada Inc	Xerox Canada Ltd	06102407225/SA	October 24, 2006	Equipment, other all present and future office equipment and software supplied or financed from time to time by the Secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the Secured party or any affiliate thereof.		October 24, 2012
3.	MAAX Canada Inc.	CIT Financial Ltd.	04082615800/SA	August 26, 2004	A specifically described motor vehicle. Together with all attachments, accessories, accessions, replacements, substitutions,		August 26, 2009

PERSONAL PROPERTY SECURITY REGISTER (ALBERTA)							
	DEBTOR(S)	SECURED PARTY (IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	TYPE OF LIEN/ COMMENTS	EXPIRY DATE
					additions and improvements thereto. Proceeds: accounts, chattel paper, money, intangibles, goods, documents of title, inventory, instruments, securities (all as defined in the Personal Property Security Act) and insurance proceeds.		
4.	MAAX Canada Inc.	Deragon Location Inc.	05040409277/SA	April 4, 2005	A specifically described motor vehicle.		April 4, 2010
5.	MAAX Canada Inc.	Deragon Location Inc.	06042804606/SA	April 28, 2006	A specifically described motor vehicle.		April 28, 2011
6.	MAAX Canada Inc.	Deragon Location Inc.	06051809637/SA	May 18, 2006	A specifically described motor vehicle.		May 18, 2011
7.	MAAX Canada Inc.	Deragon Location Inc.	07111932823/SA	November 19, 2007	A specifically described motor vehicle.		November 19, 2012

PERSONAL PROPERTY SECURITY REGISTER (ONTARIO)							
	DEBTOR(S)	SECURED PARTY(IES)	FILE NUMBER/ REGISTRATION NUMBER	DATE	CURRENT COLLATERAL CLASSIFICATION	CURRENT GENERAL COLLATERAL DESCRIPTION COMMENTS/OTHER PARTICULARS	EXPIRY DATE
1.	MAAX Canada Inc.	Deragon Location Inc.	626849478 / 20060707 1455 1530 4369	July 7, 2006	Inventory and motor vehicles DM = June 21, 2011	A specifically described motor vehicle. Amount: $23,052	July 7, 2011
2.	MAAX Canada Inc.	Deragon Location Inc.	635798934 / 20070530 1456 1530 4843	May 30, 2007	Inventory and motor vehicle. DM = May 29, 2012	Specifically described motor vehicle. Amount: $22, 471	May 30, 2012

PERSONAL PROPERTY SECURITY REGISTER (NOVA SCOTIA)							
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER	DATE	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX CANADA INC.	Deragon Location Inc.	11848876	December 8, 2006	Specifically described motor vehicle		December 8, 2011
2.	MAAX CANADA INC.	Deragon Location Inc.	11850260	December 8, 2006	Specifically described motor vehicle		December 8, 2011

REGISTER OF PERSONAL AND MOVABLE RIGHTS (QUEBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
1.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd. (lessor)	06-0682574-0031 / Rights resulting from a lease	Nov. 24, 2006	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Oct. 11, 2012
2.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd. (lessor)	06-0617087-0013 / Rights resulting from a lease	Oct. 24, 2006	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Oct. 19, 2012
3.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd. (lessor)	06-0579163-0011/ Rights resulting from a lease	Oct. 5, 2006	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Oct. 4, 2012
4.	MAAX Canada Inc. (lessee)	Leavitt Machinery General Partnership (lessor)	06-0539319-0002 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Sept. 18, 2006	n/a	Specifically described moveable property, from the collateral, with all proceeds including accounts, money, chattel paper, intangibles, goods, documents of title, licences, instruments, securites, substitutions, trade ins, insurance		Sept. 18, 2011

REGISTER OF PERSONAL AND MOVABLE RIGHTS (QUÉBEC)								
	DEBTOR(S)	SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
						proceeds and any other proceeds.		
5.	MAAX Canada Inc. (lessee)	Leavitt Machinery General Partnership (lessor)	06-0539319-0001 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Sept. 18, 2006	n/a	Specifically described moveable property, from the collateral, with all proceeds including accounts, money, chattel paper, intangibles, goods, documents of title, licences, instruments, securites, substitutions, trade ins, insurance proceeds and any other proceeds.		Sept. 18, 2011
6.	MAAX Canada Inc. (lessee)	Liftcapital Corporation (lessor)	06-0490275-0001 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Aug. 24, 2006	n/a	Specifically described movable property.	This registration is a global registration under section 2961.1 of the Civil Code of Québec.	Aug. 24, 2010
7.	MAAX Canada Inc. (lessee)	Liftcapital Corporation (lessor)	06-0490267-0001 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Aug. 24, 2006	n/a	Specifically described movable property.	This registration is a global registration under section 2961.1 of the Civil Code of Québec.	Aug. 24, 2010
8.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd (lessor)	05-0676885-0017 / Rights resulting from a lease	Nov. 29, 2005	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Nov. 24, 2012
9.	MAAX Canada Inc. (lessee)	Équipements G. N. Johnston Ltée (lessor)	05-0662899-0001 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Nov. 22, 2005	n/a	Specifically described movable property.		Nov. 18, 2010
10.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	05-0641836-0003 / Rights resulting from a lease	Nov. 10, 2005	n/a	Specifically described motor vehicle.		Oct. 25, 2012
11.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	05-0611236-0007 / Rights resulting from a lease	Oct. 26, 2005	n/a	Specifically described motor vehicle.		Oct. 13, 2012

REGISTER OF PERSONAL AND MOVEABLE RIGHTS (QUÉBEC)								
DEBTOR(S)		SECURED PARTY(IES)	REGISTRATION NUMBER/ NATURE	DATE	AMT	COLLATERAL DESCRIPTION	COMMENTS	EXPIRY DATE
12.	MAAX Canada Inc. (lessee)	Liftcapital Corporation / Corporation Liftcapital (lessor)	05-0497271-0002 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Aug. 30, 2005	n/a	Specifically described movable property.		Feb. 1, 2009
13.	MAAX Canada Inc. (lessee)	Liftcapital Corporation / Corporation Liftcapital (lessor)	05-0497271-0001 / Rights of ownership of the lessor (under a leasing contract or *credit-bail*)	Aug. 30, 2005	n/a	Specifically described movable property.		Feb. 1, 2009
14.	MAAX Canada Inc. (lessee)	Xerox Canada Ltd (lessor)	04-0689294-0001 / Rights resulting from a lease	Nov. 30, 2004	n/a	Equipment Other All present and future office equipment and software supplied or financed from time to time by the secured party (whether by lease, conditional sale or otherwise), whether or not manufactured by the secured party or any affiliate thereof.		Nov. 25, 2010
15.	MAAX Canada Inc. (lessee)	Xerox Canada Limited (lessor)	02-0401660-0010 / Rights resulting from a lease	Sept. 11, 2002	n/a	All present and future office equipment leased on conditional sale or similar basis, or otherwise financed by the secured party, whether or not manufactured by the secured party or any affiliate thereof.	This registration is a global registration under section 2961.1 of the Civil Code of Québec.	Sept. 5, 2009
16.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	08-0185823-0007 Rights resulting from a lease	April 8, 2008	n/a	Specifically described motor vehicle.		March 31, 2015
17.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	08-0090077-0002 Rights resulting from a lease.	February 20, 2008	n/a	Specifically described motor vehicle.		February 15, 2015
18.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	08-0054457-0003 Rights resulting from a lease.	January 31, 2008	n/a	Specifically described motor vehicle.		January 23, 2015
19.	MAAX Canada Inc. (lessee)	Équipements G.N. Johnston Ltée (lessor)	07-0370476-0001 Rights of ownership of the lessor (under a leasing contract or *crédit-bail*)	June 28, 2007	n/a	A specific list of equipment.		June 28, 2012
20.	MAAX Canada Inc. (lessee)	Deragon Location Inc. (lessor)	07-0319776-0006 Rights resulting from a lease.	June 6, 2007	n/a	Specifically described motor vehicle.		May 31, 2014

Canadian Liens on Real Property

Owner	Description	Encumbrances
MAAX Canada Inc.	Lots THREE MILLION TWO HUNDRED AND FIFTY-THREE THOUSAND NINE HUNDRED AND THIRTY-EIGHT AND THREE MILLION FIVE HUNDRED AND FIFTY-ONE THOUSAND TWO HUNDRED AND NINETY-SEVEN (3 253 938 AND 3 551 297) of the cadastre of the Cadastre du Québec, Registration Division of Beauce.	Right of first refusal in favour of the City of Sainte-Marie with respect to an unbuilt part of the land, secured by a resolutory clause, pursuant to a deed of sale registered at the Registry Office for the Registration Division of Beauce under number 384723. Right of first refusal in favour of the City of Sainte-Marie with respect to an unbuilt part of the land, secured by a resolutory clause, pursuant to a deed of sale registered at the Registry Office for the Registration Division of Beauce under number 398046. Utility right of way in favour of La Corporation de Telephone de Quebec registered under numbers 137442, 137524 and 143926. Utility right of way in favour of The Shawinigan Water and Power Company registered under numbers 98094, 98096, 99243 and 108014 and 144360. Utility right of way in favour of Quebec-Telephone registered under number 240954. Right of way for an underground pipe in favour of Linx Capital Inc. registered under number 13 092 622.
MAAX Canada Inc.	Part of lots 199 and 200 and lot 200-6 of the cadastre of the Parish of Saint-Frederic, Registration Division of Beauce.	Part of the property is located in a protective strip of land establish by the municipal zoning by-law of the Municipality of Tring-Jonction. Part of the property is affected by a 15-metre-strip of protected riparian land. Notice of Contamination (Section 31.58 of the Environment Quality Act) registered under number 11 972 262. Utility right of way in favour of The Shawinigan Water & Power Company registered under numbers 108964 and 108965. A water and sewer servitude in favour of the Municipality of the Village of Tring-Jonction registered under number 446711.

Owner	Description	Encumbrances
MAAX Canada Inc.	Lots 37-3, 37-4, 37-8, 37-9, 37-10, 37-11, 37-12, 37-13, 37-14, 37-15, 37-57 and three parts of lot 37, of the Township of Broughton, of the Cadastre of the Parish of Saint-Frederic, Registration Division of Beauce.	Utility right of way in favour of St-Francis Light Power Company registered under number 106696. Utility right of way in favour of Saint-Francis Water Power Company registered under number 105700.
MAAX Canada Inc.	Plan 8110274, Block 9, Lot 4, excepting thereout all mines and minerals.	Zoning Regulations subject to Calgary International Airport zoning Regulations registered under number 771 147 064. Utility Right of Way registered under number 811 039 095.
MAAX Canada Inc.	Lot 1, Section 24, Township 7 Osoyoos Division Yale District, Plan KAP73531	Undersurface rights in favour of The Director of Soldier Settlement registered under number 113109E – Inter Alia DD 259867F other than those excepted by the Crown. Notices of Permit KF93717, KK12719, KK67305, KL96673, KM84486 and KV106049

SCHEDULE "D"

List of Charged Immovable and Real Property

Address	Owner	Description
600, 620 and 624 Cameron Road, Sainte-Marie, Québec, Canada, G6E 1B2	MAAX Canada Inc.	An emplacement situated in the City of Sainte-Marie, Province of Québec, composed of: (a) Lot number THREE MILLION TWO HUNDRED AND FIFTY-THREE THOUSAND NINE HUNDRED AND THIRTY-EIGHT (3 253 938) of the Cadastre du Québec, Registration Division of Beauce; and (b) Lot number THREE MILLION FIVE HUNDRED AND FIFTY-ONE THOUSAND TWO HUNDRED AND NINETY-SEVEN (3 551 297) of the Cadastre du Québec, Registration Division of Beauce. Together with all the buildings thereon erected and, more particularly, the buildings bearinc civic numbers 600, 620 and 624 Cameron Road, City of Sainte-Marie, Province of Québec, G6E 1B2.
333 Saint-Albert Street, Tring-Jonction, Québec, Canada, G0N 1X0	MAAX Canada Inc.	An emplacement situated in the Village of Tring-Jonction, Province of Québec, composed of: (a) A part of lot number ONE HUNDRED NINETY-NINE (Pt. 199) of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce, of irregular form, bounded as follows: to the North-East, by a part of lot 199, measuring along this limit, 46,33 metres; to the East, by a part of lot 199, measuring along this limit, 31,24 metres; to the South-East, by a part of lot 199, measuring along this limit, 22,86 metres; to the South-West, by a part of lot 199, being Saint-Albert Street, measuring along this limit, 112,78 metres; to the North-West, by a part of lot 199, measuring along this limit, 36,58 metres; to the North-East, by a part of lot 199, measuring along this limit, 39,01 metres; to the North-West, by a part of lot 199, measuring along this limit, 1,52 metres; containing an area of 4 028,1 square metres. The South corner of this part of lot is situated at a distance of 55,69 mètres to the South-East of the East corner of lot 200-6 of the said Official Cadastre and is situated on the North-East limit of Saint-Albert Street; (b) A part of lot number TWO HUNDRED (Pt. 200) of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce, of

Address	Owner	Description
		irregular figure, bounded as follows: to the North-East, by a part of lot 200, measuring along this limit, 22,22 metres; to the South-East, by a part of lot 200, measuring along this limit, 54,62 metres; to the South-West, by a part of lot 34 et by lots 34-1, 34-2 et 34-7, Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce, measuring along this limit, 88,15 metres; to the North, by a part of lot 200, measuring along this limit, 26,21 metres, 26,95 metres and 31,21 metres; containing an area of 2 983,5 square metres. The East corner of this part of lot is situated at a distance of 48,16 metres to the North-West of the South corner of lot 200-6 and is situated on the South-West limit of Paré Street. The West corner of this part of lot coincide with the North corner of lot 34-7, Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; and (c) Subdivision number SIX of original lot number TWO HUNDRED (200-6) of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce. Together with all the buildings thereon erected and, more particularly, the building bearing civic number 333 Saint-Albert Street, Village of Tring-Jonction, Province of Québec, G0N 1X0.
1297-1297A 2nd Street, Industrial Park, Sainte-Marie, Québec, Canada, G6E 1G7	MAAX Canada Inc.	An emplacement situated in the City of Sainte-Marie, Province of Québec, known and designated as being lot number THREE MILLION TWO HUNDRED FIFTY-FOUR THOUSAND AND TWENTY-FIVE (3 254 025) of the Cadastre du Québec, Registration Division of Beauce. Together with all the buildings thereon erected and, more particularly, the building bearing civic numbers 1297-1297A 2nd Street, Industrial Park, City of Sainte-Marie, Province of Québec, G6E 1G7.
320 Route 112, Tring-Jonction, Québec, Canada, G0N 1X0	MAAX Canada Inc.	An emplacement situated in the Village of Tring-Jonction, Province of Québec, composed of: (a) Subdivision number FIFTY-SEVEN of original lot number THIRTY-SEVEN (37-57), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (b) A part of original lot number THIRTY-

Address	Owner	Description
		SEVEN (Pt. 37), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce, of irregular form, bounded as follows: to the North-West, by lots 37-8, 37-9, 37-10, 37-11, 37-12, 37-13, 37-14 and 37-15, measuring along this limit, 228,64 metres; to the North-East, by lot 37-3, measuring along this limit, 24,38 metres; to the East, by lot 37-3, measuring along this limit, 9,58 metres, along the arc of a curve having a radius of 6,10 metres, to the South-East, by lot 37-3, measuring along this limit, 222,54 metres; to the South-West, by a part of lot 37, measuring along this limit, 30,48 metres; containing an area of 6 959,5 square metres; (c) A part of original lot number THIRTY-SEVEN (Pt. 37), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; of irregular form, bounded as follows : to the North-West, by lot 37-3, measuring along this limit, 153,01 metres and 8,12 metres along the arc of a curve having a radius of 21,34 metres; to the North, by lot 37-57, measuring along this limit, 48,50 metres; to the North-West, by lot 37-57, measuring along this limit, 25,91 metres; to the North-East, by a part of lot 37, measuring along this limit, 45,68 metres; to the South-East, by lot 37-4, measuring along this limit, 208,82 metres; to the South, by lot 37-4, measuring along this limit, 8,53 metres, along the arc of a curve having a radius of 6,10 metres; to the South-West, by lot 37-4, measuring along this limit, 43,64 metres; to the West, by lot 37-4, measuring along this limit, 9,59 metres, along the arc of a curve having a radius of 6,10 metres; containing an area of 13 884,6 square metres; (d) A part of original lot number THIRTY-SEVEN (Pt. 37), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; of irregular form, bounded as follows: to the North-West, by lot 37-3, measuring along this limit, 106,20 metres; to the North, by lot 37-4, measuring along this limit, 9,58 metres, along the arc of a curve having a radius of 6,10 metres; to the North-East, by lot 37-4, measuring along this limit, 43,64 metres; to the North, by lot 37-4, measuring along this limit, 29,86 metres, along the arc of a curve having a radius of 21,34 metres; to the North-West, by lot 37-4, measuring along this limit, 210,12 metres and

Address	Owner	Description
		86,66 metres; to the North, by lot 37-4, measuring along this limit, 9,58 metres, along the arc of a curve having a radius of 6,10 metres; to the North-East, by a part of lot 37, being Avenue des Sables, measuring along this limit, 51,63 metres; to the South-East and to the South, by a part of lot 266, measuring along this limit, 406,42 metres, along the arc of a curve having a radius of 842,71 metres, and 59,23 metres; to the South-West, by a part of lot 37, being the widening of Chemin du Rang II, measuring along this limit, 27,42 metres; to the West, by lot 37-3, measuring along this limit, 8,45 metres, along the arc of a curve having a radius of 6,10 metres; containing an area of 23 112,6 square metres; (e) Subdivision number THREE of original lot number THIRTY-SEVEN (37-3), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (f) Subdivision number FOUR of original lot number THIRTY-SEVEN (37-4), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (g) Subdivision number EIGHT of original lot number THIRTY-SEVEN (37-8), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (h) Subdivision number NINE of original lot number THIRTY-SEVEN (37-9), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (i) Subdivision number TEN of original lot number THIRTY-SEVEN (37-10), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (j) Subdivision number ELEVEN of original lot number THIRTY-SEVEN (37-11), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (k) Subdivision number TWELVE of original lot number THIRTY-SEVEN (37-12), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; (l) Subdivision number THIRTEEN of original lot number THIRTY SEVEN (37-13), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division

Address	Owner	Description
		of Beauce; (m) Subdivision number FOURTEEN of original lot number THIRTY-SEVEN (37-14), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce; and (n) Subdivision number FIFTEEN of original lot number THIRTY-SEVEN (37-15), Township of Broughton, of the Official Cadastre of the Parish of Saint-Frédéric, Registration Division of Beauce. Together with all the buildings thereon erected and, more particularly, the building bearing civic number 320 Route 112, Village of Tring-Jonction, Province of Québec, G0N 1X0.
405 East Lake Road, Airdrie, Alberta, Canada, T4A 2J7	MAAX Canada Inc.	Plan 8110274, Block 9, Lot 4, excepting thereout all mines and minerals.
4225 Spallumcheen Drive, Armstrong, British Columbia, Canada, V0E 1B0	MAAX Canada Inc.	Lot 1, Section 24, Township 7 Osoyoos Division Yale District, Plan KAP73531, Township of Spallumchen, British Columbia.
Vacant land on Cameron Road, Sainte-Marie, Québec, Canada	MAAX Corporation	A vacant emplacement situated in the City of Sainte-Marie, Province of Québec, known and designated as being lot number THREE MILLION FIVE HUNDRED FIFTY-ONE THOUSAND TWO HUNDRED AND NINETY-EIGHT (3 551 298) of the Cadastre du Québec, Registration Division of Beauce.

TAB L

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 EXTREME FITNESS, INC.

March 27/13

Court File No. CV-13-10000-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

MOTION RECORD
(returnable March 27, 2013)

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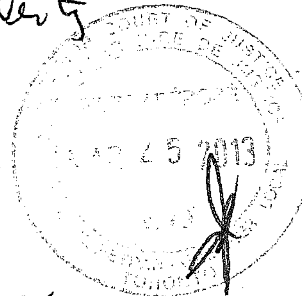
Lawyers for Extreme Fitness, Inc.

S. Graff + I. Aversa for Extreme Fitness
M Wagner + C. Descours for FTI
G. Moffatt for National Bank
A. Mitchell for Goodlife
S. Crocco for Bentall - Agent for Landlord of 10 Dundas
M. Flynn for Golub Capital.
M. Gertner for 1679628 Ontario

The motion was not opposed. Two orders were sought. (1) Approval + Vesting Order (2) Stay Extension, Assignment of Lease and Distribution.

With respect to Approval + Vesting Order, I am satisfied that the Transaction should be approved and an order shall issue in the form requested.



14176313.1

With respect to the Stay Extension, Assignment of Lease and Distribution Order, I am satisfied that the Applicant - Extreme - continues to work in good faith and with due diligence such that the extension is justified and appropriate. Stay extended to May 10, 2013.

There has been no adverse comment to the Second Report and Supplement which are approved together with activities described in the reports.

Applicant has requested a sealing order [covering Confidential Supplement to 2nd Report and confidential Appendix "B" to Hutchens Affidavit]. Having reviewed the Sierra Club principles, I am satisfied that it is appropriate to grant the sealing request for these documents.

Requested relief in draft order under the heading "Assignment of the Lease" is appropriate in the circumstances and is granted.

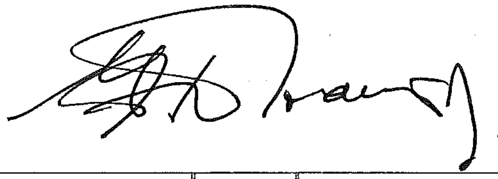
It is specifically noted that the assignment of the Lease is without prejudice to Goodlife's right to occupy the premises described in Schedule A to the Ancillary Order in the same manner as the Applicant's occupation of such premises ~~at~~ as at the Closing Date (as defined in APA) pending the determination of the landlord's motion returnable May 28, 2013 and without prejudice to the rights and arguments of the parties regarding whether the basement premises at the premises described in Schedule A

As the Ancillary Order do or do not constitute part of the Lease being assigned pursuant to the ~~Ancillary~~ Order Ancillary Order and the Approval and Vesting Order

Interim distributions are authorized.

Ancillary relief requested is also granted.

Order signed in the form presented, as amended



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 EXTREME FITNESS, INC.

Court File No. CV-13-10000-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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Lawyers for Extreme Fitness, Inc.

TAB M

SUPERIOR COURT
Commercial Division

2015 QCCS 1920 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 27, 2015

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
Petitioners
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
Mises-en-cause
And
FTI CONSULTING 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
MARTEN FALLS FIRST NATION
Objectors

JH5439

And
8901341 CANADA INC.
CANADIAN DEVELOPMENT AND MARKETING CORPORATION
Interveners

2015 QCCS 1920 (CanLII)

JUDGMENT ON PETITIONERS' AMENDED MOTION FOR THE ISSUANCE OF AN APPROVAL AND VESTING ORDER WITH RESPECT TO THE SALE OF THE CHROMITE SHARES (#82)

INTRODUCTION

[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.

---

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

[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]

---

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.

2015 QCCS 1920 (CanLII)

[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).

2015 QCCS 1920 (CanLII)

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:

---

14 Exhibit R-11 (redacted) and R-12 (unredacted).

15 It was amended at the hearing to add two First Nations bands as objectors.

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.

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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

1. 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.

[16] *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (leave to appeal refused: 2010 QCCA 1950), par. 48-49.

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> [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,

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[17] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460, par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2012 QCCS 4074, par. 50.

[18] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 70-71. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2011 QCCS 7304, par. 68-70.

[19] *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

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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.

[20] Exhibit R-9.
[21] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247, par. 48.

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[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.

[22] Exhibit R-23.

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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:

[23] Exhibits R-25 and R-26.
[24] Exhibit CDM-1.
[25] Exhibit R-30A.

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- 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.;

[26] Exhibit CDM-3.
[27] Exhibit CDM-4.
[28] Exhibit CDM-4.
[29] Exhibit CDM-4.
[30] Exhibit CDM-4.

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- 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.

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[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

[31] Exhibit R-7.

[32] Declaration of Intervention and Contestation (#87), par. 30.

[33] See, for example, *Boutiques San Francisco inc. (Arrangement relatif aux)*, [2004] R.J.Q. 965 (C.S.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

[34] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, par. 35, 56; *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, par. 79..

[35] *In the Matter of CCAA and Skeena Cellulose Inc.*, 2002 BCSC 597, par. 14.

[36] Exhibit O-1.

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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]

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[37] *Supra*, note 9.

[38] *Crown Trust* v. *Rosenberg*, 1986 CanLII 2760 (ON SC), p. 43; *Skyepharma plc* v. *Hyal Pharmaceutical Corp.*, [2000] O.J. No 467 (ON CA), par. 24-26, 30; *Consumers Packaging Inc. (Re)*, 2001 CanLII 6708 (ON CA), par. 7; *BDC Venture Capital Inc.* v. *Natural Convergence Inc.*, 2009 ONCA 665, par. 7-8.

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[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).

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[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] *Re Canadian Airlines Corporation*, 2000 ABQB 442, par. 95; *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. Gen. Div. [Commercial List]), 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.

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[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.

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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

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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.

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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.

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[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**.

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STEPHEN W. HAMILTON J.S.C.

Me Bernard Boucher
Me Sébastien Guy
Me Steven J. Weisz
BLAKE, CASSELS & GRAYDON, S.E.N.C.R.L.
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
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L.
for:
FTI Consulting Canada Inc.

Me Jean-Yves Simard
LAVERY DE BILLY, S.E.N.C.R.L.
Me Sean Zweig
BENNETT JONES
for:
9201955 CANADA INC.

Me Stéphane Hébert
Me Maurice Fleming
MILLER THOMSON, S.E.N.C.R.L./LLP
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
OSLER, HOSKIN & HARCOURT, S.E.N.C.R.L./S.R.L.
for:
8901341 Canada inc.
Canadian Development and Marketing Corporation

Date of hearing: April 24, 2015

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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

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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

2015 QCCS 1920 (CanLII)

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

2015 QCCS 1920 (CanLII)

TAB N

CITATION: Elleway Acquisitions Limited v. 4358376 Canada Inc., 2013 ONSC 7009
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131203

2013 ONSC 7009 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED.

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

4358376 CANADA INC. (OPERATING AS ITRAVEL 2000.COM), THE CRUISE PROFESSIONALS LIMITED (OPERATING AS THE CRUISE PROFESSIONALS), AND 7500106 CANADA INC. (OPERATING AS TRAVELCASH), Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD
&ENDORSED: NOVEMBER 4, 2013

REASONS: DECEMBER 3, 2013

ENDORSEMENT

[1] At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

[2] On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

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[3] The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

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[4] The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

[5] The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

[6] The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

[7] Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

[8] The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

[9] In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

[10] In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

[11] In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

[12] In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

[13] The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

[14] In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

[15] In January 2013, discussions ended and the independent committee was disbanded.

[16] In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

[17] In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

[18] In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

[19] In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

[20] In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

[21] On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for

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Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

[22] The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

[23] itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

[24] The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

[25] Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

[26] In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;

(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

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(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

[27] The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

[28] The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

[29] Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

[30] Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

[31] It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

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b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

[32] In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

[33] Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

(a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

(b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp*. (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

[34] In the case of *Re Tool-Plas*, I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

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[35] Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

[36] Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

[37] I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

[38] Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

[39] This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

[40] It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

[41] Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

[42] Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

[43] Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

[44] In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[45] The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

[46] The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

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[47] The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

(a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

[48] In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

[49] For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

2013 ONSC 7009 (CanLII)

MORAWETZ J.

Date: December 3, 2013

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TAB O

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

2008 CanLII 54791 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **D. Bish, for the Applicant, Tool-Plas**

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD
& RELEASED: **SEPTEMBER 29, 2008**

E N D O R S E M E N T

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

2008 CanLII 54791 (ON SC)

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

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[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

2008 CanLII 54791 (ON SC)

MORAWETZ J.

DATE: October 24, 2008

TAB P

CITATION: Montrose Mortgage Corporation v. Kingsway Arms Ottawa, 2013 ONSC 6905
COURT FILE NO.: CV-13-10298-00CL
DATE: 20131106

2013 ONSC 6905 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Montrose Mortgage Corporation Ltd., Applicant

AND:

Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc., Kingsway Arms (Carleton Place) Inc., Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Dietrich, for the Applicant

R. Jaipargas, for the proposed Receiver, Grant Thornton Limited

HEARD: November 5, 2013

REASONS FOR DECISION

I. Application for approval of a "pre-pack" credit bid sale in a proposed receivership

[1] Montrose Mortgage Corporation Ltd. applied for (i) an order appointing Grant Thornton Limited ("GTL") as receiver and manager of all assets, undertakings and properties of Kingsway Arms Ottawa Inc., 1168614 Ontario Limited, Kingsway Arms (Walden Village) Inc. and Kingsway Arms (Carleton Place) Inc. (collectively the "Debtors"), as well as (ii) an order approving a purchase and sale agreement between the Receiver and 2391766 Ontario Inc. dated October 16, 2013, together with a related vesting order. The proposed sale essentially involved an indirect credit bid by the debtors' main secured creditor, Montrose, which was acting on the loans to the Debtors as agent for GMF Nominee Inc. ("Greystone").

[2] On November 5, 2013, I granted and signed the orders sought. These are my reasons for so doing.

II. Material facts

[3] The Debtors operated four retirement residences which werer home to about 351 residents and employed 220 employees. The Debtors were beneficially owned by several limited partnerships. Service of the application was made on those beneficial owners. Counsel for a number of the beneficial owners sent an email to applicant's counsel on November 4, 2013,

advising that he had no instructions to appear at the hearing to oppose the relief requested; no other beneficial owner appeared.

[4] The Debtors were operated by three related management companies: Kingsway Arms Management (Villa Orleans/St. Joseph) Inc., Kingsway Arms Management (at Walden Village) Inc. and Kingsway Arms Management (at Carleton Place) Inc. In its November 1, 2013 Supplemental Report Grant Thorton stated that the Property Managers had executed an agreement which contemplated the termination of the property management agreements upon the issuance of the Approval and Vesting Order.

[5] As of August 31, 2013, the Debtors owed Montrose close to $36 million. Montrose had made demands for payment and had given *BIA* s. 244 notices back in March and December, 2012. As well, Montrose delivered notices of sale under the *PPSA* and *Mortgages Act*. The evidence disclosed that the Debtors were unable to repay or service that debt and were in default of the terms of the loans. Independent counsel to GTL delivered opinions that Montrose's security was valid and enforceable subject to the customary qualifications and assumptions.

[6] In February, 2012, Montrose appointed GTL as monitor to review and report on the financial and operational condition of the Debtors. With Montrose's support, in March, 2012 one of the Debtors retained John A. Jenson Realty Inc. as listing agent to market, ultimately, each of the four retirement residences.

[7] The application materials described in detail the efforts Jenson undertook to market the properties, which included advertisements, direct contact with potential purchasers, the preparation of a confidential information memorandum and granting access to data to those who made serious expressions of interest. Few offers resulted. Most offers, if accepted, would have resulted in a significant shortfall on the debt. In the first half of this year a more substantial offer emerged which resulted in the execution of a letter of intent, but the transaction did not proceed because the purchaser was unable to secure adequate financing.

[8] Montrose obtained appraisals of the retirement residences from a professional appraiser, Altus Group Limited, and, in the case of the Carleton Place Retirement Residence, an additional appraisal from CBRE Limited. The Altus Group appraisals gave two valuation opinions for each property: one on an "as is" basis, and the other on a "stabilized" occupancy basis. I have reviewed those appraisals. Given that the occupancy rates for three of the residences were below the 80% level, with one at 57%, and Carleton Place was 88% occupied, I agreed with the submissions of the applicant that the "as is" basis valuations presented a more accurate picture of fair market value at this juncture.

[9] In light of the failure of the marketing process to elicit satisfactory offers for the properties, Montrose applied for the appointment of a receiver over the properties in order to effect a credit bid sale for them. Greystone incorporated the Purchaser who proposed to acquire each Debtor's assets charged by Montrose's security for an amount equivalent to the total amount of all indebtedness owing to Montrose and to assume the prior ranking Desjardins Prior Charge of the Villa Orleans Retirement Residence. In addition, the Purchaser would assume the

2013 ONSC 6905 (CanLII)

leasehold interest of the land on which the St. Joseph Retirement Residence is located; the landlord is the National Capital Commission. At the time of the hearing neither Desjardins nor the NCC had provided their formal consents to the proposed assumptions, but both indicated that they were processing Montrose's request. Under the terms of the proposed sale, the Purchaser assumed the risk of securing those consents.

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III. Analysis

[10] "Quick flip" or "pre-pack" transactions are becoming more common in the Ontario distress marketplace. In certain circumstances, a "quick flip" involving the appointment of a receiver and then immediately seeking court approval of a "pre-packaged" sale transaction may well represent the best, or only, commercial alternative to a liquidation.[1] In such situations the court still will assess the need for a receiver and the reasonableness of the proposed sale against the standard criteria set out in decisions such as *Bank of Nova Scotia v. Freure Village on Clair Creek*[2] and *Royal Bank v. Soundair Corp.*,[3] respectively. However, courts will scrutinize with especial care the adequacy and the fairness of the sales and marketing process in "quick flip" transactions:

> Part of the duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to a related party, the overall fairness of the proposed related-party transaction. As stated by Morawetz J. in the *Tool-Plas* case:
>
> > [T]he Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed.[4]

The need for such a robust and transparent record is heightened even more where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors.

[11] In the present case, I was satisfied from the evidence filed by Montrose that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thereby ensuring a place to live for the residents and maintaining current levels of employment. The record revealed a professional and prolonged effort to elicit interest in the properties from third party purchasers, but it appeared that market conditions were such that interest could not be generated at a level which would cover the senior

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[1] *Tool-Plas Systems Inc., Re* (2008), 48 C.B.R. (5th) 91 (S.C.J.)
[2] (1996), 40 C.B.R. (3d) 274 (Gen. Div., Commercial List)
[3] (1991), 4 O.R. (3d) 1 (C.A.)
[4] *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 89 C.B.R. (5th) 78 (S.C.J.), para. 30.

secured indebtedness. As to the reasonableness of the credit bid, the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances. Finally, the proposed sale agreement gave proper treatment to claims in priority to that enjoyed by Montrose.

[12] Given those circumstances, I concluded that it was just and convenient to appoint GTL as receiver of the Debtors and to approve the proposed sale.

[13] Montrose asked for an order sealing large portions of the applicant's main affidavit and the confidential appendices to the GTL report on the basis of commercial sensitivity. I granted a sealing order which would remain in place until the earlier of the closing of the proposed sale or the further order of this court.

[14] Finally, Montrose filed a USB key containing an electronic copy of its application materials, for which I thank it. I would observe that although I was able to read the materials on the USB key, I was not able to edit them because they were in "imaged" form. I would remind counsel that the Commercial List's *Guidelines for Preparing and Delivering Electronic Documents requested by Judges* require parties to perform Optical Character Recognition (OCR) within PDF to enable text searching. "Imaged", rather than "OCR'd" documents are of much less use to judges. I would encourage the Commercial List Bar to continue their efforts to train their administrative staffs to follow the scanning directions contained in the *Guidelines*.

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D. M. Brown J.

Date: November 6, 2013

2013 ONSC 6905 (CanLII)

TAB Q

CITATION: Karrys Bros. Ltd. (Re), 2014 ONSC7465
COURT FILE NO.: 32-1942339/1942340/1942341
DATE: 20141224

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF AN INTENTION TO MAKE A PROPOSAL OF KARRYS BROS., LIMITED, KARRYS SOFTWARE LIMITED AND KARBRO TRANSPORT INC.,

COUNSEL: *E. Pillon and K. Esaw* for the Applicants

L. Rogers for PWC

S. Graft for BMO

C. Armstrong for Core-Mark

HEARD: December 23, 2014

ENDORSEMENT

Overview

[1] On December 23, 2014 I granted orders approving a sale of substantially all of the applicants' assets together with various related administrative orders, with reasons to follow. These are those reasons.

[2] This motion seeks approval of a sale of the applicants' assets out of the ordinary course, authorization to distribute funds to the senior secured lender, a sealing order of certain confidential information and various administrative orders, including:

(i) extending the time for filing a proposal;

(ii) approving a key employee retention agreement;

(iii) approving an administrative charge;

(iv) approving the consolidation of the applicants' proposal proceedings; and

(v) approving the report of the proposal trustee.

Background

[3] Karrys is a wholesale distributor of tobacco, confectionery, snacks, beverages, automotive supplies and other products to retail, gas and convenience stores across Canada. As of November 1, 2014, Karrys' assets were exceeded by its liabilities by over $1 million. Karrys experienced net losses of over $3 million in each of the last two years.

[4] As a result of its financial difficulties, Karrys committed defaults under its loan agreement with the Bank of Montréal in 2013. BMO is Karrys' senior secured lender. BMO agreed to a number of forbearance agreements to enable the sales process which is at the heart of this motion.

[5] Karrys commenced a sales process in December 2013. It retained a financial advisor, Capitalink. Karrys had initial, exclusive negotiations with Core-Mark, itself a wholesale distributor of similar goods, in May through July 2014. Those negotiations did not result in an agreement.

[6] Karrys retained Price Waterhouse Coopers to assist Karrys and Capitalink in undertaking a more expansive sale process. In the fall of 2014, Karrys developed a process in which Core-Mark agreed to make a stalking horse bid for substantially all of Karrys' assets.

[7] Over 53 potential strategic and financial buyers were also invited to bid on the assets. Thirteen of these potential buyers entered into confidentiality agreements and received a confidential information memorandum and access to Karrys' data room. PWC and Capitalink responded to all reasonable requests for information.

[8] By the bidding deadline of noon on December 10, 2014, however, no other bids were received. Core-Mark was, accordingly, declared the successful bidder.

[9] Karrys now asks for the court's approval of the asset purchase agreement with Core-Mark and for a vesting order, together with approval of distribution, from the proceeds, of the amount owed to BMO and other related relief.

The Sale and Vesting Order

[10] Jurisdiction to make orders approving the sale derives from s. 65.13 of the BIA. Factors for the court to consider when asked to approve a sale out of the ordinary course are also listed in s. 65.13.

[11] It is not necessary for the debtor to present its proposal under the BIA before an order approving a sale, *Re Komtech*, 2011 ONSC 3230.

[12] In this case, the sale was the result of a broad and comprehensive marketing process. Two financial advisors were engaged. When initial negotiations with Core-Mark did not produce an amount the applicants originally thought acceptable, another process was initiated with the assistance of PWC. Efforts to lever the Core-Mark offer were, however, although widely promoted, ultimately unsuccessful. The "market" has, in that sense, spoken.

[13] The proposal trustee, PWC, has reviewed the sale process and is supportive of the process and the result. The proposal trustee has, as well, conducted a detailed analysis of the Core-Mark bid measured against a "liquidation in bankruptcy" scenario. Even under a "best case" liquidation scenario, the unsecured creditors would be expected to recover significantly less than under the Core-Mark sale transaction. Under the proposed sale, there is the possibility of surplus for distribution to unsecured creditors. There would be no such possibility under a liquidation scenario. BMO, the senior secured lender, is also supportive of the process and the result.

[14] Because the purchase price represents, through an extensive sales process, the highest price realizable and an amount which is greater than what could be realized under a liquidation, the consideration to be received for the assets is reasonable and fair. Further, the sale will enable Karrys to make the payments contemplated under s. 65.13(8) of the BIA.

[15] The fact that the sales process was not pre-approved by the court is not a bar to the court's approval in this case. Is clear on the evidence that the Core-Mark transaction is the best available option in the circumstances. No one has come forward to argue otherwise. The test is the same whether approval is sought before or after the process – the principles in *Soundair* govern. The *Soundair* test has been met. A judgment call had to be made whether to further extend the process in hopes of perhaps finding a better bid. Further delay would just as likely have resulted in a greater erosion of value. An immediate sale was, on the evidence, the only way to maximize recovery.

[16] In addition, the process actually followed is indistinguishable from what the court might reasonably have approved had prior authorization been sought. There is no evidence, or likelihood, that Karrys or its creditors would be in a better position if some further, or other, sales process had been followed.

[17] The sale is approved and the vesting order shall issue.

<u>The Key Supplier Issue</u>

[18] On the very day Karrys filed its notice of intention to make a proposal, Karrys' principal tobacco supplier delivered a substantial quantity of tobacco. A dispute arose over payment. The supplier took the position it was under no legal obligation to continue to supply and that it would not supply unless payment was received. Karrys' supply agreement had expired and the parties were operating on the basis of an informal supply arrangement.

[19] Ensuring ongoing tobacco supply from this supplier was critical to Karrys in terms of the ongoing operations of the business pending the closing of the sale to Core-Mark, the satisfaction of conditions precedent to the closing with Core-Mark, including the loss of potential customers should their tobacco requirements not be satisfied, and the resulting risk that the Core-Mark transaction would be lost as a result.

[20] Karrys and its legal advisers considered there was significant litigation risk relating to the ability to enforce a stay of proceedings against the supplier in any event and, accordingly, entered into negotiations with the tobacco supplier.

[21] These negotiations resulted in a substantial payment to the supplier which, arguably, involved post-filing payment for a pre-filing obligation. Given the importance of this supplier to ongoing operations and to the success of the Core-Mark sale, however, Karrys, along with its advisors, had little option but to reach a settlement.

[22] Unlike the CCAA, the concept of "critical suppliers" is not found in the proposal provisions of the BIA. Nevertheless, in my view, similar considerations can and should be taken into account in appropriate circumstances. In this case, Karrys and its advisors reasonably believed that the ongoing viability of the business and the Core-Mark sale (which, as found

above, represents the highest realizable price for Karrys' assets available in the circumstances) required the ongoing availability of this critical source of supply. There is also a significant net benefit to Karrys arising from sales of the product supplied. The supply contract negotiated, in the context of both the importance of the supply and significant litigation risk, was, I find, reasonable in the circumstances.

BMO Distribution

[23] BMO delivered notices of intention to enforce its security. The unchallenged evidence before the court is that BMO holds a valid, perfected security interest over each of the applicants' assets. BMO is entitled to a distribution of proceeds from the sale in satisfaction of its claim.

Sealing Order

[24] I am satisfied that the confidential appendices should be sealed until the deal is closed. There is an important public interest in maximizing returns in proceedings of this kind. It is important, therefore, that until the deal is concluded, commercially sensitive information about the deal not be publicly disclosed. Failure to grant the order would impair the integrity of any subsequent process. In addition, in the context of the key employee retention agreement, there is sensitive personal information which ought not to be disclosed.

[25] The *Sierra Club* test has been met on the facts of this case, *Elleway Acquisitions Ltd.*, 2013 ONSC 7009. The salutary effects of granting the sealing order outweigh the limited deleterious effect of restricting access to these limited pieces of evidence.

Extension

[26] Section 50.4(9) of the BIA grants the jurisdiction to grant the extension. The initial proposal period expires on January 12, 2015. The Core-Mark transaction will not close until February 2015.

[27] The applicants are acting in good faith. There is some prospect of surplus funds for distribution to unsecured creditors, given time to close the Core-Mark sale and assess the remaining priorities and claims. The cash flow statements indicate that Karrys has sufficient cash to fund operations through to the end of February 2015. There is no evidence any creditor will be prejudiced by the extension.

[28] Accordingly, the time for filing a proposal is extended to February 23, 2015.

Key Employee

[29] It is often recognized in restructuring proceedings that retention of key employees is vital. Securing payment is, in turn, a vital incentive for the employee to remain.

[30] In this case, there is one employee whose assistance has been, and will remain, key to ongoing operations to the date of sale. The retention bonus in issue is relatively modest. It is supported by the proposal trustee and BMO. Without securing the retention payment, there is a

significant risk the employee would leave. In addition, given the abbreviated timeframe for closing the Core-Mark sale, it would be almost impossible to find a timely replacement.

[31] For these reasons, the retention agreement and charge, as requested, is approved.

Administrative Charge

[32] Section 64.2 of the BIA provides for a super-priority to secure the fees for needed professional services during the restructuring. Secured creditors have received notice of this request. The proposal trustee supports the granting of the charge. The amount sought is, in my view, appropriate. The administrative charge requested is approved.

Consolidation

[33] It is clear that the operations of the three applicants are closely intertwined such that it would be difficult to disentangle their affairs. In order to secure the just, most expeditious and least expensive resolution, it is necessary to consolidate these closely related bankruptcy proceedings. This will avoid duplication and reduce cost. The requested order is therefore granted.

Proposal Trustee Report

[34] Given my approval of the elements above, it follows that the first report and activities of the proposal trustee should also be approved.

Penny J.

Date: December 24, 2014

TAB R

2006 CarswellOnt 2541
Ontario Superior Court of Justice [Commercial List]

Fund 321 Ltd. Partnership v. Samsys Technologies Inc.

2006 CarswellOnt 2541, 21 C.B.R. (5th) 1, 9 P.P.S.A.C. (3d) 185

Fund 321 Limited Partnership, c.o.b. as Wellington-Financial Fund II (Plaintiff) and Samsys Technologies Inc., Samsys Incorporated, and Hamel-Davidson Corporation (Defendants)

Mesbur J.

Heard: April 13, 2006
Judgment: April 28, 2006
Docket: 06-CL-6380

Counsel: Fred Myers, Jason Wadden for Plaintiff / Applicant
T. Reyes for Proposed Receiver, PricewaterhouseCoopers Inc.
Robin B. Schwill for Defendants
Brandon Jaffe for Opposing Shareholder, Tiger Capital Corporation

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Interim receiver — Appointment

Defendants were small cap, publicly-traded technology company comprised of North Carolina parent company and its two Canadian subsidiaries in Ontario and Nova Scotia — Plaintiff was defendants' first secured lender by debenture — Defendants secured indebtedness under debenture to plaintiff by general security agreements, guarantees and share pledge agreements, which were registered under relevant personal property legislation in each jurisdiction — Defendants defaulted on debenture and repaid $2 million, but defendants defaulted again and plaintiff sent notice of default — Defendants were well aware of financial difficulties and were seeking solutions including new financing, being acquired, merger, licensing its intellectual property rights or selling some of its shares — Defendants' board of directors spent 15 months trying to market company — Only S Inc. showed any significant interest, but was not interested in share purchase after completion of due diligence — Plaintiff entered direct negotiations with S Inc. and reached agreement on sale of defendants' assets to S Inc. — Under plaintiff's deal with S Inc., plaintiff would be repaid but little would remain for remaining creditors and shareholders — Defendants supported transaction, but defendants' shareholders opposed sale — Plaintiff brought motion for order under s. 47 of Bankruptcy and Insolvency Act for appointment of receiver of defendants for limited purpose of approving and effecting sale of assets — Motion granted — Plaintiff had valid, perfected security interest over defendants' property — It was necessary to appoint receiver to effect sale in order to protect plaintiff's interests — Sufficient efforts were made to get price and sale as only option was provident one — Debtor's interests had been met since defendants supported sale as only viable option — Given the board's attempts, it could not be concluded that anyone's interests were improperly preferred over any others — There was no unfairness in marketing and sale process.

Table of Authorities

Cases considered by *Mesbur J.*:

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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, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — pursuant to

s. 47(1) — considered

s. 47(3) — considered

s. 244 — referred to

s. 244(1) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

MOTION by plaintiff for order under s. 47 of *Bankruptcy and Insolvency Act* for appointment of receiver of defendants for limited purpose of approving and effecting sale of assets.

***Mesbur J.*:**

1 The plaintiff, Wellington, moved under s. 47 of the *Bankruptcy and Insolvency Act* for an order appointing PricewaterhouseCoopers Inc. (PwC) as receiver of the defendants for the limited purpose of approving and effecting a sale transaction of the property assets and undertaking of SAMSys Technologies Inc. to a purchaser, Sirit Inc. If the receiver was appointed, and the sale approved, the plaintiff also sought a vesting order so the transaction could be completed immediately. This type of transaction involving a limited purpose receiver, has been referred to as a "quick flip", and has often been utilized in the technology sector. [1]

2 Tiger Capital Corporation is a SAMSys shareholder. On behalf of itself and some other shareholders, Tiger opposed the sale, or, at the very least, sought an adjournment of the motion.

3 At the end of the hearing I indicated to counsel that I was satisfied the order should be granted. I made the requested order, with my reasons for doing so to follow, since the transaction was scheduled to close April 13, 2006. These are those reasons.

Some factual background

4 The defendants comprise SAMSys Technologies Inc., a North Carolina company, and its Canadian subsidiaries, SAMSys Incorporated, and Hamel-Davidson Corporation, Ontario and Nova Scotia companies. I will refer to the defendants collectively as SAMSys. SAMSys is a "small cap" publicly traded technology company. It is in the business of developing and marketing Radio Frequency Identification Devices (RFID's), a product that has been described as the next generation of bar codes. The product is used for things as diverse as inventory control, tracking animals, or reading transponders.

5 The plaintiff is SAMSys' first secured lender. It advanced a $6 million loan in August of 2005, pursuant to the terms of a debenture. To secure its obligations under the debenture, SAMSys and its subsidiaries secured the indebtedness by the usual panoply of General Security Agreements, guarantees, and share pledge agreements. Wellington registered the necessary financing statements or other similar documents concerning the security under the *Personal Property Security Act* of Ontario, or similar legislation in Nova Scotia and North Carolina.

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6 One of the provisions of the debenture required SAMSys to maintain certain revenue thresholds. If it failed to do so, it was required to immediately repay $2 million of the debt. These circumstances occurred at the end of December, 2005, and $2 million was repaid. As a result of making this payment, SAMSys' cash resources dropped to about $4.7 million compared to the roughly $8.7 million it had reported in its financial statements dated December 31, 2005 for the period October to December, 2005.

7 SAMSys continued to experience financial pressure. Although it had estimated revenues of over $ 6 million for the first 6 months of the 2006 fiscal year, (that is from October 1, 2005 to March 31, 2006), its actual revenues for the period were only $1.62 million. There was concern its cash reserves would fall below $2 million by early May, thus putting it in breach of one of its covenants under the debenture. Around the same time, the company's Chief Executive Officer advised Wellington's CEO that SAMSys was utilizing its cash reserves at a rate of about $1 million per month.

8 Section 6.1(c) of the debenture defines one of the events of default as follows:

> The Corporation or any subsidiary becomes unable to satisfy its liabilities as they become due and/or the realizable value of the Corporation's assets is less than the aggregate sum of its liabilities.

9 Wellington took the position that the net realizable value of the corporation's assets was less than the aggregate sum of its liabilities, and delivered a notice of default dated March 28, 2006. Initially, SAMSys denied that it was in default. However, once it determined that there was no inherent underlying value in its development costs in its intellectual property, it conceded that the realizable value of its assets was less than the aggregate sum of its liabilities, and therefore default had occurred under the terms of the debenture.

10 SAMSys' Board of Directors was, and had been, well aware of the company's declining fortunes, and was actively seeking a solution. George Kypreos, the company's Vice-President and Chief Financial Officer has provided an affidavit in which he outline the steps the Board took to deal with SAMSys' financial situation.

11 He states that back in January of 2005, the Board retained DecisionPoint International, LLC, to advise the company about strategic alternatives available to it. Mr Kypreos describes DecisionPoint as a "boutique investment bank offering global merger and acquisition advisory services, including buy and sell-side assignments, to leading middle-market technology firms." DecisionPoint tried for 15 months to locate a strategic investor or buyer for all or part of SAMSys' business. The affidavit goes on to describe the marketing process, the list of potential targets who were identified and contacted, and parties who executed a confidentiality agreement and went on to do due diligence.

12 SAMSys also sought advice from TDSI (TD Securities Inc.) to assist in the process with advice about possible equity or debt transactions.

13 In late March of this year the Board announced that it had established a Special Committee of independent directors "to review and consider strategic alternatives available to the company for enhancing shareholder value including, but not limited to, business combinations and strategic partnerships."

14 According to Mr. Kapreos, SAMSys investigated the possibility of new financing, the possibility of being acquired by or merged into another company, the possibility of licensing its intellectual property rights, or selling some or all of its assets. With the input of the Special Committee, the Board concluded that it was in the best interests of the company to conclude a transaction involving the sale of its business.

15 Apparently, only Sirit Inc., a company with whom SAMSys had had intermittent negotiations over the years, showed any significant interest in a strategic transaction. After they completed their due diligence, however, Sirit indicated it was not interested in purchasing the shares of SAMSys. It negotiated the current transaction with the plaintiff, and SAMSys entered into the negotiations as well.

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16 The Board was of the view that in light of their failure to effect a sale, the only remaining option for the company would be to cease operations. As Mr. Kapreos says in his affidavit, this is the only responsible course the Board could take under the circumstances.

17 As I have mentioned, the plaintiff entered into direct discussions with Sirit and was able to reach agreement on the proposed transaction. The transaction will see Sirit purchase all the shares of the North Carolina company, and purchase the remaining assets of the Ontario operations. The plaintiff will be repaid its debt, but there will be little or nothing for the remaining creditors who are owed about $1.5 million, and, needless to say, there will be nothing for the shareholders.

18 SAMSys supports the transaction, and indeed has signed the letter of intent. This itself is an act of default under the debenture, which gives the plaintiff the right to seek the appointment of a receiver. The second debenture holder was served with this motion, but did not appear, and apparently takes no position. No other creditor appeared, either.

19 PwC, in anticipation of this motion, conducted an independent analysis of the steps SAMSys has taken to market the company. Greg Watson, a Senior Vice-President of PwC has reviewed the preliminary liquidation analysis SAMSys prepared. PwC has discussed the company's financial status with management, and also reviewed the steps taken by DecisionPoint to market the company. Mr. Watson states, "it seems clear that the transaction proposed by the Plaintiff and Sirit is the only available alternative to maximize the value of realization on SAMSys' assets. Even if the company had sufficient cash to allow it to engage in yet another marketing process, there is no basis to expect that it would be able to obtain a better realization."

20 Importantly, Mr. Watson also points out that although the company had sought to realize value on its development costs concerning its intellectual property, "historically, in an insolvency context, buyers will only pay for a product that is ready for market. Buyers do not typically invest fresh cash to pay for development or other sunk costs." Mr. Kapreos confirms this view. He deposes that although SAMsys has invested over $2 million in its current product development project, it was unable to find anyone to value the investment without a market-ready product.

21 Mr. Watson's affidavit concludes with the following observation:

> In light of the breadth and lengthy duration of the marketing process undertaken by SAMSys and DecisionPoint, the absence of available alternatives, and significantly, the fact that SAMSys is quickly depleting its cash reserves, I do not believe that SAMSys can afford to undertake any further marketing efforts or that there would be any valuable purpose served by doing so. The price offered by Sirit is acceptable to the secured creditor and is the only available alternative to liquidation. As such, it represents the maximum realizable value for the property, assets and undertaking of SAMSys that is attainable in the circumstances.

Position of the parties

22 Wellington and SAMSys take the position that this transaction is the only viable alternative for the company. SAMSys has actively marketed itself over a lengthy period, with no success. If this sale is not approved, the Board takes the position the company will have to cease operations.

23 Tiger objects to the transaction on a number of grounds. First, it points to the fact that the company's shares were recently trading at 50 to 60 cents per share, suggesting there is equity in the company. It also says that since on March 31, 2006 SAMSys apparently had $3.5 million on hand, against a debt of $4 million to the plaintiff, it needs only to come up with an additional $500,000 to pay out Wellington, which might be available through equity financing. Tiger and the other shareholders have not proposed to supply this financing, nor have they proposed any viable alternative financing source.

24 Tiger also complains of the sale being essentially a liquidation, with almost nothing for the value of the company as a going concern. Tiger points to the lack of an appraisal, and is particularly concerned about the seeming lack of any value ascribed to SAMSys' assets, its value as an enterprise, and particularly the value of the development work the company has done

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on a new RFID reader called the Saturn reader. Tiger says that the Saturn was almost ready to go to market, sometime in May. It says now the president of Sirit is scheduled to talk about Saturn on behalf of Sirit, replacing a SAMSys executive in that role.

25 Tiger suggests that as a result of Wellington's actions, the value of the company's shares plummeted over a matter of days, with a resulting $19 million of erosion in the value of the company. This is based on the share price of 50 cents/share on March 26, when the company's press release indicated it was looking at options. Then, on March 28, the company issued a new press release, disclosing it had received Wellington's default notice. Then the price dropped to 19 cents per share. This was followed by a TSX investigation, and the company's press release of March 31, indicating the intent to sell. Tiger complains that Wellington could, and should have handled the matter differently, thus preserving, rather than eroding value.

26 Tiger also complains about not knowing the details of the DecisionPoint marketing plan. The Kypreos affidavit does set out significant detail about the marketing plan, including the DecisionPoint engagement letter, the "teaser" document it prepared to send to potential interested parties, beginning a year ago, as well as the Management Presentation sent to the parties that executed a confidentiality agreement. The Kypreos affidavit also includes the TDSI engagement letter. It relates to their advisory services in connection with possible equity or debt transactions.

27 Tiger expresses concern about the lack of evidence about anyone wanting to acquire SAMSys' technology, or development costs.

28 In Tiger's view, the entire sale process is proceeding far too quickly, and is being forced on the shareholders. Tiger does not at this time, however, suggest that the Board has acted in any way that is contrary to its obligations to the company, its shareholders or its creditors.

29 Finally, Tiger expresses some suspicion about the real or perceived relationship between Wellington and either the purchaser Sirit, or its principals, particularly John Albright.

30 Although Tiger voices many complaints, and says it simply wants to block the sale, it has no suggestion as to how the company is to fund its ongoing obligations of $29,000 per day, if the motion is delayed or dismissed. It suggests that PwC should be appointed Receiver to develop and conduct a marketing plan, but does not offer to fund that process.

31 It is important to address these concerns in the context of the legal analysis required to assess the motion as a whole.

The law and analysis

32 Section 47(1) of the *Bankruptcy and Insolvency Act* permits the appointment of an interim receiver where a notice is or is about to be sent under subsection 244(1) of the *Act.* Section 244(1) requires a secured creditor who intends to enforce its security against the property of an insolvent purpose to send notice of that intention to the insolvent person. Here, Wellington sent the prescribed notice, dated March 28, 2006.

33 First, I must address whether Wellington has a perfected security that entitles it to have given notice under section 244. Then I must look at the provisions of section 47(3), which require the court to find that the appointment of a receiver is necessary either to protect the debtor's estate or to protect the interests of the creditor who sent the section 244 notice. In that context, I must consider whether the proposed sale is reasonable. Lastly, I will address the concerns Tiger raises to see if they have an impact on whether the sale is reasonable or not.

34 Wellington has provided three legal opinions, one from Ontario, one from North Carolina and one from Nova Scotia, all opining that Wellington has a valid, perfected security over the property of the defendants in their respective jurisdictions. No one questions the validity of Wellington's security. I am satisfied it has a valid, perfected security over the defendants' property.

35 Next I must address the issue of whether the appointment of an interim receiver is necessary either to protect the debtor's estate or Wellington's interests. It is clear to me that a sale is the only way for the creditor to recover, and will provide maximum recovery for this creditor who stands in priority to all others. It is therefore necessary to appoint the receiver to effect a sale

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in order to protect Wellington's interests. The next question is whether this sale is reasonable, and should it be immediately approved.

Is the proposed sale reasonable?

36 *Royal Bank v. Soundair Corp.* [2] sets out the relevant considerations to determine whether a court should approve a proposed sale. Although *Soundair* centres on the issue of when, and if, the court should second-guess the recommendations of a receiver who has been appointed and has carried out the marketing process itself, its considerations are nevertheless apposite here, particularly since the proposed receiver has expressed the view that the marketing and sale process SAMSys undertook were appropriate.

37 *Soundair* confirms the duties of the court in considering whether a receiver who has sold property has acted properly. The court must do the following:

> (a) it should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> (b) it should consider the interests of all parties;
>
> (c) it should consider the efficacy and integrity of the process by which offers are obtained;
>
> (d) it should consider whether there has been unfairness in the working out of the process.

Although this is not technically a receiver's sale, applying the *Soundair* principles seems an appropriate route for the court to consider the reasonableness of the sale, particularly since the receiver is of the view that the process was reasonable, and no purpose would be served in a new marketing plan. As the Court of Appeal did in *Soundair*, I will discuss each of the factors in turn.

Has there been a sufficient effort to get the best price, and has the task been approached providently?

38 The Board spent 15 months trying to market the company and get the best price for it. Tiger suggests, somewhat inferentially, that Wellington undermined the process by negotiating directly with Sirit, who therefore must have known it could acquire SAMSys at a lower price by waiting until the company was desperate, and basically paying only enough to satisfy Wellington's security.

39 First, there is no evidence to support what is essentially an innuendo. Second, there is also no suggestion the Board has acted improperly, or contrary to any of its fiduciary obligations. A fifteen-month active marketing process bore no fruit. Sirit has been in negotiations, on and off, with SAMSys for many years. Sirit was not prepared to make an offer in the context of the general marketing process. SAMSys utilized the services of two professional firms to assist in helping to sell the company, but had no success. I must conclude that sufficient efforts were made to get the best price, and the sale, as the only option, is a provident one. The receiver's opinion confirms this view.

Consideration of the interests of the parties

40 In *Soundair*, the court confirmed the well-established principle that "the primary interest is that of the creditors of the debtor." The court goes on to say that there are also other persons whose interests require consideration. The court referred specifically to the interests of the debtor and those of the prospective purchaser. It did not mention the interests of the shareholders in this context. Here, the debtor supports the sale as the only viable option open to the company. The debtor's interests have clearly been considered. The prospective purchaser is the only potential purchaser. Its interests would be met by approving the sale.

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41 The Board undertook the lengthy process of trying to sell all or part of SAMSys assets, shares, or undertaking. They approached the task on a number of levels, with the assistance of both DecisionPoint and TDSI. On reviewing the history of the Board's attempts, I cannot conclude that anyone's interests were improperly preferred over any other's.

The efficacy and integrity of the process obtaining the offer

42 The courts have long identified an important consideration as the integrity of the process by which the sale has been effected. Here, Tiger has suggested that there were other options open to the company. They say equity financing, for example, was an option instead of a sale. This was tried, and failed. They suggest other borrowing might have been available to pay out the balance of Wellington's loan, but have no concrete suggestions of where this money might have come from. Tiger candidly admitted the shareholders were not proposing to supply it.

Was there unfairness in the process?

43 Tiger does not really point to anything that is described as "unfair" in the marketing/sale process, other than some specific concerns that I will deal with below. I cannot conclude there was any unfairness in the process as that term is described in *Soundair*. I note that Mr. Watson of PwC deposes that he and a colleague had extensive conversations with the managing director of DecisionPoint, with Mr. Kypreos of SAMSys, and reviewed the advertisements DecisionPoint prepared, together with the Management Presentation issued to prospective purchasers. He reviewed the list of 35 parties DecisionPoint and SAMSys approached, and the control log of the 16 parties DecisionPoint had follow up efforts with. Mr. Watson concludes, "it seems clear that the transaction proposed by the Plaintiff and Sirit is the only available alternative to maximize the value of realization on SAMSys' assets. Even if the company had sufficient cash to allow it to engage in yet another marketing process, there is no basis to expect that it would be able to obtain a better realization." Mr. Watson speaks of the "breadth and lengthy duration" of the marketing process.

44 On the basis of the *Soundair* criteria, I would approve the sale. However, I must also address Tiger's concerns, to see if they have any effect on my final determination.

Tiger's additional concerns

45 Is there equity in the company, or is equity financing an option, as Tiger suggests? In my view, there is not. The trading price of the shares is but one indicator of value. I have reviewed the most recent financial statements of the company, for the year ended September 30, 2005, with comparative figures for 2004. Over that time period, the company's deficit increased from just under $27 million to over $39 million. Although sales figures were higher in the 2005 fiscal year, expenses were proportionally even higher, resulting in a loss for the year of nearly $11 million, compared with a loss of $7.5 million the previous fiscal year.

46 As I have already stated, the company's projected revenues for the first six months of its 2006 fiscal year fell short of projections by over $4 million, and the company was depleting its cash reserves by $1 million per month. It is clear the company is, and has been haemorrhaging money. Efforts at finding equity financing with the help of TDSI failed. I cannot see there is any merit to this complaint of Tiger's.

47 Tiger's next concern is about a liquidation-type sale, with no appraisal, and no value for what are commonly referred to as "sunk costs" for product development. The sale process has gone on for well over a year, with no buyer except for Sirit. The sale process itself provided confidential financial information to a number of prospective purchasers. Although many of these prospects went through the due diligence process, none was interested enough to make an offer. Even without an appraisal, I am satisfied, as is the Board, that the proposed sale is the maximum realization available for the assets, business and undertaking of SAMSys.

48 Tiger also expresses concern about the effect of Wellington's actions on share value. First, there are many reasons for share prices to rise and fall. Wellington quite properly was concerned about its security, having regard to SAMSys' failed revenue targets, significant expenses, and declining cash reserves. Tiger suggests that the default Wellington relies on is a "soft"

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default, rather than SAMSys failing to pay monthly payments. The parties negotiated and agreed on all the default provisions. Wellington is as entitled to rely on any one of them as any other. The general RFID industry is apparently facing uncertainties, according to the affidavit of Mark McQueen. It is indeed unfortunate there will be no return for the shareholders, who are understandably upset about their investment going bad. That does not mean, however, that a secured lender need hold off on enforcing its security pursuant to any defined event of default.

49 As to Tiger's complaints about the lack of particularity of the marketing plan used in SAMSys' attempts to find a buyer, I am satisfied that the affidavit material sets out the plan with reasonable detail. It persuades me that the marketing efforts were reasonable, focused, and sensible, with the assistance of appropriate professional advice.

50 It is also clear to me that in situations like this, it would be extremely rare for a potential buyer to ascribe any value to an insolvent company's sunk development costs. I am not surprised there is no purchase value ascribed to these costs. I am also satisfied that potential buyers for these products in development were marketed as well, sadly with no results.

51 The marketing process as a whole has gone on for well over a year. It is true that the current transaction has happened quickly. However, the Board has considered it in the context of the overall efforts to effect a sale. While the process may appear rushed to the shareholders, I am not persuaded the proposed sale has been undertaken lightly, or without reasoned consideration by the Board and its Special Committee.

52 Lastly, I would like to address the suggestion that there is an improper or non-arms length relationship between Wellington and Sirit. Tiger says that John L. Albright sits on Wellington's advisory counsel, and a corporation called J.L. Albright Venture Partners holds over 21% of Sirit's shares. Tiger assumes that Mr. Albright and J.L. Albright Venture Partners do not deal at arms length. From these facts Tiger infers there is a non-arms length relationship between Wellington and Sirit.

53 In an affidavit sworn April 12, 2006, Mark McQueen, the CEO of Wellington, deals with the question of the relationship between Wellington and Sirit. He unequivocally states, "there is no economic relationship of any nature whatsoever between the secured creditor (Wellington-Financial) and either the purchaser, Sirit Inc. ("Sirit"), or its principals." Mr. McQueen concedes that Mr. Albright, one of the principals of one of Sirit's significant shareholders is a member of Wellington's unpaid Advisory Committee. He states, however, that the Committee has never met, and its members have no active role in Wellington's management. Thus, Mr. Albright and Sirit would have no active role in Wellington's management. In my view, this adequately answers Tiger's concerns about a non-arms length relationship.

54 For these reasons, I am not persuaded that the issues Tiger raises are sufficient to delay or deny the sale transaction. I am satisfied that the sale is necessary to protect Wellington's interests, and thus the requirements of s. 47(3) of the *Bankruptcy and Insolvency Act* have been met, and a limited purpose receiver should be appointed to effect the sale.

Disposition

55 In the result, it is for these reasons that I granted the motion. As the parties have agreed, there will be no order as to costs.

Motion granted.

Footnotes

1 See R.I. Thornton and G.R. Azeff, *The Interim Receiver Under Section 47 of the Bankruptcy and Insolvency Act (Canada)*, Insolvency Institute of Canada, 13th annual Conference, October 24-27, 2002, at pages 3-4 and P. Farkas, *Sale of a Business: What Does the Court Expect of the Receiver*, Canadian Institute Third Annual Insolvency Law and Practice Conference, at page 3.

2 (1991), 4 O.R. (3d) 1 (Ont. C.A.)

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TAB S

SUPERIOR COURT

2010 QCCS 1742 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 3, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

And
THE LAND REGISTRAR FOR THE LAND REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF MONTMORENCY
And
THE LAND REGISTRAR FOR THE LAND REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF PORTNEUF
And
THE LAND REGISTRAR FOR THE RESTIGOUCHE COUNTY LAND REGISTRY OFFICE
And
THE LAND REGISTRAR FOR THE THUNDER BAY LAND REGISTRY OFFICE
And
THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS
Mis en cause

REASONS FOR JUDGMENT AND VESTING ORDER IN RESPECT OF THE BEAUPRÉ, DALHOUSIE, DONNACONA AND FORT WILLIAM ASSETS (#513)

2010 QCCS 1742 (CanLII)

INTRODUCTION

[1] This judgment deals with the approval of a sale of assets contemplated by the Petitioners in the context of their CCAA restructuring.

[2] At issue are, on the one hand, the fairness of the sale process involved and the appropriateness of the Monitor's recommendation in that regard, and on the other hand, the legal standing of a disgruntled bidder to contest the approval sought.

THE MOTION AT ISSUE

[3] Through their Amended Motion for the Issuance of an Order Authorizing the Sale of Certain Assets of the Petitioners (Four Closed Mills) (the "**Motion**"), the Petitioners seek the approval of the sale of four closed mills to American Iron & Metal LP ("**AIM**") and the issuance of two Vesting Orders[1] in connection thereto.

[4] The Purchase Agreement and the Land Swap Agreement contemplated in that regard, which were executed on April 6, 15 and 21, 2010, are filed in the record as Exhibits R-1, R-1A and R-2A.

[5] In short, given the current state of the North American newsprint and forest products industry, the Petitioners have had to go through a process of idling and ultimately selling certain of their mills that they no longer require to satisfy market demand and that will not form part of their mill configuration after emergence from their current CCAA proceedings.

[6] So far, the Petitioners, with the assistance of the Monitor, have in fact undertaken a number of similar sales processes with respect to closed mills, including:

(a) the pulp and paper mill in Belgo, Quebec that was sold to Recyclage Arctic Beluga Inc. ("**Arctic Beluga**"), as approved and authorized by the Court on November 24, 2009;

(b) the St-Raymond sawmill that was sold to 9213-3933 Quebec Inc., as approved and authorized by the Court on December 11, 2009; and

(c) the Mackenzie Facility that was sold to 1508756 Ontario Inc., as approved and authorized by the Court on March 23, 2010.

[1] Namely, a first Vesting Order in respect of the Beaupré, Dalhousie, Donnacona and Fort William closed mills assets (Exhibit R-3A) and a second Vesting Order in respect of the corresponding Fort William land swap (Exhibit R-4A).

[7] The transaction at issue here includes pulp and paper mills located in Dalhousie, New Brunswick (the “**Dalhousie Mill**”), Donnacona, Quebec (the “**Donnacona Mill**”), Fort William, Ontario (the “**Fort William Mill**”) and Beaupré, Quebec (the “**Beaupré Mill**”) (collectively, the “**Closed Mills**”).

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[8] The assets comprising the Closed Mills include the real property, buildings, machinery and equipment located at the four sites.

[9] The Closed Mills are being sold on an “as is/where is” basis, in an effort to (i) reduce the Petitioners’ ongoing carrying costs, which are estimated to be approximately CDN$12 million per year, and (ii) mitigate the Petitioners’ potential exposure to environmental clean-up costs if the sites are demolished in the future, which are estimated at some CDN$10 million based on the Monitor's testimony at hearing.

[10] The Petitioners marketed the Closed Mills as a bundled group to maximize their value, minimize the potential future environmental liability associated with the sites, and ensure the disposal of all four sites through their current US Chapter 11 and CCAA proceedings.

[11] According to the Petitioners, the proposed sale is the product of good faith, arm's length negotiations between them and AIM.

[12] They believe that the marketing and sale process that was followed was fair and reasonable. While they did receive other offers that were, on their faces, higher in amount than AIM's offer, they consider that none of the other bidders satisfactorily demonstrated an ability to consummate a sale within the time frame and on financial terms that were acceptable to them.

[13] Accordingly, the Petitioners submit that the contemplated sale of the Closed Mills to AIM is in the best interest of and will generally benefit all of their stakeholders, in that:

a) the sale forms part of Petitioners' continuing objective and strategy to elaborate a restructuring plan, which will allow them (or any successor) to be profitable over time. This includes the following previously announced measures of (a) disposing of non-strategic assets, (b) reducing indebtedness, and (c) reducing financial costs;

b) the Closed Mills are not required to continue the operations of the Petitioners, nor are they vital to successfully restructure their business;

c) each of the Closed Mills faces potential environmental liabilities and other clean-up costs. The Petitioners also incur monthly expenses to maintain the sites in their closed state, including tax, utility, insurance and security costs;

d) the proposed transaction is on attractive terms in the current market and will provide the Petitioners with additional liquidity. In addition to realizing cash proceeds from the Closed Mills and additional proceeds from the sales of the paper machines, the projected sale will also relieve the Petitioners of potentially significant environmental liabilities; and

e) the Petitioners' creditors will not suffer any prejudice as a result of the proposed sale and the issuance of the proposed vesting orders since the proceeds will be remitted to the Monitor in trust and shall stand in the place and stead of the Purchased Assets (as defined in the contemplated Purchase Agreement). As a result, all liens, charges and encumbrances on the Purchased Assets will attach to such proceeds, with the same priority as they had immediately prior to the sale.

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[14] In its 38th Report dated April 24, 2010, the Monitor supports the Petitioners' position and recommends that the contemplated sale to AIM be approved.

[15] Some key creditors, notably the Ad Hoc Committee of the Bondholders, also support the Motion. Others (for instance, the Term Lenders and the Senior Secured Noteholders) indicate that they simply submit to the Court's decision.

[16] None of the numerous Petitioners' creditors opposes the contemplated sale. None of the parties that may be affected by the wording of the Vesting Orders sought either.

[17] However, Arctic Beluga, one of the unsuccessful bidders in the marketing and sale process of the Closed Mills, intervenes to the Motion and objects to its conclusions.

[18] It claims that its penultimate bid[2] for the Closed Mills was a proposal for CDN$22.1 million in cash, an amount more than CDN$8.3 million greater than the amount proposed by the Petitioners in the Motion.

[19] According to Arctic Beluga, the AIM bid that forms the basis of the contemplated sale is for CDN$8.8 million in cash, plus 40% of the proceeds from any sale of the machinery (of which only CDN$5 million is guaranteed within 90 days of closing), and is significantly lower than its own offer of over CDN$22 million in cash.

[20] Arctic Beluga argues that it lost the ability to purchase the Closed Mills due to unfairness in the bidding process. It considers that the Court has the discretion to withhold approval of the sale where there has been unfairness in the sale process or where there are substantially higher offers available.

[21] It thus requests the Court to 1) dismiss the Motion so that the Petitioners may consider its proposal for the Closed Mills, 2) refuse to authorize the Petitioners to enter

[2] Dated March 22, 2010 and included in Exhibit I-1.

into the proposed Purchase Agreement and Land Swap Agreement, and 3) declare that its proposal is the highest and best offer for the Closed Mills.

[22] The Petitioners reply that Arctic Beluga has no standing to challenge the Court's approval of the sale of the Closed Mills contemplated in these proceedings.

[23] Subsidiarily, in the event that Arctic Beluga is entitled to participate in the Motion, they consider that any inquiry into the integrity and fairness of the bidding process reveals that the contemplated sale to AIM is fair, reasonable and to the advantage of the Petitioners and the other interested parties, namely the Petitioners' creditors.

[24] To complete this summary of the relevant context, it is worth adding that at the hearing, in view of Arctic Beluga's Intervention, AIM also intervened to support the Petitioners' Motion.

[25] It is worth mentioning as well that even though he did not contest the Motion *per se*, the Ville de Beaupré's Counsel voiced his client's concerns with respect to the amount of unpaid taxes[3] currently outstanding in regard to the Beaupré Mill located on its territory.

[26] Apparently, part of these outstanding taxes has been paid very recently, but there is a potential dispute remaining on the balance owed. That issue is not, however, in front of the Court at the moment.

ANALYSIS AND DISCUSSION

[27] In the Court's opinion, the Petitioners' Motion is well founded and the Vesting Orders sought should be granted.

[28] The sale process followed here was beyond reproach. Nothing justifies refusing the Petitioners' request and setting aside the corresponding recommendation of the Monitor. None of the complaints raised by Arctic Beluga appears justified or legitimate under the circumstances.

[29] On the issue of standing, even though the Court, to expedite the hearing, did not prevent Arctic Beluga from participating in the debate, it agrees with Petitioners that, in the end, its legal standing appeared to be most probably inexistent in this case.

[30] This notwithstanding, it remains that in determining whether or not to approve the sale, the Court had to be satisfied that the applicable criteria were indeed met. Because of that, the complaints raised would have seemingly been looked at, no matter what. As part of its role as officer of the Court, the Monitor had, in fact, raised and addressed them in its 38th Report in any event.

[31] The Court's brief reasons follow.

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3 Exhibits VB-1 and I-5.

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THE SALE APPROVAL

[32] In a prior decision rendered in the context of this restructuring[4], the Court has indicated that, in its view, it had jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale was in the best interest of the stakeholders generally[5].

[33] Here, there are sufficient and definite justifications for the sale of the Closed Mills. The Petitioners no longer use them. Their annual holding costs are important. To insure that a purchaser takes over the environmental liabilities relating thereto and to improve the Petitioners' liquidity are, no doubt, valid objectives.

[34] In that prior decision, the Court noted as well that in determining whether or not to authorize such a sale of assets, it should consider the following key factors:

- whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the process.

[35] These principles were established by the Ontario Court of Appeal in the *Soundair*[6] decision. They are applicable in a CCAA sale situation[7].

[36] The *Soundair* criteria focus first and foremost on the "integrity of the process", which is integral to the administration of statutes like the CCAA. From that standpoint, the Court must be wary of reopening a bidding process, particularly where doing so could doom the transaction that has been achieved[8].

[37] Here, the Monitor's 38th Report comprehensively outlines the phases of the marketing and sale process that led to the outcome now challenged by Arctic Beluga. This process is detailed at length at paragraphs 26 to 67 of the Report.

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4 *AbitibiBowater Inc.*, *Re,* 2009 QCCS 6460, at para. 36 and 37.

5 See, in this respect, *Railpower Technologies Corp.*, *Re,* 2009 QCCS 2885, at para. 96 to 99; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467, at para. 35 (Ont. S.C.J.); *Boutique Euphoria inc.*, *Re,* 2007 QCCS 7128, at para. 91 to 95; *Calpine Canada Energy Ltd., Re*, (2007) 35 C.B.R. (5th) 1 (Alta Q.B.), and *Boutiques San Francisco, Re*, (2004) 7 C.B.R. (5th) 189 (S.C.).

6 *Royal Bank* v. *Soundair Corp.*, (1991) 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 16.

7 See, for instance, the decisions cited at Note 5 and *Tiger Brand Knitting Co., Re,* (2005) 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005) 19 C.B.R. (5th) 53 (Ont. C.A.); *PSINet Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J.), at para. 6; and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346, at para. 47 (Ont. Gen. Div.).

8 *Grant Forest Products Inc., Re,* 2010 ONSC 1846, at para. 30-33.

[38] The Court agrees with the Monitor's view that, in trying to achieve the best possible result within the best possible time frame, the Petitioners, with the guidance and assistance of the Monitor, have conducted a fair, reasonable and thorough sale process that proved to be transparent and efficient.

[39] Suffice it to note in that regard that over sixty potential purchasers were contacted during the course of the initial Phase I of the sale process and provided with bid package information, that the initial response was limited to six parties who submitted bids, three of which were unacceptable to the Petitioners, and that the subsequent Phase II involved the three finalists of Phase I.

[40] By sending the bid package to over sixty potential purchasers, there can be no doubt that the Petitioners, with the assistance of the Monitor, displayed their best efforts to obtain the best price for the Closed Mills.

[41] Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval[9].

[42] In point of fact, Arctic Beluga's assertion of alleged unfairness in the sale process is simply not supported by any of the evidence adduced.

[43] Arctic Beluga was not treated unfairly. The Petitioners and the Monitor diligently considered the unsolicited revised bids it tendered, even after the acceptance of AIM's offer. It was allowed every possible chance to improve its offer by submitting a proof of funds. However, it failed to do enough to convince the Petitioners and the Monitor that its bid was, in the end, the best one available.

[44] Turning to the analysis of the bids received, it is again explained in details in the Monitor's 38th Report, at paragraphs 45 to 67.

[45] In short, the Petitioners, with the Monitor's support, selected AIM’s offer for the following reasons:

(a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;

(b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;

(c) AIM confirmed that no further due diligence was required;

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9 See, on that point, *Consumers Packaging Inc., (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 8, and *Canwest Global Communications Corp., Re,* 2010 ONSC 1176, at para. 42.

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(d) AIM had provided sufficient evidence of its ability to assume the environmental liabilities associated with the Closed Mills; and

(e) AIM did not have any financing conditions in its offer and had provided satisfactory evidence of its financial ability to close the sale.

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[46] Both the Petitioners and the Monitor considered that the proposed transaction reflected the current fair market value of the assets and that it satisfied the Petitioners' objective of identifying a purchaser for the Closed Mills that was capable of mitigating the potential environmental liabilities and closing in a timely manner, consistent with Petitioners' on-going reorganization plans.

[47] The Petitioners were close to completing the sale with AIM when Arctic Beluga submitted its latest revised bid that ended up being turned down.

[48] The Petitioners, again with the support of the Monitor, were of the view that it would not have been appropriate for them to risk having AIM rescind its offer, especially given that Arctic Beluga had still not provided satisfactory evidence of its financial ability to close the transaction.

[49] The Court considers that their decision in this respect was reasonable and defendable. The relevant factors were weighed in an impartial and independent manner.

[50] Neither the Petitioners nor the Monitor ignored or disregarded the Arctic Beluga bids. Rather, they thoroughly considered them, up to the very last revision thereof, albeit received quite late in the whole process.

[51] They asked for clarifications, sometimes proper support, finally sufficient commitments.

[52] In the end, through an overall assessment of the bids received, the Petitioners and the Monitor exercised their business and commercial judgment to retain the AIM offer as being the best one.

[53] No evidence suggests that in doing so, the Petitioners or the Monitor acted in bad faith, with an ulterior motive or with a view to unduly favor AIM. Contrary to what Arctic Beluga suggested, there was no "fait accompli" here that would have benefited AIM.

[54] The Petitioners and the Monitor rather expressed legitimate concerns over Arctic Beluga ultimate bid. These concerns focused upon the latter's commitments towards the environmental exposures issues and upon the lack of satisfactory answers in regard to the funding of their proposal.

[55] In a situation where, according to the evidence, the environmental exposures could potentially be in the range of some CDN$10 million, the Court can hardly dispute these concerns as being anything but legitimate.

[56] From that perspective, the concerns expressed by the Petitioners and the Monitor over the clauses of Arctic Beluga penultimate bid concerning the exclusion of liability for hazardous material were, arguably, reasonable concerns[10]. Mostly in the absence of similar exclusion in the offer of AIM.

[57] Similarly, their conclusion that the answers[11] provided by that bidder for the funding requirement of their proposal were not satisfactory when compared to the ones given by AIM[12] cannot be set aside by the Court as being improper.

[58] In that regard, the solicitation documentation[13] sent to Arctic Beluga and the other bidders clearly stated that selected bidders would have to provide evidence that they had secured adequate and irrevocable financing to complete the transaction.

[59] A reading of clauses 4 and 5 of the "funding commitment" initially provided by Arctic Beluga[14] did raise some question as to its adequate and irrevocable nature. It did not satisfy the Petitioners that Arctic Beluga had the ability to pay the proposed purchase price and did not adequately demonstrate that it had the funds to fulfill, satisfy and fund future environmental obligations.

[60] The subsequent letter received from Arctic Beluga's bankers[15] did appear to be somewhat incomplete in that regard as well.

[61] Arctic Beluga's offer, although highest in price, was consequently never backed with a satisfactory proof of funding despite repeated requests by the Petitioners and the Monitor.

[62] In the situation at hand, the Phase I sale process was terminated as a result of the decision to remove the Mackenzie Mill from the process. However, prior to that, the successful bidder had failed to provide satisfactory evidence that it would be able to finance the transaction despite several requests in that regard.

[63] If anything, this underscored the importance of requesting and appraising evidence of any bidder's financial wherewithal to close the sale.

[64] The applicable duty during a sale process such as this one is not to obtain the best possible price at any cost, but to do everything reasonably possible with a view to obtaining the best price.

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10 See Exhibit I-1 and general condition # 5 of the Arctic Beluga penultimate bid.
11 See Exhibits I-6, I-8 and I-9.
12 See Exhibit I-7.
13 See Exhibit I-2.
14 See Exhibit I-6.
15 See Exhibit I-9.

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[65] The dollar amount of Arctic Beluga's offer is irrelevant unless it can be used to demonstrate that the Petitioners, with the assistance of the Monitor, acted improvidently in accepting AIM's offer over theirs[16].

[66] Nothing in the evidence suggests that this could have been the case here.

[67] In that regard, Arctic Beluga's references to the findings of the courts in *Re Beauty Counselors of Canada Ltd*[17] and *Re Selkirk*[18] hardly support its argument.

[68] In these decisions, the courts first emphasized that it was not desirable for a purchaser to wait to the last minute, even up to the court approval stage, to submit its best offer. Yet, the courts then added that they could still consider such a late offer if, for instance, a substantially higher offer turned up at the approval stage. In support of that view, the courts explained that in doing so, the evidence could very well show that the trustee did not properly carry out its duty to obtain the best price for the estate.

[69] This reasoning has clearly no application in this matter. As stated, the process followed was appropriate and beyond reproach. The bids received were reviewed and analyzed. Arctic Beluga's bid was rejected for reasonable and defendable justifications.

[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.

[72] In prior decisions rendered in similar context[19], courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

[73] In the circumstances, the Court agrees that the Petitioners and the Monitor were "entitled to prefer a bird in the hand to two in the bush" and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments.

[74] AIM has transferred an amount of $880,000 to the Petitioners' Counsel as a deposit required under the Purchase Agreement. It has the full financial capacity to consummate the sale within the time period provided for[20].

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16 *Royal Bank* v. *Soundair Corp.*, (1991) 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 30.
17 (1986) 58 C.B.R. (N.S.) 237 (Ont. S.C.).
18 (1987) 64 C.B.R. (N.S.) 140 (Ont. S.C.).
19 *Railpower Technologies Corp., Re,* 2009 QCCS 2885, at para. 96 to 99, and *Boutique Euphoria inc., Re,* 2007 QCCS 7128, at para. 91 to 95.
20 Exhibits AIM-1 and AIM-2.

[75] As a result, the Court finds that the Petitioners are well founded in proceeding with the sale to AIM on the basis that the offer submitted by the latter was the most advantageous and presented the fewest closing risks for the Petitioners and their creditors.

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[76] All in all, the Court agrees with the following summary of the situation found in the Monitor's 38th Report, at paragraph 79:

(a) the Petitioners have used their best efforts to obtain the best purchase price possible;

(b) the Petitioners have acted in a fair and reasonable manner throughout the sale process and with respect to all potential purchasers, including Arctic Beluga;

(c) the Petitioners have considered the interests of the stakeholders in the CCAA proceedings;

(d) the sale process with respect to the Closed Mills was thorough, extensive, fair and reasonable; and

(e) Arctic Beluga had ample opportunity to present its highest and best offer for the Closed Mills, including ample opportunity to address the issues of closing risk and the ability to finance the transaction and any future environmental liabilities, and they have not done so in a satisfactory manner.

[77] The contemplated sale of the Closed Mills to AIM will therefore be approved.

THE STANDING ISSUE

[78] In view of the Court's finding on the sale approval, the second issue pertaining to the lack of standing of Arctic Beluga is, in the end, purely theoretical.

[79] Be it as a result of Arctic Beluga's Intervention or because of the Monitor's 38th Report, it remains that the Court had, in any event, to be satisfied that the criteria applicable for the approval of the sale were met. In doing so, proper consideration of the complaints raised was necessary, no matter what.

[80] Even if this standing issue does not consequently need to be decided to render judgment on the Motion, some remarks are, however, still called for in that regard.

[81] Interestingly, the Court notes that in the few reported decisions[21] of this province's courts dealing with the contestation of sale approval motions, the standing issue of the disgruntled bidder has apparently not been raised or analyzed.

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[21] See, for instance, the judgments rendered in *Railpower Technologies Corp.*, *Re,* 2009 QCCS 2885; *Boutique Euphoria inc.*, *Re,* 2007 QCCS 7128; and *Boutiques San Francisco, Re*, (2004) 7 C.B.R. (5th) 189 (S.C.).

[82] In comparison, in a leading case on the subject[22], the Ontario Court of Appeal has ruled, a decade ago, that a bitter bidder simply does not have a right that is finally disposed of by an order approving a sale of a debtor's assets. As such, it has no legal interest in a sale approval motion.

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[83] For the Ontario Court of Appeal, the purpose of such a motion is to consider the best interests of the parties who have a direct interest in the proceeds of sale, that is, the creditors. An unsuccessful bidder's interest is merely commercial:

> 24 […] If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.
>
> 25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: Crown Trust v. Rosenberg, supra.
>
> 26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

[84] The Ontario Court of Appeal explained as follows the policy reasons underpinning its approach to the lack of standing of an unsuccessful prospective purchaser[23]:

> 30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court-approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands of a disappointed would be

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[22] *Skyepharma PLC v. Hyal Pharmaceutical Corporation,* [2000] O.J. No. 467 (Ont. C.A.), affirming [1999] O.J. No. 4300 (Ont. S.C.) ("*Skyepharma*").

[23] *Id*, at para. 30. See also, *Consumers Packaging Inc. (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 7.

> purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended."

[85] Along with what appears to be a strong line of cases[24], Morawetz J. recently confirmed the validity of the *Skyepharma* precedent in the context of an opposition to a sale approval filed by a disgruntled bidder in both Canadian proceedings under the CCAA and in US proceedings under Chapter 11[25].

[86] Here, Arctic Beluga stood alone in contesting the Motion. None of the creditors supported its contestation. Its only interest was to close the deal itself, arguably for the interesting profits it conceded it would reap in the very good scrap metal market that exists presently.

[87] Arctic Beluga's contestation did, in the end, delay the sale approval and no doubt brought a level of uncertainty in a process where the interested parties had a definite interest in finalizing the deal without further hurdles.

[88] From that perspective, Arctic Beluga's contestation proved to be, at the very least, a good example of the "à propos" of the policy reasons that seem to support the strong line of cases cited before that question the standing of bitter bidder in these debates.

FOR THESE REASONS, THE COURT:

[1] **AUTHORIZES** Abitibi-Consolidated Company of Canada ("**ACCC**"), Bowater Maritimes Inc. ("**BMI**") and Bowater Canadian Forest Products Inc. ("**BCFPI**" and together with ACCC and BMI, the "**Vendors**") to enter into, and Abitibi-Consolidated Inc. ("**ACI**") to intervene in, the agreement entitled *Purchase and Sale Agreement* (as amended, the "**Purchase Agreement**"), by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "**Purchaser**") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed as Exhibits R-1 and R-1(a) to the Motion, and into all the transactions contemplated therein (the "**Sale Transactions**") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor;

[2] **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Vendors to proceed with the Sale Transactions and that no shareholder or regulatory approval shall be required in connection therewith, save and except for the satisfaction of the Land Swap Transactions and the obtaining of the U.S. Court Order (as said terms are defined in the Purchase Agreement);

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[24] See *Consumers Packaging Inc. (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 7; *BDC Venture Capital Inc.* v. *Natural Convergence Inc.* 2009 ONCA 637, at para. 20*; BDC Venture Capital Inc. v. Natural Convergence Inc*., 2009 ONCA 665, at para. 8.

[25] *In the Matter of Nortel Networks Corporation,* 2010 ONSC 126, at para. 3.

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[3] **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as **Schedule "D"** hereto, (the "**First Closing Monitor's Certificate**"), all right, title and interest in and to the Beaupré Assets, Donnacona Assets and Dalhousie Assets (each as defined below and collectively, the "**First Closing Assets**"), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), 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 "**First Closing Assets Encumbrances**"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; 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 New Brunswick *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, easements and restrictive covenants listed on **Schedule "E"** hereto (the "**Permitted First Closing Assets Encumbrances**") and, for greater certainty, **ORDERS** that all of the First Closing Assets Encumbrances affecting or relating to the First Closing Assets be expunged and discharged as against the First Closing Assets, in each case effective as of the applicable time and date set out in the Purchase Agreement;

[4] **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as **Schedule "F"** hereto, (the "**Second Closing Monitor's Certificate**"), all right, title and interest in and to the Fort William Assets (as defined below), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), 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 "**Fort William Assets Encumbrances**"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication

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or filing pursuant to the Ontario *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, notification agreements, easements and restrictive covenants generally described in **Schedule "G"** (the **"Permitted Fort William Assets Encumbrances**") upon their registration on title. This Order shall not be registered on title to the Fort William Assets until all of such generally described Permitted Fort William Assets Encumbrances are registered on title, at which time the Petitioners shall be at liberty to obtain, without notice, an Order of this Court amending the within Order to incorporate herein the registration particulars of such Permitted Fort William Assets Encumbrances in Schedule “G”;

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[5] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Montmorency, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Beaupré, in the Province of Quebec, corresponding to an immovable property known and designated as being composed of lots 3 681 089, 3 681 454, 3 681 523, 3 681 449, 3 682 466, 3 681 122, 3 681 097, 3 681 114, 3 681 205, 3 682 294, 3 681 022 and 3 681 556 of the Cadastre of Quebec, Registration Division of Montmorency, with all buildings thereon erected bearing civic number 1 du Moulin Street, Beaupré, Québec, Canada, G0A 1E0 (the "**Beaupré Assets**"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Beaupré Assets, including, without limitation, the following registrations published at the said Land Registry:

- Hypothec dated February 17, 2000 registered under number 140 085 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

- Hypothec dated April 1, 2008 registered under number 15 079 215 and assigned on January 21, 2010 under number 16 882 450 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated August 18, 2008 registered under number 15 504 248 in the index of immovables with respect to lot 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated October 30, 2008 registered under number 15 683 288 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

- Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and

Prior notice for sale by judicial authority dated July 23, 2009 registered under number 16 400 646 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and;

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- Hypothec dated May 8, 2009 registered under number 16 145 374 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated May 8, 2009 registered under number 16 145 375 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and

- Hypothec dated December 9, 2009 registered under number 16 789 817 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

[6] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Portneuf, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Donnacona, in the Province of Québec, corresponding to an immovable property known and designated as being composed of lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf, with all buildings thereon erected bearing civic number 1 Notre-Dame Street, Donnacona, Québec, Canada, G0A 1T0 (the "**Donnacona Assets**"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Donnacona Assets, including, without limitation, the following registrations published at the said Land Registry:

- Hypothec dated March 9, 2009 registered under number 16 000 177 with respect to lot 3 507 098 (legal construction) and Notice for sale by judicial authority dated September 24, 2009 registered under number 16 573 711 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

- Hypothec dated April 30, 2009 registered under number 16 122 878 and assigned on May 22, 2009 under number 16 184 386 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

- Hypothec dated March 18, 1997 registered under number 482 357 modified on August 30, 1999 under registration number 497 828 with respect to lots

3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf; and

- Hypothec dated November 24, 1998 registered under number 493 417 and modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

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[7] **ORDERS** the Quebec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Vesting Order and the First Closing Monitor's Certificate, to reduce the scope of the hypothecs registered under numbers: 06-0308066-0001, 08-0674019-0001, 09-0216695-0002, 09-0481801-0001 and 09-0236637-0016[26] in connection with the Donnacona Assets and 08-0163796-0002, 08-0163791-0002, 08-0695718-0002, 09-0481801-0002, 09-0256803-0016[27], 09-0256803-0002[28] and 09-0762559-0002 in connection with the Beaupré Assets and to cancel, release and discharge all of the First Closing Assets Encumbrances in order to allow the transfer to the Purchaser of the Beaupré Assets and the Donnacona Assets, as described in the Purchase Agreement, free and clear of any and all encumbrances created by those hypothecs;

[8] **ORDERS** that upon registration in the Land Registry Office for the Registry Division of Restigouche County of an Application for Vesting Order in the form prescribed by the *Registry Act* (New Brunswick) duly executed by the Monitor, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in **Schedule "H"** hereto (the "**Dalhousie Assets**") in fee simple, and is hereby directed to delete and expunge from title to the Dalhousie Assets any and all First Closing Assets Encumbrances on the Dalhousie Assets;

[9] **ORDERS** that upon the filing of the First Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Dalhousie Assets, including filing such financing change statements in the New Brunswick Personal Property Registry (the "**NBPPR**") as may be necessary, from any registration filed against the Vendors in the NBPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Dalhousie Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

[10] **ORDERS** that upon registration in the Land Registry Office:

[26] Assigned to Law Debenture Trust Company of New York registered under number 09-0288002-0001.
[27] Assigned to U.S. Bank National Association and Wells Fargo Bank, N.A. under number 10-0018318-0001.
[28] *Ibid.*

(a) for the Land Titles Division of Thunder Bay of an Application for Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor’s Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in **Schedule** "**I**", **Section 1** (the "**Fort William Land Titles Assets**") hereto in fee simple, and is hereby directed to delete and expunge from title to the Fort William Land Titles Assets all of the Fort William Assets Encumbrances, which for the sake of clarity do not include the Permitted Fort William Land Titles Assets Encumbrances listed on Schedule G, Section 1, hereto;

(b) for the Registry Division of Thunder Bay of a Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor’s Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to record such Vesting Order in respect of the subject real property identified in **Schedule** "**I**", **Section 2** (the "**Fort William Registry Assets**");

[11] **ORDERS** that upon the filing of the Second Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Fort William Assets, including filing such financing change statements in the Ontario Personal Property Registry ("**OPPR**") as may be necessary, from any registration filed against the Vendors in the OPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Fort William Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

[12] **ORDERS** that the proceeds from the sale of the First Closing Assets and the Fort William Assets, net of the payment of all outstanding Taxes (as defined in the Purchase Agreement) and all transaction-related costs, including without limitation, attorney's fees (the "**Net Proceeds**") shall be remitted to Ernst & Young Inc., in its capacity as Monitor of the Petitioners, until the issuance of directions by this Court with respect to the allocation of said Net Proceeds;

[13] **ORDERS** that for the purposes of determining the nature and priority of the First Closing Assets Encumbrances, the Net Proceeds from the sale of the First Closing Assets shall stand in the place and stead of the First Closing Assets, and that upon payment of the First Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all First Closing Assets Encumbrances except those listed in Schedule E hereto shall attach to the Net Proceeds with the same priority as they had with respect to the First Closing Assets immediately prior to the sale, as if the First Closing Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

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[14] **ORDERS** that for the purposes of determining the nature and priority of the Fort William Assets Encumbrances, the Net Proceeds from the sale of the Fort William Assets shall stand in the place and stead of the Fort William Assets, and that upon payment of the Second Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all Fort William Assets Encumbrances except those listed in Schedule G hereto shall attach to the Net Proceeds with the same priority as they had with respect to the Fort William Assets immediately prior to the sale, as if the Fort William Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

[15] **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

(ii) any petitions 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

(iii) the provisions of any federal or provincial legislation;

the vesting of the First Closing Assets and the Fort William Assets contemplated in this Vesting Order, as well as the execution of the Purchase Agreement pursuant to this Vesting 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 settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it give rise to an oppression or any other remedy;

[16] **ORDERS AND DECLARES** that the Sale Transactions are exempt from the application of the *Bulk Sales Act* (Ontario);

[17] **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order, including without limitation, the United States Bankruptcy Court for the District of Delaware, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order;

[18] **ORDERS** the provisional execution of this Vesting Order notwithstanding any appeal and without the necessity of furnishing any security;

[19] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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Date of hearing: April 26, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

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1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**
20. **ABITIBI-CONSOLIDATED (U.K.) INC.**

SCHEDULE "B"

BOWATER PETITIONERS

1. **BOWATER CANADIAN HOLDINGS INC.**
2. **BOWATER CANADA FINANCE CORPORATION**
3. **BOWATER CANADIAN LIMITED**
4. **3231378 NOVA SCOTIA COMPANY**
5. **ABITIBIBOWATER CANADA INC.**
6. **BOWATER CANADA TREASURY CORPORATION**
7. **BOWATER CANADIAN FOREST PRODUCTS INC.**
8. **BOWATER SHELBURNE CORPORATION**
9. **BOWATER LAHAVE CORPORATION**
10. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
11. **BOWATER TREATED WOOD INC.**
12. **CANEXEL HARDBOARD INC.**
13. **9068-9050 QUÉBEC INC.**
14. **ALLIANCE FOREST PRODUCTS (2001) INC.**
15. **BOWATER BELLEDUNE SAWMILL INC.**
16. **BOWATER MARITIMES INC.**
17. **BOWATER MITIS INC.**
18. **BOWATER GUÉRETTE INC.**
19. **BOWATER COUTURIER INC.**

2010 QCCS 1742 (CanLII)

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**

2010 QCCS 1742 (CanLII)

SCHEDULE "D"

FIRST CLOSING MONITOR'S CERTIFICATE

2010 QCCS 1742 (CanLII)

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries

thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

2010 QCCS 1742 (CanLII)

WHEREAS pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "**Monitor**") was named monitor of, *inter alia*, the Abitibi Petitioners; and

WHEREAS on ●, 2010, the Court issued an Order (the "**Closed Mills Vesting Order**") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("**ACCC**"), Bowater Maritimes Inc. ("**BMI**") and Bowater Canadian Forest Products Inc. ("**BCFPI**" and together with ACCC and BMI, the "**Vendors**") of an agreement entitled *Purchase and Sale Agreement* (the "**Purchase Agreement**") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "**Purchaser**") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "**Sale Transactions**") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

WHEREAS the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

THE MONITOR CERTIFIES THAT IT HAS BEEN ADVISED BY THE VENDORS AND THE PURCHASER AS TO THE FOLLOWING:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the First Closing Purchase Price payable upon the First Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the First Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

---

[1] The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

[2] The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

[3] The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

This Certificate was delivered by the Monitor at ____ **[TIME]** on ____________ **[DATE].**

Ernst & Young Inc. in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

Name: ____

Title: ____

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2010 QCCS 1742 (CanLII)

2010 QCCS 1742 (CanLII)

SCHEDULE "E"

PERMITTED FIRST CLOSING ASSETS ENCUMBRANCES

1. Beaupré Mill

   a. Servitudes dated February 10, 1954 registered under numbers 34 173, 34 174, 34 175, 34 176, 34 177, 34 178, 34 179, 34 180 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

   b. Servitude dated April 4, 1964 registered under number 45 815 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

   c. Servitudes dated December 17, 1980 registered under numbers 83 049, 83 050, 83 051, 83 052 and 83 053 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   d. Servitudes dated December 18, 1980 registered under number 83 095, 83 096 and 83 097 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   e. Servitude dated December 23, 1980 registered under number 83 121 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   f. Servitudes dated December 24, 1980 registered under numbers 83 140, 83 141, 83 142, 83 143, 83 144, 83 145, 83 146 and 83 147 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   g. Servitude dated December 30, 1980 registered under number 83 182 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   h. Servitudes dated January 7, 1981 registered under numbers 83 196, 83 197, 83 198 and 83 199 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   i. Servitudes dated January 9, 1981 registered under numbers 83 215 and 83 216 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

   j. Servitude dated March 20, 1981 registered under number 83 751 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

k. Servitude dated June 22, 1981 registered under number 84 426 in the index of immovables with respect to lot 3 682 466 in the Registration Division of Montmorency, Cadastre of Québec;

l. Servitude dated November 13, 1981 registered under number 85 429 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

m. Servitude dated December 4, 1981 registered under number 85 555 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

n. Servitude dated December 9, 1981 registered under number 85 567 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

o. Servitude dated December 14, 1981 registered under number 85 602 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

p. Servitude dated December 16, 1981 registered under number 85 617 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

q. Servitude dated December 7, 1982 registered under number 87 882 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

r. Servitude dated December 20, 1982 registered under number 88 007 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

s. Servitude dated March 23, 1983 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

t. Servitude dated September 9, 1983 registered under number 90 365 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

u. Servitude dated April 25, 1985 registered under number 91 154 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

v. Servitude dated July 7, 1986 registered under number 98 833 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

2010 QCCS 1742 (CanLII)

w. Servitude dated September 8, 1986 registered under number 99 187 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

x. Servitude dated December 23, 1997 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

y. Servitude dated December 23, 1997 registered under number 134 993 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec;

z. Servitude dated December 23, 1997 registered under number 134 994 in the index of immovables with respect to lot 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec; and

aa. Servitude dated July 25, 2000 registered under number 141 246 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec.

2. Dalhousie Mill

None

3. Donnacona Mill

a. Servitude dated November 12, 1920 registered under number 68 747 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

b. Servitude dated October 26, 1931 registered under number 80007 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

c. Servitude dated May 11, 1933 registered under number 87 789 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

d. Servitude dated April 10, 1946 registered under number 109891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

e. Servitude dated October 6, 1951 registered under number 125685 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

f. Servitude dated February 16, 1961 registered under number 154 517 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

2010 QCCS 1742 (CanLII)

g. Servitude dated February 1, 1983 registered under number 272521 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

h. Servitude dated April 14, 1986 registered under number 293891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

i. Servitudes dated March 25, 1987 registered under numbers 301930, 301931 and 302028 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

j. Servitude dated October 30, 1990 registered under number 333377 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

k. Servitude dated April 19, 1996 registered under number 476330 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

l. Servitude dated April 19, 1996 registered under number 476331 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec; and

m. Servitude dated May 20, 2003 registered under number 10 410 139 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec.

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2010 QCCS 1742 (CanLII)

SCHEDULE "F"

SECOND CLOSING MONITOR'S CERTIFICATE

2010 QCCS 1742 (CanLII)

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries

thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

2010 QCCS 1742 (CanLII)

WHEREAS pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "**Monitor**") was named monitor of, *inter alia*, the Abitibi Petitioners; and

WHEREAS on ●, 2010, the Court issued an Order (the "**Closed Mills Vesting Order**") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("**ACCC**"), Bowater Maritimes Inc. ("**BMI**") and Bowater Canadian Forest Products Inc. ("**BCFPI**" and together with ACCC and BMI, the "**Vendors**") of an agreement entitled *Purchase and Sale Agreement* (the "**Purchase Agreement**") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "**Purchaser**") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "**Sale Transactions**") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

WHEREAS the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

THE MONITOR CERTIFIES THAT IT HAS BEEN ADVISED BY THE VENDORS AND THE PURCHASER AS TO THE FOLLOWING:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the Second Closing Purchase Price payable upon the Second Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the Second Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

---

[1] The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

[2] The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

[3] The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

This Certificate was delivered by the Monitor at ____ **[TIME]** on ____________ **[DATE].**

Ernst & Young Inc. in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

Name: ____

Title: ____

2010 QCCS 1742 (CanLII)

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2010 QCCS 1742 (CanLII)

SCHEDULE "G"

PERMITTED FORT WILLIAM ASSETS ENCUMBRANCES

Section 1 Permitted Fort William Land Titles Assets Encumbrances

1. Notification Agreement in favour of the City of Thunder Bay, registered on PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2, 3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

2. Water Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027, being Part 10, 55R-13027

Section 2 Permitted Fort William Registry Assets Encumbrances

3. Notification Agreement in favour of the City of Thunder Bay, Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

4. Telephone Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Part 20, 55R-13027

5. Water Easement in favour of the City of Thunder Bay, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 12 and 15, 55R-13027

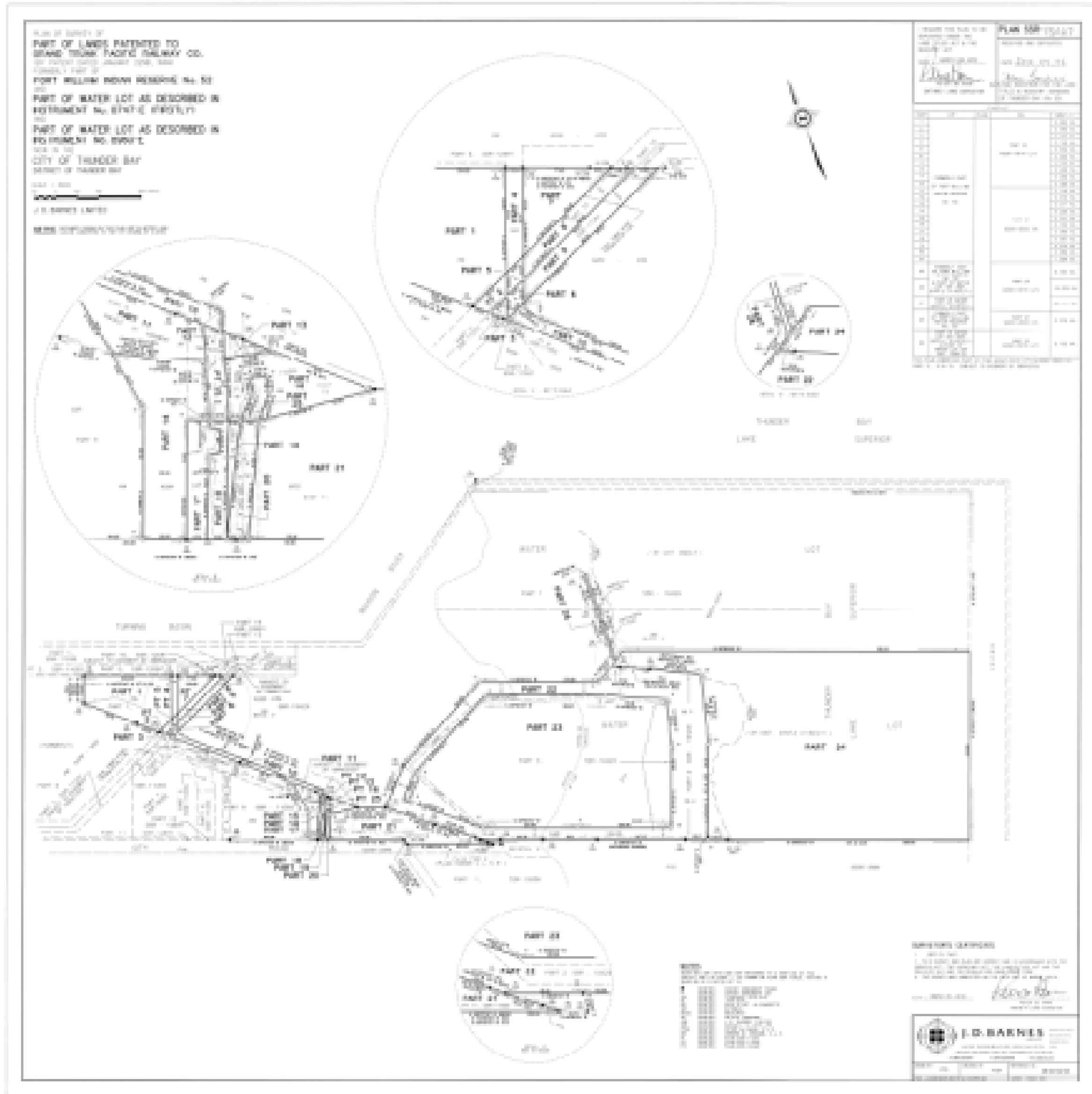
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

7. Agreement registered as Instrument #403730 on July 14, 1999

8. Easement registered as Instrument #403729 on July 14, 1999

The said registered reference plan 55R13027 is attached as Annex A to this Schedule G (the **“Reference Plan”**).

Annex A



2010 QCCS 1742 (CanLII)

SCHEDULE "H"

DALHOUSIE ASSETS

2010 QCCS 1742 (CanLII)

Municipal address:

451 William St., Dalhousie, New Brunswick, Canada, E8C 2X9

Legal description (Property Identifier No.):

50173616, 50172030, 50173715, 50172667, 50172634, 50173574, 50173582, 50173590, 50172626, 50173640, 50173624, 50173632, 50173657, 50173681, 50173673, 50173665, 50173749, 50173756, 50173764, 50105394, 50251354, 50172774, 50173566, 50173707

SAVE AND EXCEPT FOR

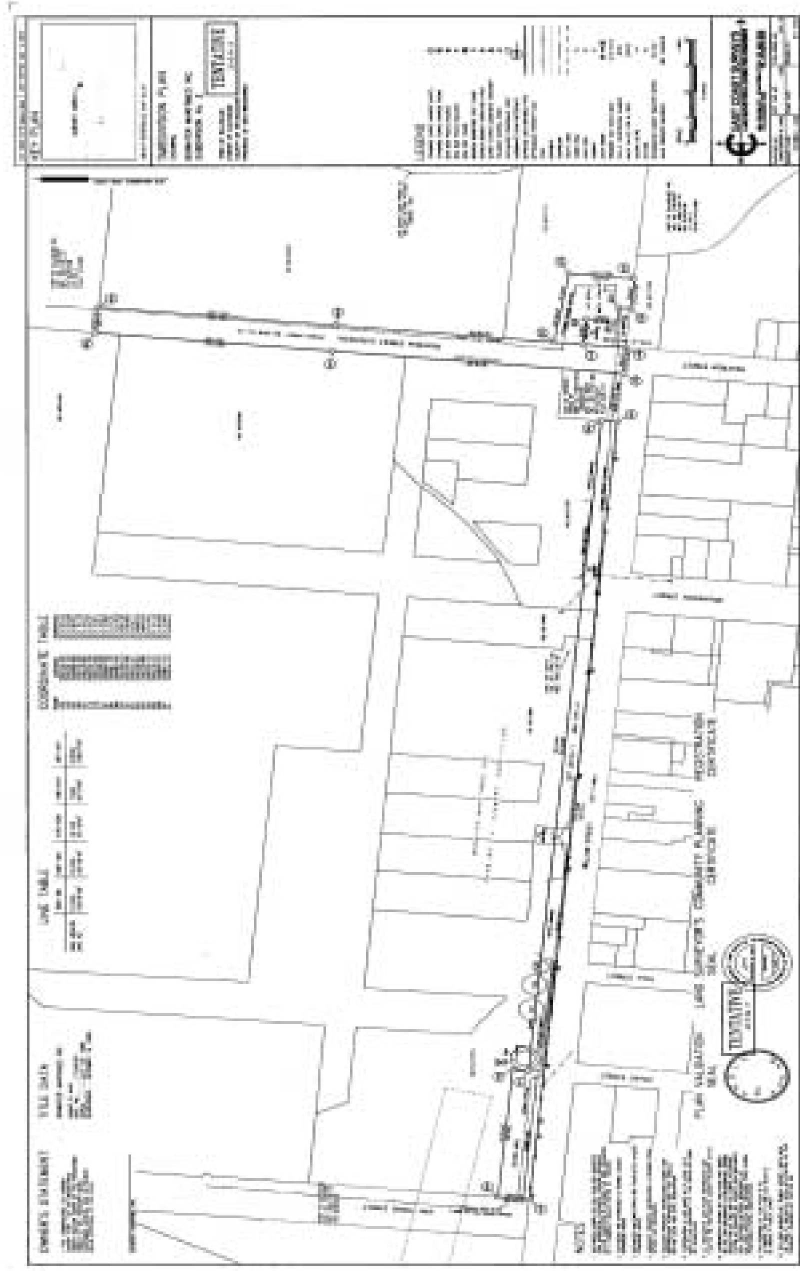
The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "**Dalhousie Plan**").

For greater certainty, the following property is not included in the sale:

Legal description (Property Identifier No.): 50191857, 50191865, 50191881, 50191873, 50191899, 50191915, 50191931, 50192384, 50192400, 50068832, 50193002, 50192996, 50192988, 50192970, 50192418, 50260538, 50260520, 50260512, 50072131, 50340959, 50340942, 50340934, 50340926, 50340918, 50340900, 50340892, 50340884, 50340645, 50340637, 50340629, 50340611, 50339779, 50192392, 50191949, 50191923, 50191907, 50172949, 50172931, 50172907, 50056506, 50241611, 50172899, 50172881, 50172873, 50172865, 50172857, 50172840, 50172832, 50172824, 50172444, 50171966, 50171958, 50173699, 50104553, 50173731, 50172923, 50172915.

Annex A

Dalhousie Plan



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2010 QCCS 1742 (CanLII)

SCHEDULE "I"

FORT WILLIAM ASSETS

2010 QCCS 1742 (CanLII)

Municipal address:

1735 City Road, Thunder Bay, Ontario, Canada, P7B 6T7

Legal description:

Section 1 Fort William Land Titles Assets

PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2 ,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

Section 2 Fort William Registry Assets

Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

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TAB T

2009 CarswellOnt 7169
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7169, 183 A.C.W.S. (3d) 325

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: November 12, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Jeremy Dacks for Applicants

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

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

Whether proposal subject to s. 36 of Companies' Creditors Arrangement Act — C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants) were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Transfer of N Co. was not subject to requirements of s. 36 of Act — Section 36 applied to N Co. despite fact that it was general partnership and was therefore not "debtor company" as defined by Act — However, s. 36 was inapplicable in specific circumstances of case at bar — Businesses of N Co. and applicants were highly integrated and this business structure predated applicants' insolvency — TRA was internal reorganization transaction designed to realign shared services and assets — TRA provided framework for applicants and LP entities to restructure their inter-entity arrangements for benefit of their respective stakeholders — It would be commercially unreasonable to require third party sale of N Co. under s. 36 of Act before permitting realignment of shared services agreements.

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

C Inc. owned various businesses including newspaper publisher, N Co. — In 2005, as part of income trust spin off, Limited Partnership (LP) was formed to acquire certain C Inc. businesses — N Co. was excluded from spin off — Despite spin off, C Inc. and LP entered agreements to share certain services (shared services agreements) — In 2007, LP became wholly

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owned indirect subsidiary of C Inc. — In 2009, N Co. and certain other C Inc. entities (applicants) were granted protection under Companies' Creditors Arrangement Act (Act) — LP did not seek protection but negotiated forbearance agreement with its lenders — Both applicants' recapitalization transaction as well as LP's forbearance agreement contemplated restructuring that involved disentanglement of shared services and transfer of N Co. to LP — Applicants and LP entered into Transition and Reorganization Agreement (TRA), which addressed such restructuring — Applicants brought motion for order approving TRA — Motion granted — Proposed transfer of N Co. facilitated restructuring and was fair — Recapitalization transaction was designed to restructure C Inc. into viable industry participant — This preserved value for stakeholders and maintained employment for as many of applicants' employees as possible — TRA was entered into after extensive negotiation and consultation among applicants, LP and their respective financial, legal advisers and restructuring advisers — There was no prejudice to applicants' major creditors of the CMI entities — Monitor supported TRA as being in best interests of broad range of stakeholders — In absence of TRA, it was likely that N Co. would be required to shut down and lay off most or all its employees — Under TRA, all N Co. employees would be offered employment and it pension obligations and liabilities would be assumed — No third party expressed any interest in acquiring N Co.

Table of Authorities

Cases considered by *Pepall J.*:

Millgate Financial Corp. v. BCED Holdings Ltd. (2003), 2003 CarswellOnt 5547, 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) — considered

Pacific Mobile Corp., Re (1985), 1985 CarswellQue 106, [1985] 1 S.C.R. 290, 55 C.B.R. (N.S.) 32, 16 D.L.R. (4th) 319, 57 N.R. 63, 1985 CarswellQue 30 (S.C.C.) — considered

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

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "company" — referred to

s. 2(1) "debtor company" — referred to

s. 36 — considered

s. 36(1) — considered

s. 36(4) — considered

s. 36(7) — considered

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Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

APPLICATION by corporations under protection of *Companies' Creditors Arrangement Act* for order approving Transition and Reorganization Agreement.

***Pepall J.*:**

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/ La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Backround Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act ("CCAA")* protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

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- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;

- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and

- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of $9.3 million in fiscal year ending August 31, 2009 and a net loss of $0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately $139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit

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pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of $1.5 million and a wind up deficiency of $1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- $187.3 million

CIT Secured Facility- $10.7 million

CMI Senior Unsecured Subordinated Notes- US$393.2 million

Irish Holdco Unsecured Note- $430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately $139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately $1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) $2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of $1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds $6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately $14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from

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a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

• it facilitates the reorganizaton and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;

• it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;

• it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and

• the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

(a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;

(b) the Transition and Reorganization Agreement should be approved by the Court; and

(c) the stay should be extended to January 22, 2010.

Discussion

(A) Section 36 of the CCAA

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

(a) a debtor company under CCAA protection

(b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act [1] is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

(1) Restriction on disposition of business assets - 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.

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(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) Factors to be considered - 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.

(4) Additional factors — related persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) Related persons - For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) Assets may be disposed of free and clear - 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.

(7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement. [2]

29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the

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National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book [3] on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse." [4]

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act* [5] . As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.* [6] , authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act* [7] , courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller [8] . In *Pacific Mobile Corp., Re* [9] , the Supreme Court of Canada stated:

> It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.
>
> We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"...
>
> 'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4),which deals with dispositions of assets to a related party, was intended to:

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid. [10]

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.* [11] ., a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

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36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Stelco Inc., Re* [12] Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

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41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Application granted.

Footnotes

1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

2 The reference to paragraph 6(4)a should presumably be 6(6)a.

3 Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".

4 Ibid.

5 R.S.C. 1985, c.C-36 as amended.

6 (2003), 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) at para.52.

7 R.S.O. 1990, c. B. 14, as amended.

8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290 (S.C.C.).

10 Supra, note 3.

11 Supra, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

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TAB U

CITATION: Re Nortel Networks Corporation et al, 2014 ONSC 4777
COURT FILE NO.: 09-CL-7950
DATE: 20140819

2014 ONSC 4777 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

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

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett* and *Graham Smith*, for the Monitor and Canadian Debtors

Ken Rosenberg, for the Canadian Creditors' Committee

Michael Barrack, D.J. Miller and *Michael Shakra,* for the UK Pension Claimants

Tracy Wynne, for EMEA Debtors

Kenneth Kraft, for the Wilmington Trust, National Association

Richard Swan, Gavin Finlayson and *Kevin Zych,* for the Ad Hoc Group of Bondholders

Shayne Kukulowicz, for the US Unsecured Creditors' Committee

John D. Marshall, for Law Debenture Trust Company of New York

Brett Harrison, for Bank of New York Mellon

Andrew Gray and *Scott Bomhof,* for the US Debtors

HEARD: July 25, 2014

ENDORSEMENT

2014 ONSC 4777 (CanLII)

[1] Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

[2] Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

[3] The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the

insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

[4] The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

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[5] By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and the US Unsecured Creditors Committee.

[7] The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of

CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

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[8] For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

[9] In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

[10] The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

[11] The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodea*u (C.A.), 104 O.R. (3d) 161, at para. 43. However, the question remains as to whether their contractual rights should prevail.

[12] It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.) at para. 25, per Blair J.A. and *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.), at para. 16 per Morawetz J. This common law principle

has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, (Ont. S.C.), Blair J. (as he then was) stated the following:

> **20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:
>
> > I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

[13] This rule is "judge-made" law. See *In re Humber Ironworks and Shipbuilding Company* (1869), L.R. 4 Ch. App. 643 at 647, per Sir G. M. Giffard, L.J.

[14] In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

> 25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks, supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

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[15] The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust,* Blair J.A. stated:

> 26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

[16] In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Re Savin,* quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

> 19. … I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

[17] In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

> **22** This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view….
>
> **23** Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

[18] Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

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[19] When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

[20] The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

[21] In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In *Re Nortel Networks Corp.*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

[22] In *re Lehndorff General Partners Ltd*. (1993), 17 C.B.R. (3d) 24 (Ont. S.C.), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

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> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company … provided the same is proposed in the best interests of the creditors generally.

[23] It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

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Can the interest stops rule apply in a CCAA proceeding?

[24] There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

[25] The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

> I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[26] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 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.

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[27] If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

[28] It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing dealing with the property of insolvent companies. See *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (C.A.), at paras. 62 and 64, per Laskin J.A.

[29] Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

[30] In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

[31] In her analysis, Deschamps J. made a number of statements, including

> Because the CCAA is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. (para. 23)
>
> 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. (para. 24)
>
> 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. (para. 47)
>
> 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… (para. 54)
>
> The CCAA and BIA 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. (para. 78)

[32] In *Re Indalex*, [2013] S.C.R. 271, a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in Century Services in para 23 referred to above. She then stated:

> In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

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[33] Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

[34] There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

[35] In my view, there is no need for there to be a "liquidating" CCCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

[36] The bondholders contend, however, that *Re Stelco Inc*., 2007 ONCA 483, 32 C.B.R. (4th) 77 is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class

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and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

[37] The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

[38] Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

[39] In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, [*NAV Canada*]. A number of comments can be made.

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[40] First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada.*

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[41] In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

[42] Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

[43] In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft

could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

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[44] At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

> **96** Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

[45] The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

[46] There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing

interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

[47] In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US$1.6 billion out of a total world-wide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

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Need for a CCAA plan

[48] The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

[49] One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

[50] However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

[51] In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

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[52] It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

[53] I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

[54] A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **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).
>
> **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. (underlining added)

[55] I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Limited (Re)*, 2014 ONSC 3393, Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

[56] In *AbitibiBowater Inc., (Re)*, 2009 QCCS 6461, Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite

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> majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
>
> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[57] Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

[58] Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

[59] There is a comment by Laskin J.A. in *Ivaco Inc., (Re)* (2006), 83 O.R. (3d) 108 (C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

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> [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

[60] This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon , distribution orders without a plan are common in Canada.

[61] While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

[62] I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

[63] Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

____

Newbould J.

2014 ONSC 4777 (CanLII)

Date: August 19, 2014

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TAB V

2012 ONSC 3767
Ontario Superior Court of Justice [Commercial List]

Cinram International Inc., Re

2012 CarswellOnt 8413, 2012 ONSC 3767, 217 A.C.W.S. (3d) 11, 91 C.B.R. (5th) 46

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

And In the Matter of a Plan of Compromise or Arrangement of Cinram International Inc., Cinram International Income Fund, CII Trust and The Companies Listed in Schedule "A" (Applicants)

Morawetz J.

Heard: June 25, 2012
Judgment: June 26, 2012
Docket: CV-12-9767-00CL

Counsel: Robert J. Chadwick, Melaney Wagner, Caroline Descours for Applicants
Steven Golick for Warner Electra-Atlantic Corp.
Steven Weisz for Pre-Petition First Lien Agent, Pre-Petition Second Lien Agent and DIP Agent
Tracy Sandler for Twentieth Century Fox Film Corporation
David Byers for Proposed Monitor, FTI Consulting Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C group brought application seeking initial order under Act, and relief including stay of proceedings against third party non-applicant; authorization to make pre-filing payments; and approval of certain Court-ordered charges over their assets relating to their DIP Financing, administrative costs, indemnification of their trustees, directors and officers, Key Employee Retention Plan, and consent consideration — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate — Applicants spent considerable time reviewing their alternatives and did so in consultative manner with their senior secured lenders — Senior secured lenders supported application, notwithstanding that it was clear that they would suffer significant shortfall on their positions.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group brought application seeking initial order under Companies' Creditors Arrangement Act and other relief, including authorization for C International to act as foreign representative in within proceedings to seek recognition order under Chapter 15 of U.S. Bankruptcy Code on basis that Ontario, Canada was Centre of Main Interest (COMI) of applicants — Application granted on other grounds — It is

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function of receiving court, in this case, U.S. Bankruptcy Court for District of Delaware, to make determination on location of COMI and to determine whether present proceeding is foreign main proceeding for purposes of Chapter 15.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous

Stay against third party non-applicant — C group of companies was replicator and distributor of CDs and DVDs with operational footprint across North America and Europe — C group experienced significant declines in revenue and EBITDA, and had insufficient funds to meet their immediate cash requirements as result of liquidity challenges — C group sought protection of Companies' Creditors Arrangement Act — C LP was not applicant in proceedings; however, C LP formed part of C group's income trust structure with C Fund, ultimate parent of C group — C group brought application seeking initial order under Act, including stay of proceedings against C LP — Application granted — Applicants met all qualifications established for relief under Act — Charges referenced in initial order were approved — Relief requested in initial order was extensive and went beyond what court usually considers on initial hearing; however, in circumstances, requested relief was appropriate.

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Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 36, 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — considered

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

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.) — referred to

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Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) — referred to

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s. 2 "insolvent person" — considered

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

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s. 2(1) "company" — considered

s. 2(1) "debtor company" — considered

s. 3(1) — considered

s. 3(2) — considered

s. 11 — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 1997, c. 12, s. 124] — considered

s. 11.2(2) [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 1997, c. 12, s. 124] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

s. 11.51 [en. 2005, c. 47, s. 128] — considered

s. 11.52 [en. 2005, c. 47, s. 128] — considered

APPLICATION by group of debtor companies for initial order and other relief under *Companies' Creditors Arrangement Act*.

***Morawetz J.*:**

1 Cinram International Inc. ("CII"), Cinram International Income Fund ("Cinram Fund"), CII Trust and the Companies listed in Schedule "A" (collectively, the "Applicants") brought this application seeking an initial order (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). The Applicants also request that the court exercise its jurisdiction to extend a stay of proceedings and other benefits under the Initial Order to Cinram International Limited Partnership ("Cinram LP", collectively with the Applicants, the "CCAA Parties").

2 Cinram Fund, together with its direct and indirect subsidiaries (collectively, "Cinram" or the "Cinram Group") is a replicator and distributor of CDs and DVDs. Cinram has a diversified operational footprint across North America and Europe that enables it to meet the replication and logistics demands of its customers.

3 The evidentiary record establishes that Cinram has experienced significant declines in revenue and EBITDA, which, according to Cinram, are a result of the economic downturn in Cinram's primary markets of North America and Europe, which impacted consumers' discretionary spending and adversely affected the entire industry.

4 Cinram advises that over the past several years it has continued to evaluate its strategic alternatives and rationalize its operating footprint in order to attempt to balance its ongoing operations and financial challenges with its existing debt levels. However, despite cost reductions and recapitalized initiatives and the implementation of a variety of restructuring alternatives, the Cinram Group has experienced a number of challenges that has led to it seeking protection under the CCAA.

5 Counsel to Cinram outlined the principal objectives of these CCAA proceedings as:

(i) to ensure the ongoing operations of the Cinram Group;

(ii) to ensure the CCAA Parties have the necessary availability of working capital funds to maximize the ongoing business of the Cinram Group for the benefit of its stakeholders; and

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(iii) to complete the sale and transfer of substantially all of the Cinram Group's business as a going concern (the "Proposed Transaction").

6 Cinram contemplates that these CCAA proceedings will be the primary court supervised restructuring of the CCAA Parties. Cinram has operations in the United States and certain of the Applicants are incorporated under the laws of the United States. Cinram, however, takes the position that Canada is the nerve centre of the Cinram Group.

7 The Applicants also seek authorization for Cinram International ULC ("Cinram ULC") to act as "foreign representative" in the within proceedings to seek a recognition order under Chapter 15 of the United States Bankruptcy Code ("Chapter 15"). Cinram advises that the proceedings under Chapter 15 are intended to ensure that the CCAA Parties are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction to be undertaken pursuant to these CCAA proceedings.

8 Counsel to the Applicants submits that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Cinram is one of the world's largest providers of pre-recorded multi-media products and related logistics services. It has facilities in North America and Europe, and it:

(i) manufactures DVDs, blue ray disks and CDs, and provides distribution services for motion picture studios, music labels, video game publishers, computer software companies, telecommunication companies and retailers around the world;

(ii) provides various digital media services through One K Studios, LLC; and

(iii) provides retail inventory control and forecasting services through Cinram Retail Services LLC (collectively, the "Cinram Business").

9 Cinram contemplates that the Proposed Transaction could allow it to restore itself as a market leader in the industry. Cinram takes the position that it requires CCAA protection to provide stability to its operations and to complete the Proposed Transaction.

10 The Proposed Transaction has the support of the lenders forming the steering committee with respect to Cinram's First Lien Credit Facilities (the "Steering Committee"), the members of which have been subject to confidentiality agreements and represent 40% of the loans under Cinram's First Lien Credit Facilities (the "Initial Consenting Lenders"). Cinram also anticipates further support of the Proposed Transaction from additional lenders under its credit facilities following the public announcement of the Proposed Transaction.

11 Cinram Fund is the direct or indirect parent and sole shareholder of all of the subsidiaries in Cinram's corporate structure. A simplified corporate structure of the Cinram Group showing all of the CCAA Parties, including the designation of the CCAA Parties' business segments and certain non-filing entities, is set out in the Pre-Filing Report of FTI Consulting Inc. (the "Monitor") at paragraph 13. A copy is attached as Schedule "B".

12 Cinram Fund, CII, Cinram International General Partner Inc. ("Cinram GP"), CII Trust, Cinram ULC and 1362806 Ontario Limited are the Canadian entities in the Cinram Group that are Applicants in these proceedings (collectively, the "Canadian Applicants"). Cinram Fund and CII Trust are both open-ended limited purpose trusts, established under the laws of Ontario, and each of the remaining Canadian Applicants is incorporated pursuant to Federal or Provincial legislation.

13 Cinram (US) Holdings Inc. ("CUSH"), Cinram Inc., IHC Corporation ("IHC"), Cinram Manufacturing, LLC ("Cinram Manufacturing"), Cinram Distribution, LLC ("Cinram Distribution"), Cinram Wireless, LLC ("Cinram Wireless"), Cinram Retail Services, LLC ("Cinram Retail") and One K Studios, LLC ("One K") are the U.S. entities in the Cinram Group that are Applicants in these proceedings (collectively, the "U.S. Applicants"). Each of the U.S. Applicants is incorporated under the

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laws of Delaware, with the exception of One K, which is incorporated under the laws of California. On May 25, 2012, each of the U.S. Applicants opened a new Canadian-based bank account with J.P. Morgan.

14 Cinram LP is not an Applicant in these proceedings. However, the Applicants seek to have a stay of proceedings and other relief under the CCAA extended to Cinram LP as it forms part of Cinram's income trust structure with Cinram Fund, the ultimate parent of the Cinram Group.

15 Cinram's European entities are not part of these proceedings and it is not intended that any insolvency proceedings will be commenced with respect to Cinram's European entities, except for Cinram Optical Discs SAC, which has commenced insolvency proceedings in France.

16 The Cinram Group's principal source of long-term debt is the senior secured credit facilities provided under credit agreements known as the "First-Lien Credit Agreement" and the "Second-Lien Credit Agreement" (together with the First-Lien Credit Agreement, the "Credit Agreements").

17 All of the CCAA Parties, with the exception of Cinram Fund, Cinram GP, CII Trust and Cinram LP (collectively, the "Fund Entities"), are borrowers and/or guarantors under the Credit Agreements. The obligations under the Credit Agreements are secured by substantially all of the assets of the Applicants and certain of their European subsidiaries.

18 As at March 31, 2012, there was approximately $233 million outstanding under the First-Lien Term Loan Facility; $19 million outstanding under the First-Lien Revolving Credit Facilities; approximately $12 million of letter of credit exposure under the First-Lien Credit Agreement; and approximately $12 million outstanding under the Second-Lien Credit Agreement.

19 Cinram advises that in light of the financial circumstances of the Cinram Group, it is not possible to obtain additional financing that could be used to repay the amounts owing under the Credit Agreements.

20 Mr. John Bell, Chief Financial Officer of CII, stated in his affidavit that in connection with certain defaults under the Credit Agreements, a series of waivers was extended from December 2011 to June 30, 2012 and that upon expiry of the waivers, the lenders have the ability to demand immediate repayment of the outstanding amounts under the Credit Agreements and the borrowers and the other Applicants that are guarantors under the Credit Agreements would be unable to meet their debt obligations. Mr. Bell further stated that there is no reasonable expectation that Cinram would be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012, fiscal 2013, and fiscal 2014. The cash flow forecast attached to his affidavit indicates that, without additional funding, the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

21 The Applicants request a stay of proceedings. They take the position that in light of their financial circumstances, there could be a vast and significant erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks, which, because of the integration of the Cinram business, also apply to the Applicants' subsidiaries, including Cinram LP:

(a) the lenders demanding payment in full for money owing under the Credit Agreements;

(b) potential termination of contracts by key suppliers; and

(c) potential termination of contracts by customers.

22 As indicated in the cash flow forecast, the Applicants do not have sufficient funds available to meet their immediate cash requirements as a result of their current liquidity challenges. Mr. Bell states in his affidavit that the Applicants require access to Debtor-In-Possession ("DIP") Financing in the amount of $15 millions to continue operations while they implement their restructuring, including the Proposed Transaction. Cinram has negotiated a DIP Credit Agreement with the lenders forming the Steering Committee (the "DIP Lenders") through J.P. Morgan Chase Bank, NA as Administrative Agent (the "DIP Agent") whereby the DIP Lenders agree to provide the DIP Financing in the form of a term loan in the amount of $15 million.

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23 The Applicants also indicate that during the course of the CCAA proceedings, the CCAA Parties intend to generally make payments to ensure their ongoing business operations for the benefit of their stakeholders, including obligations incurred prior to, on, or after the commencement of these proceedings relating to:

(a) the active employment of employees in the ordinary course;

(b) suppliers and service providers the CCAA Parties and the Monitor have determined to be critical to the continued operation of the Cinram business;

(c) certain customer programs in place pursuant to existing contracts or arrangements with customers; and

(d) inter-company payments among the CCAA Parties in respect of, among other things, shared services.

24 Mr. Bell states that the ability to make these payments relating to critical suppliers and customer programs is subject to a consultation and approval process agreed to among the Monitor, the DIP Agent and the CCAA Parties.

25 The Applicants also request an Administration Charge for the benefit of the Monitor and Moelis and Company, LLC ("Moelis"), an investment bank engaged to assist Cinram in a comprehensive and thorough review of its strategic alternatives.

26 In addition, the directors (and in the case of Cinram Fund and CII Trust, the Trustees, referred to collectively with the directors as the "Directors/Trustees") requested a Director's Charge to provide certainty with respect to potential personal liability if they continue in their current capacities. Mr. Bell states that in order to complete a successful restructuring, including the Proposed Transaction, the Applicants require the active and committed involvement of their Directors/Trustees and officers. Further, Cinram's insurers have advised that if Cinram was to file for CCAA protection, and the insurers agreed to renew the existing D&O policies, there would be a significant increase in the premium for that insurance.

27 Cinram has also developed a key employee retention program (the "KERP") with the principal purpose of providing an incentive for eligible employees, including eligible officers, to remain with the Cinram Group despite its financial difficulties. The KERP has been reviewed and approved by the Board of Trustees of the Cinram Fund. The KERP includes retention payments (the "KERP Retention Payments") to certain existing employees, including certain officers employed at Canadian and U.S. Entities, who are critical to the preservation of Cinram's enterprise value.

28 Cinram also advises that on June 22, 2012, Cinram Fund, the borrowers under the Credit Agreements, and the Initial Consenting Lenders entered into a support agreement pursuant to which the Initial Consenting Lenders agreed to support the Proposed Transaction to be pursued through these CCAA proceedings (the "Support Agreement").

29 Pursuant to the Support Agreement, lenders under the First-Lien Credit Agreement who execute the Support Agreement or Consent Agreement prior to July 10, 2012 (the "Consent Date") are entitled to receive consent consideration (the "Early Consent Consideration") equal to 4% of the principal amount of loans under the First-Lien Credit Agreement held by such consenting lenders as of the Consent Date, payable in cash from the net sale proceeds of the Proposed Transaction upon distribution of such proceeds in the CCAA proceedings.

30 Mr. Bell states that it is contemplated that the CCAA proceedings will be the primary court-supervised restructuring of the CCAA Parties. He states that the CCAA Parties are part of a consolidated business in Canada, the United States and Europe that is headquartered in Canada and operationally and functionally integrated in many significant respects. Mr. Bell further states that although Cinram has operations in the United States, and certain of the Applicants are incorporated under the laws of the United States, it is Ontario that is Cinram's home jurisdiction and the nerve centre of the CCAA Parties' management, business and operations.

31 The CCAA Parties have advised that they will be seeking a recognition order under Chapter 15 to ensure that they are protected from creditor actions in the United States and to assist with the global implementation of the Proposed Transaction. Thus, the Applicants seek authorization in the Proposed Initial Order for:

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Cinram ULC to seek recognition of these proceedings as "foreign main proceedings" and to seek such additional relief required in connection with the prosecution of any sale transaction, including the Proposed Transaction, as well as authorization for the Monitor, as a court-appointed officer, to assist the CCAA Parties with any matters relating to any of the CCAA Parties' subsidiaries and any foreign proceedings commenced in relation thereto.

32 Mr. Bell further states that the Monitor will be actively involved in assisting Cinram ULC as the foreign representative of the Applicants in the Chapter 15 proceedings and will assist in keeping this court informed of developments in the Chapter 15 proceedings.

33 The facts relating to the CCAA Parties, the Cinram business, and the requested relief are fully set out in Mr. Bell's affidavit.

34 Counsel to the Applicants filed a comprehensive factum in support of the requested relief in the Initial Order. Part III of the factum sets out the issues and the law.

35 The relief requested in the form of the Initial Order is extensive. It goes beyond what this court usually considers on an initial hearing. However, in the circumstances of this case, I have been persuaded that the requested relief is appropriate.

36 In making this determination, I have taken into account that the Applicants have spent a considerable period of time reviewing their alternatives and have done so in a consultative manner with their senior secured lenders. The senior secured lenders support this application, notwithstanding that it is clear that they will suffer a significant shortfall on their positions. It is also noted that the Early Consent Consideration will be available to lenders under the First-Lien Credit Agreement who execute the Support Agreement prior to July 10, 2012. Thus, all of these lenders will have the opportunity to participate in this arrangement.

37 As previously indicated, the Applicants' factum is comprehensive. The submissions on the law are extensive and cover all of the outstanding issues. It provides a fulsome review of the jurisprudence in the area, which for purposes of this application, I accept. For this reason, paragraphs 41-96 of the factum are attached as Schedule "C" for reference purposes.

38 The Applicants have also requested that the confidential supplement — which contains the KERP summary listing the individual KERP Payments and certain DIP Schedules — be sealed. I am satisfied that the KERP summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP and that the DIP schedules contain sensitive competitive information of the CCAA Parties which should also be treated as being confidential. Having considered the principals of *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I accept the Applicants' submission on this issue and grant the requested sealing order in respect of the confidential supplement.

39 Finally, the Applicants have advised that they intend to proceed with a Chapter 15 application on June 26, 2012 before the United States Bankruptcy Court in the District of Delaware. I am given to understand that Cinram ULC, as proposed foreign representative, will be seeking recognition of the CCAA proceedings as "foreign main proceedings" on the basis that Ontario, Canada is the Centre of Main Interest or "COMI" of the CCAA Applicants.

40 In his affidavit at paragraph 195, Mr. Bell states that the CCAA Parties are part of a consolidated business that is headquartered in Canada and operationally and functionally integrated in many significant respects and that, as a result of the following factors, the Applicants submit the COMI of the CCAA Parties is Ontario, Canada:

(a) the Cinram Group is managed on a consolidated basis out of the corporate headquarters in Toronto, Ontario, where corporate-level decision-making and corporate administrative functions are centralized;

(b) key contracts, including, among others, major customer service agreements, are negotiated at the corporate level and created in Canada;

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(c) the Chief Executive Officer and Chief Financial Officer of CII, who are also directors, trustees and/or officers of other entities in the Cinram Group, are based in Canada;

(d) meetings of the board of trustees and board of directors typically take place in Canada;

(e) pricing decisions for entities in the Cinram Group are ultimately made by the Chief Executive Officer and Chief Financial Officer in Toronto, Ontario;

(f) cash management functions for Cinram's North American entities, including the administration of Cinram's accounts receivable and accounts payable, are managed from Cinram's head office in Toronto, Ontario;

(g) although certain bookkeeping, invoicing and accounting functions are performed locally, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits are managed at a consolidated level in Toronto, Ontario;

(h) information technology, marketing, and real estate services are provided by CII at the head office in Toronto, Ontario;

(i) with the exception of routine maintenance expenditures, all capital expenditure decisions affecting the Cinram Group are managed in Toronto, Ontario;

(j) new business development initiatives are centralized and managed from Toronto, Ontario; and

(k) research and development functions for the Cinram Group are corporate-level activities centralized at Toronto, Ontario, including the Cinram Group's corporate-level research and development budget and strategy.

41 Counsel submits that the CCAA Parties are highly dependent upon the critical business functions performed on their behalf from Cinram's head office in Toronto and would not be able to function independently without significant disruptions to their operations.

42 The above comments with respect to the COMI are provided for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether this CCAA proceeding is a "foreign main proceeding" for the purposes of Chapter 15.

43 In the result, I am satisfied that the Applicants meet all of the qualifications established for relief under the CCAA and I have signed the Initial Order in the form submitted, which includes approvals of the Charges referenced in the Initial Order.

Schedule "A"

Additional Applicants

Cinram International General Partner Inc.

Cinram International ULC

1362806 Ontario Limited

Cinram (U.S.) Holdings Inc.

Cinram, Inc.

IHC Corporation

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Cinram Manufacturing LLC

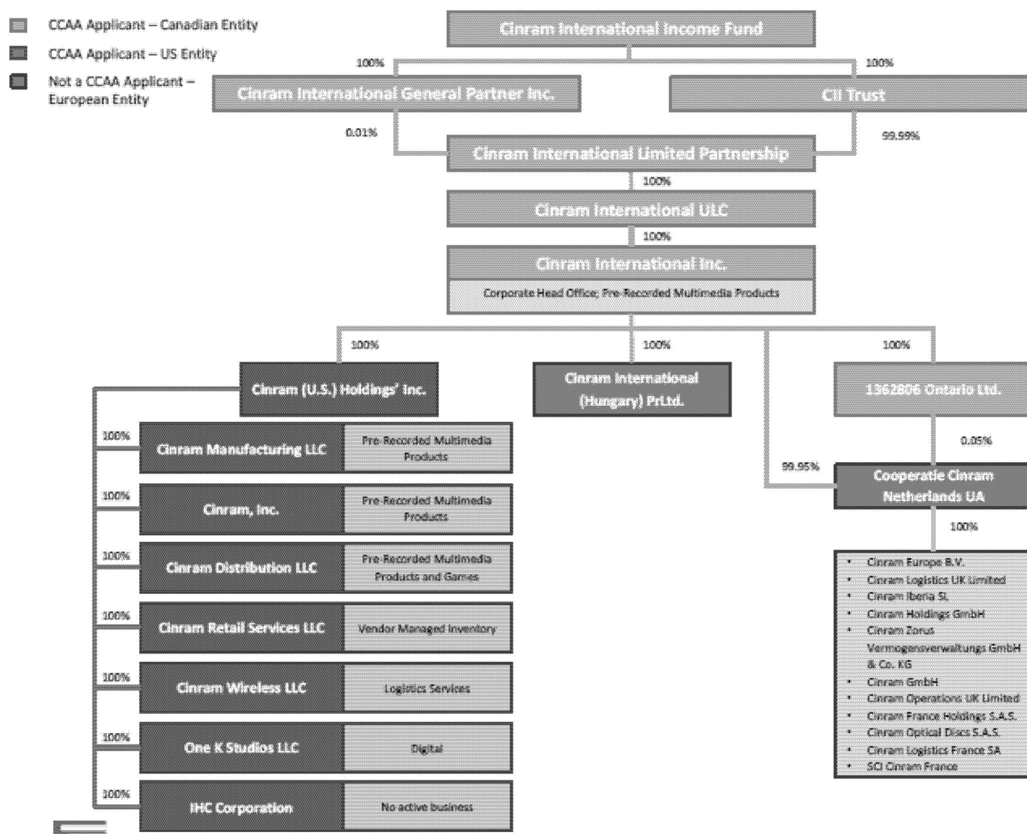
Cinram Distribution LLC

Cinram Wireless LLC

Cinram Retail Services, LLC

One K Studios, LLC

Schedule "B"



Graphic 1

Schedule "C"

A. The Applicants Are "Debtor Companies" to Which the CCAA Applies

41. The CCAA applies in respect of a "debtor company" (including a foreign company having assets or doing business in Canada) or "affiliated debtor companies" where the total of claims against such company or companies exceeds $5 million.

CCAA, Section 3(1).

42. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

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43. The terms "company" and "debtor company" are defined in Section 2 of the CCAA as follows:

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 ("company" and "debtor company").

44. The Applicants are debtor companies within the meaning of these definitions.

(2) The Applicants are "companies"

45. The Applicants are "companies" because:

a. with respect to the Canadian Applicants, each is incorporated pursuant to federal or provincial legislation or, in the case of Cinram Fund and CII Trust, is an income trust; and

b. with respect to the U.S. Applicants, each is an incorporated company with certain funds in bank accounts in Canada opened in May 2012 and therefore each is a company having assets or doing business in Canada.

Bell Affidavit at paras. 4, 80, 84, 86, 91, 94, 98, 102, 105, 108, 111, 114, 117, 120, 123, 212; Application Record, Tab 2.

46. The test for "having assets or doing business in Canada" is disjunctive, such that either "having assets" in Canada or "doing business in Canada" is sufficient to qualify an incorporated company as a "company" within the meaning of the CCAA.

47. Having only nominal assets in Canada, such as funds on deposit in a Canadian bank account, brings a foreign corporation within the definition of "company". In order to meet the threshold statutory requirements of the CCAA, an applicant need only be in technical compliance with the plain words of the CCAA.

Canwest Global Communications Corp., Re (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) at para. 30 [*Canwest Global*]; Book of Authorities of the Applicants ("*Book of Authorities*"), Tab 1.

Global Light Telecommunications Inc., Re (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at para. 17 [*Global Light*]; Book of Authorities, Tab 2.

48. The Courts do not engage in a quantitative or qualitative analysis of the assets or the circumstances in which the assets were created. Accordingly, the use of "instant" transactions immediately preceding a CCAA application, such as the creation of "instant debts" or "instant assets" for the purposes of bringing an entity within the scope of the CCAA, has received judicial approval as a legitimate device to bring a debtor within technical requirements of the CCAA.

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Global Light Telecommunications Inc., Re, *supra* at para. 17; Book of Authorities, Tab 2.

Cadillac Fairview Inc., Re (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div. [Commercial List]) at paras. 5-6; Book of Authorities, Tab 3.

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at paras. 74, 83; Book of Authorities, Tab 4.

(3) The Applicants are insolvent

49. The Applicants are "debtor companies" as defined in the CCAA because they are companies (as set out above) and they are insolvent.

50. The insolvency of the debtor is assessed as of the time of filing the CCAA application. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), which defines an "insolvent person" as a person (i) who is not bankrupt; and (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

a. is for any reason unable to meet his obligations as they generally become due;

b. has ceased paying his current obligations in the ordinary course of business as they generally become due; or

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

BIA, Section 2 ("insolvent person").

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal to C.A. refused [2004] O.J. No. 1903 (Ont. C.A.); leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), at para.4 [*Stelco*]; Book of Authorities, Tab 5.

51. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco Inc., Re, *supra* at paras. 26 and 28; Book of Authorities, Tab 5.

52. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco Inc., Re, *supra* at para. 40; Book of Authorities, Tab 5.

53. The Applicants meet both the traditional test for insolvency under the BIA and the expanded test for insolvency based on a looming liquidity condition as a result of the following:

a. The Applicants are unable to comply with certain financial covenants under the Credit Agreements and have entered into a series of waivers with their lenders from December 2011 to June 30, 2012.

b. Were the Lenders to accelerate the amounts owing under the Credit Agreements, the Borrowers and the other Applicants that are Guarantors under the Credit Agreements would be unable to meet their debt obligations. Cinram Fund would be the ultimate parent of an insolvent business.

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d. The Applicants have been unable to repay or refinance the amounts owing under the Credit Agreements or find an out-of-court transaction for the sale of the Cinram Business with proceeds that equal or exceed the amounts owing under the Credit Agreements.

e. Reduced revenues and EBITDA and increased borrowing costs have significantly impaired Cinram's ability to service its debt obligations. There is no reasonable expectation that Cinram will be able to service its debt load in the short to medium term given forecasted net revenues and EBITDA for the remainder of fiscal 2012 and for fiscal 2013 and 2014.

f. The decline in revenues and EBITDA generated by the Cinram Business has caused the value of the Cinram Business to decline. As a result, the aggregate value of the Property, taken at fair value, is not sufficient to allow for payment of all of the Applicants' obligations due and accruing due.

g. The Cash Flow Forecast indicates that without additional funding the Applicants will exhaust their available cash resources and will thus be unable to meet their obligations as they become due.

Bell Affidavit, paras. 23, 179-181, 183, 197-199; Application Record, Tab 2.

(4) The Applicants are affiliated companies with claims outstanding in excess of $5 million

54. The Applicants are affiliated debtor companies with total claims exceeding 5 million dollars. Therefore, the CCAA applies to the Applicants in accordance with Section 3(1).

55. Affiliated companies are defined in Section 3(2) of the CCAA as follows:

a. companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each is controlled by the same person; and

b. two companies are affiliated with the same company at the same time are deemed to be affiliated with each other.

CCAA, Section 3(2).

56. CII, CII Trust and all of the entities listed in Schedule "A" hereto are indirect, wholly owned subsidiaries of Cinram Fund; thus, the Applicants are "affiliated companies" for the purpose of the CCAA.

Bell Affidavit, paras. 3, 71; Application Record, Tab 2.

57. All of the CCAA Parties (except for the Fund Entities) are each a Borrower and/or Guarantor under the Credit Agreements. As at March 31, 2012 there was approximately $252 million of aggregate principal amount outstanding under the First Lien Credit Agreement (plus approximately $12 million in letter of credit exposure) and approximately $12 million of aggregate principal amount outstanding under the Second Lien Credit Agreement. The total claims against the Applicants far exceed $5 million.

Bell Affidavit, paras. 75; Application Record, Tab 2.

B. The Relief is Available under The CCAA and Consistent with the Purpose and Policy of the CCAA

(1) The CCAA is Flexible, Remedial Legislation

58. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructurings whenever possible.

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Nova Metal Products Inc. v. Comiskey (Trustee of), *supra* at paras. 22 and 56-60; Book of Authorities, Tab 4. *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at para. 5; Book of Authorities, Tab 6.

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at pp. 4 and 7; Book of Authorities, Tab 7.

59. On numerous occasions, courts have held that Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Sulphur Corp. of Canada Ltd., Re (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.) ("*Sulphur*") at para. 26; Book of Authorities, Tab 8.

60. Given the nature and purpose of the CCAA, this Honourable Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) The Stay of Proceedings Against Non-Applicants is Appropriate

61. The relief sought in this application includes a stay of proceedings in favour of Cinram LP and the Applicants' direct and indirect subsidiaries that are also party to an agreement with an Applicant (whether as surety, guarantor or otherwise) (each, a "Subsidiary Counterparty"), including any contract or credit agreement. It is just and reasonable to grant the requested stay of proceedings because:

a. the Cinram Business is integrated among the Applicants, Cinram LP and the Subsidiary Counterparties;

b. if any proceedings were commenced against Cinram LP, or if any of the third parties to such agreements were to commence proceedings or exercise rights and remedies against the Subsidiary Counterparties, this would have a detrimental effect on the Applicants' ability to restructure and implement the Proposed Transaction and would lead to an erosion of value of the Cinram Business; and

c. a stay of proceedings that extends to Cinram LP and the Subsidiary Counterparties is necessary in order to maintain stability with respect to the Cinram Business and maintain value for the benefit of the Applicants' stakeholders.

Bell Affidavit, paras. 185-186; Application Record, Tab 2.

62. The purpose of the CCAA is to preserve the *status quo* to enable a plan of compromise to be prepared, filed and considered by the creditors:

In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

Lehndorff General Partner Ltd., Re, *supra* at para. 5; Book of Authorities, Tab 6. *Canwest Global Communications Corp., Re*, *supra* at para. 27; Book of Authorities, Tab 1.

CCAA, Section 11.

63. The Court has broad inherent jurisdiction to impose stays of proceedings that supplement the statutory provisions of Section 11 of the CCAA, providing the Court with the power to grant a stay of proceedings where it is just and reasonable to do so, including with respect to non-applicant parties.

Lehndorff General Partner Ltd., Re, *supra* at paras. 5 and 16; Book of Authorities, Tab 6.

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T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) at para. 6; Book of Authorities, Tab 9.

64. The Courts have found it just and reasonable to grant a stay of proceedings against third party non-applicants in a number of circumstances, including:

a. where it is important to the reorganization process;

b. where the business operations of the Applicants and the third party non-applicants are intertwined and the third parties are not subject to the jurisdiction of the CCAA, such as partnerships that do not qualify as "companies" within the meaning of the CCAA;

c. against non-applicant subsidiaries of a debtor company where such subsidiaries were guarantors under the note indentures issued by the debtor company; and

d. against non-applicant subsidiaries relating to any guarantee, contribution or indemnity obligation, liability or claim in respect of obligations and claims against the debtor companies.

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 31; Book of Authorities, Tab 10. *Lehndorff General Partner Ltd., Re*, *supra* at para. 21; Book of Authorities, Tab 6.

Canwest Global Communications Corp., Re, *supra* at paras. 28 and 29; Book of Authorities, Tab 1.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 5, 18, and 31; Book of Authorities, Tab 11.

Re MAAX Corp, Initial Order granted June 12, 2008, Montreal 500-11-033561-081, (Que. Sup. Ct. [Commercial Division]) at para. 7; Book of Authorities, Tab 12.

65. The Applicants submit the balance of convenience favours extending the relief in the proposed Initial Order to Cinram LP and the Subsidiary Counterparties. The business operations of the Applicants, Cinram LP and the Subsidiary Counterparties are intertwined and the stay of proceedings is necessary to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow an orderly, going-concern sale of the Cinram Business as an important component of its reorganization process.

(3) Entitlement to Make Pre-Filing Payments

66. To ensure the continued operation of the CCAA Parties' business and maximization of value in the interests of Cinram's stakeholders, the Applicants seek authorization (but not a requirement) for the CCAA Parties to make certain pre-filing payments, including: (a) payments to employees in respect of wages, benefits, and related amounts; (b) payments to suppliers and service providers critical to the ongoing operation of the business; (c) payments and the application of credits in connection with certain existing customer programs; and (d) intercompany payments among the Applicants related to intercompany loans and shared services. Payments will be made with the consent of the Monitor and, in certain circumstances, with the consent of the Agent.

67. There is ample authority supporting the Court's general jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. This jurisdiction of the Court is not ousted by Section 11.4 of the CCAA, which became effective as part of the 2009 amendments to the CCAA and codified the Court's practice of declaring a person to be a critical supplier and granting a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global Communications Corp., Re*, the recent amendments, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Canwest Global Communications Corp., Re *supra*, at paras. 41 and 43; Book of Authorities, Tab 1.

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68. There are many cases since the 2009 amendments where the Courts have authorized the applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the Courts considered a number of factors, including:

a. whether the goods and services were integral to the business of the applicants;

b. the applicants' dependency on the uninterrupted supply of the goods or services;

c. the fact that no payments would be made without the consent of the Monitor;

d. the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities are minimized;

e. whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

f. the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Canwest Global Communications Corp., Re supra, at para. 43; Book of Authorities, Tab 1.

Brainhunter Inc., Re, [2009] O.J. No. 5207 (Ont. S.C.J. [Commercial List]) at para. 21 [*Brainhunter*]; Book of Authorities, Tab 13.

Priszm Income Fund, Re (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) at paras. 29-34; Book of Authorities, Tab 14.

69. The CCAA Parties rely on the efficient and expedited supply of products and services from their suppliers and service providers in order to ensure that their operations continue in an efficient manner so that they can satisfy customer requirements. The CCAA Parties operate in a highly competitive environment where the timely provision of their products and services is essential in order for the company to remain a successful player in the industry and to ensure the continuance of the Cinram Business. The CCAA Parties require flexibility to ensure adequate and timely supply of required products and to attempt to obtain and negotiate credit terms with its suppliers and service providers. In order to accomplish this, the CCAA Parties require the ability to pay certain pre-filing amounts and post-filing payables to those suppliers they consider essential to the Cinram Business, as approved by the Monitor. The Monitor, in determining whether to approve pre-filing payments as critical to the ongoing business operations, will consider various factors, including the above factors derived from the caselaw.

Bell Affidavit, paras. 226, 228, 230; Application Record, Tab 2.

70. In addition, the CCAA Parties' continued compliance with their existing customer programs, as described in the Bell Affidavit, including the payment of certain pre-filing amounts owing under certain customer programs and the application of certain credits granted to customers pre-filing to post-filing receivables, is essential in order for the CCAA Parties to maintain their customer relationships as part of the CCAA Parties' going concern business.

Bell Affidavit, paras. 234; Application Record, Tab 2.

71. Further, due to the operational integration of the businesses of the CCAA Parties, as described above, there is a significant volume of financial transactions between and among the Applicants, including, among others, charges by an Applicant providing shared services to another Applicant of intercompany accounts due from the recipients of those services, and charges by a Applicant that manufactures and furnishes products to another Applicant of inter-company accounts due from the receiving entity.

Bell Affidavit, paras. 225; Application Record, Tab 2.

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72. Accordingly, the Applicants submit that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the CCAA Parties the authority to make the pre-filing payments described in the proposed Initial Order subject to the terms therein.

(4) The Charges Are Appropriate

73. The Applicants seek approval of certain Court-ordered charges over their assets relating to their DIP Financing (defined below), administrative costs, indemnification of their trustees, directors and officers, KERP and Support Agreement. The Lenders and the Administrative Agent under the Credit Agreements, the senior secured facilities that will be primed by the charges, have been provided with notice of the within Application. The proposed Initial Order does not purport to give the Court-ordered charges priority over any other validly perfected security interests.

(A) DIP Lenders' Charge

74. In the proposed Initial Order, the Applicants seek approval of the DIP Credit Agreement providing a debtor-in-possession term facility in the principal amount of $15 million (the "DIP Financing"), to be secured by a charge over all of the assets and property of the Applicants that are Borrowers and/or Guarantors under the Credit Agreements (the "Charged Property") ranking ahead of all other charges except the Administration Charge.

75. Section 11.2 of the CCAA expressly provides the Court the statutory jurisdiction to grant a debtor-in-possession ("DIP") financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) *Priority* — secured creditors — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *Timminco Ltd., Re*, 211 A.C.W.S. (3d) 881 (Ont. S.C.J. [Commercial List]) [2012 CarswellOnt 1466] at para. 31; Book of Authorities, Tab 15. CCAA, Section 11.2(1) and (2).

76. Section 11.2 of the CCAA sets out the following factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> 11.2(4) Factors to be considered — In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(*b*), if any.

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CCAA, Section 11.2(4).

77. The above list of factors is not exhaustive, and it may be appropriate for the Court to consider additional factors in determining whether to grant a DIP financing charge. For example, in circumstances where funds to be borrowed pursuant to a DIP facility were not expected to be immediately necessary, but applicants' cash flow statements projected the need for additional liquidity, the Court in granting the requested DIP charge considered the fact that the applicants' ability to borrows funds that would be secured by a charge would help retain the confidence of their trade creditors, employees and suppliers.

Canwest Publishing Inc./Publications Canwest Inc., Re (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) at paras. 42-43 [*Canwest Publishing*]; Book of Authorities, Tab 16.

78. Courts in recent cross-border cases have exercised their broad power to grant charges to DIP lenders over the assets of foreign applicants. In many of these cases, the debtors have commenced recognition proceedings under Chapter 15.

Re Catalyst Paper Corporation, Initial Order granted on January 31, 2012, Court File No. S-120712 (B.C.S.C.) [*Catalyst Paper*]; Book of Authorities, Tab 17.

Angiotech, *supra*, Initial Order granted on January 28, 2011, Court File No. S-110587; Book of Authorities, Tab 18

Fraser Papers Inc., Re [2009 CarswellOnt 3658 (Ont. S.C.J. [Commercial List])], Initial Order granted on June 18, 2009, Court File No. CV-09-8241-00CL; Book of Authorities, Tab 19.

79. As noted above, pursuant to Section 11.2(1) of the CCAA, a DIP financing charge may not secure an obligation that existed before the order was made. The requested DIP Lenders' Charge will not secure any pre-filing obligations.

80. The following factors support the granting of the DIP Lenders' Charge, many of which incorporate the considerations enumerated in Section 11.2(4) listed above:

a. the Cash Flow Forecast indicates the Applicants will need additional liquidity afforded by the DIP Financing in order to continue operations through the duration of these proposed CCAA Proceedings;

b. the Cinram Business is intended to continue to operate on a going concern basis during these CCAA Proceedings under the direction of the current management with the assistance of the Applicants' advisors and the Monitor;

c. the DIP Financing is expected to provide the Applicants with sufficient liquidity to implement the Proposed Transaction through these CCAA Proceedingsand implement certain operational restructuring initiatives, which will materially enhance the likelihood of a going concern outcome for the Cinram Business;

d. the nature and the value of the Applicants' assets as set out in their consolidated financial statements can support the requested DIP Lenders' Charge;

e. members of the Steering Committee under the First Lien Credit Agreement, who are senior secured creditors of the Applicants, have agreed to provide the DIP Financing;

f. the proposed DIP Lenders have indicated that they will not provide the DIP Financing if the DIP Lenders' Charge is not approved;

g. the DIP Lenders' Charge will not secure any pre-filing obligations;

h. the senior secured lenders under the Credit Agreements affected by the charge have been provided with notice of these CCAA Proceedings;and

i. the proposed Monitor is supportive of the DIP Facility, including the DIP Lenders' Charge.

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Bell Affidavit, paras. 199-202, 205-208; Application Record, Tab 2.

(B) Administration Charge

81. The Applicants seek a charge over the Charged Property in the amount of CAD$3.5 million to secure the fees of the Monitor and its counsel, the Applicants' Canadian and U.S. counsel, the Applicants' Investment Banker, the Canadian and U.S. Counsel to the DIP Agent, the DIP Lenders, the Administrative Agent and the Lenders under the Credit Agreements, and the financial advisor to the DIP Lenders and the Lenders under the Credit Agreements (the "Administration Charge"). This charge is to rank in priority to all of the other charges set out in the proposed Initial Order.

82. Prior to the 2009 amendments, administration charges were granted pursuant to the inherent jurisdiction of the Court. Section 11.52 of the CCAA now expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) *Court may order security or charge to cover certain costs*

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Section 11.52(1) and (2).

82. Administration charges were granted pursuant to Section 11.52 in, among other cases, *Timminco Ltd., Re*, *Canwest Global Communications Corp., Re* and *Canwest Publishing Inc./Publications Canwest Inc., Re*.

Canwest Global Communications Corp., Re, *supra*; Book of Authorities, Tab 1.

Canwest Publishing, *supra*; Book of Authorities, Tab 16.

Timminco Ltd., Re, 2012 ONSC 106 (Ont. S.C.J. [Commercial List]) [*Timminco*]; Book of Authorities, Tab 20.

84. In *Canwest Publishing*, the Court noted Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. These factors were also considered by the Court in *Timminco*. The list of factors to consider in approving an administration charge include:

a. the size and complexity of the business being restructured;

b. the proposed role of the beneficiaries of the charge;

c. whether there is unwarranted duplication of roles;

d. whether the quantum of the proposed charge appears to be fair and reasonable;

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e. the position of the secured creditors likely to be affected by the charge; and

f. the position of the Monitor.

Canwest Publishing supra, at para. 54; Book of Authorities, Tab 16.

Timminco, *supra*, at paras. 26-29; Book of Authorities, Tab 20.

85. The Applicants submit that the Administration Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Administration Charge, given:

a. the proposed restructuring of the Cinram Business is large and complex, spanning several jurisdictions across North America and Europe, and will require the extensive involvement of professional advisors;

b. the professionals that are to be beneficiaries of the Administration Charge have each played a critical role in the CCAA Parties' restructuring efforts to date and will continue to be pivotal to the CCAA Parties' ability to pursue a successful restructuring going forward, including the Investment Banker's involvement in the completion of the Proposed Transaction;

c. there is no unwarranted duplication of roles;

d. the senior secured creditors affected by the charge have been provided with notice of these CCAA Proceedings; and

e. the Monitor is in support of the proposed Administration Charge.

Bell Affidavit, paras. 188, 190; Application Record, Tab 2.

(C) Directors' Charge

86. The Applicants seek a Directors' Charge in an amount of CAD$13 over the Charged Property to secure their respective indemnification obligations for liabilities imposed on the Applicants' trustees, directors and officers (the "Directors and Officers"). The Directors' Charge is to be subordinate to the Administration Charge and the DIP Lenders' Charge but in priority to the KERP Charge and the Consent Consideration Charge.

87. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

11.51(1) *Security or charge relating to director's indemnification*

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) *Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

11.51(3) *Restriction* — indemnification insurance

The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) *Negligence, misconduct or fault*

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The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

88. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global Communications Corp., Re*, the Court outlined the test for granting such a charge:

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

Canwest Global Communications Corp., Re, *supra* at paras 46-48; Book of Authorities, Tab 1.

Canwest Publishing, *supra* at paras. 56-57; Book of Authorities, Tab 16.

Timminco, *supra* at paras. 30-36; Book of Authorities, Tab 20.

89. The Applicants submit that the D&O Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the D&O Charge in the amount of CAD$13 million, given:

a. the Directors and Officers of the Applicants may be subject to potential liabilities in connection with these CCAA proceedings with respect to which the Directors and Officers have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

b. renewal of coverage to protect the Directors and Officers is at a significantly increased cost due to the imminent commencement of these CCAA proceedings;

c. the Directors' Charge would cover obligations and liabilities that the Directors and Officers, as applicable, may incur after the commencement of these CCAA Proceedings and is not intended to cover wilful misconduct or gross negligence;

d. the Applicants require the continued support and involvement of their Directors and Officers who have been instrumental in the restructuring efforts of the CCAA Parties to date;

e. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

f. the Monitor is in support of the proposed Directors' Charge.

Bell Affidavit, paras. 249, 250, 254-257; Application Record, Tab 2.

(D) KERP Charge

90. The Applicants seek a KERP Charge in an amount of CAD$3 million over the Charged Property to secure the KERP Retention Payments, KERP Transaction Payments and Aurora KERP Payments payable to certain key employees of the CCAA Parties crucial for the CCAA Parties' successful restructuring.

91. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])] considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

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a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

d. the employees' history with and knowledge of the debtor;

e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

Grant Forest Products Inc., Re, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) at para. 8-24 [*Grant Forest*]; Book of Authorities, Tab 21.

Canwest Publishing Inc./Publications Canwest Inc., Re supra, at paras 59; Book of Authorities, Tab 16.

Canwest Global Communications Corp., Re supra, at para. 49; Book of Authorities, Tab 1.

Timminco Ltd., Re (2012), 95 C.C.P.B. 48 (Ont. S.C.J. [Commercial List]) at paras. 72-75; Book of Authorities, Tab 22.

92. The purpose of a KERP arrangement is to retain key personnel for the duration of the debtor's restructuring process and it is logical for compensation under a KERP arrangement to be deferred until after the restructuring process has been completed, with "staged bonuses" being acceptable. KERP arrangements that do not defer retention payments to completion of the restructuring may also be just and fair in the circumstances.

Grant Forest Products Inc., Re, *supra* at para. 22-23; Book of Authorities, Tab 21.

93. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the KERP Charge in the amount of CAD$3 million, given:

a. the KERP was developed by Cinram with the principal purpose of providing an incentive to the Eligible Employees, the Eligible Officers, and the Aurora Employees to remain with the Cinram Group while the company pursued its restructuring efforts;

b. the Eligible Employees and the Eligible Officers are essential for a restructuring of the Cinram Group and the preservation of Cinram's value during the restructuring process;

c. the Aurora Employees are essential for an orderly transition of Cinram Distribution's business operations from the Aurora facility to its Nashville facility;

d. it would be detrimental to the restructuring process if Cinram were required to find replacements for the Eligible Employees, the Eligible Officers and/or the Aurora Employees during this critical period;

e. the KERP, including the KERP Retention Payments, the KERP Transaction Payments and the Aurora KERP Payments payable thereunder, not only provides appropriate incentives for the Eligible Employees, the Eligible Officers and the

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Aurora Employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Cinram's restructuring process;

f. the senior secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

g. the KERP has been reviewed and approved by the board of trustees of Cinram Fund and is supported by the Monitor.

Bell Affidavit, paras. 236-239, 245-247; Application Record, Tab 2.

(E) Consent Consideration Charge

94. The Applicants request the Consent Consideration Charge over the Charged Property to secure the Early Consent Consideration. The Consent Consideration Charge is to be subordinate in priority to the Administration Charge, the DIP Lenders' Charge, the Directors' Charge and the KERP Charge.

95. The Courts have permitted the opportunity to receive consideration for early consent to a restructuring transaction in the context of CCAA proceedings payable upon implementation of such restructuring transaction. In *Sino-Forest Corp., Re*, the Court ordered that any noteholder wishing to become a consenting noteholder under the support agreement and entitled to early consent consideration was required to execute a joinder agreement to the support agreement prior to the applicable consent deadline. Similarly, in these proceedings, lenders under the First Lien Credit Agreement who execute the Support Agreement (or a joinder thereto) and thereby agree to support the Proposed Transaction on or before July 10, 2012, are entitled to Early Consent Consideration earned on consummation of the Proposed Transaction to be paid from the net sale proceeds.

Sino-Forest Corp., Re, *supra*, Initial Order granted on March 30, 2012, Court File No. CV-12-9667-00CL at para. 15; Book of Authorities, Tab 23. Bell Affidavit, para. 176; Application Record, Tab 2.

96. The Applicants submit it is appropriate in the present circumstances for this Honourable Court to exercise its jurisdiction and grant the Consent Consideration Charge, given:

a. the Proposed Transaction will enable the Cinram Business to continue as a going concern and return to a market leader in the industry;

b. Consenting Lenders are only entitled to the Early Consent Consideration if the Proposed Transaction is consummated; and

c. the Early Consent Consideration is to be paid from the net sale proceeds upon distribution of same in these proceedings.

Bell Affidavit, para. 176; Application Record, Tab 2.

Application granted.

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TAB W

Court File No. CV15-10961-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 8TH
	)	
JUSTICE NEWBOULD	)	DAY OF JUNE, 2015

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 NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

AMENDED AND RESTATED INITIAL ORDER

THIS MOTION, made by Nelson Education Ltd. ("**Nelson Education**") and Nelson Education Holdings Ltd. ("**Holdings**", together with Nelson Education, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Amended and Restated Initial Order was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Greg Nordal sworn June 3, 2015 and the Exhibits thereto (the "**June Affidavit**"), the First Report of FTI Consulting Canada Inc. ("**FTI**") as the Court-appointed monitor (the "**Monitor**"), and on hearing the submissions of counsel for the Applicants, the Monitor, the First Lien Steering Committee and the First Lien Agent (each as defined in the May Affidavit (as defined below)), Royal Bank of Canada in its capacities as the non-Consenting First Lien Lender, Second Lien Agent, Second Lien Lender and provider of the Applicants' Cash Management System (each as defined in the May Affidavit (as defined below)) and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Sydney Young, filed.

CAPITALIZED TERMS

1. THIS COURT ORDERS that, unless otherwise indicated or defined herein, capitalized terms have the meaning given to them in the affidavit of Greg Nordal sworn May 11, 2015 (the "**May Affidavit**").

AMENDED AND RESTATED ORDER

2. THIS COURT ORDERS that, other than as it relates to the appointment of FTI as Monitor which shall be effective from and after May 29, 2015, effective on and from the date hereof, this Amended and Restated Order shall amend and restate the Initial Order granted on May 12, 2015 in these proceedings (the "**Initial Order**").

POSSESSION OF PROPERTY AND OPERATIONS

3. THIS COURT ORDERS that the Applicants shall remain in possession and control of their respective current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall each continue to carry on business in the ordinary course and in a manner consistent with the preservation of their business (the "**Business**") and the Property.

4. THIS COURT ORDERS that, subject to the provisions of paragraph 5 hereof, the Applicants shall be entitled to continue to utilize the central cash management system currently in place, including the Applicants' current business forms, cheques and bank accounts, as described in the May Affidavit (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, and shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System.

5. THIS COURT ORDERS that Royal Bank of Canada, in its capacity as provider of the Cash Management System ("**RBC**"), shall be entitled to the benefit of and is hereby granted a charge (the "**Cash Management Charge**") on the Property, as security for any obligations of the Applicants to RBC that may arise in connection with RBC's provision of the Cash Management System. The Applicants or any interested party shall have the right to bring a motion or as otherwise directed by the Court to establish the aggregate amount of the Cash Management Charge. The Cash Management Charge shall have the priority set out in paragraphs 26 and 28 hereof.

6. THIS COURT ORDERS that, subject to review of the Monitor, the Applicants shall be entitled but not required to pay expenses and satisfy obligations whether incurred prior to, on or after the making of this Order, in the ordinary course of business.

7. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay:

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

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

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of

secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

8. THIS COURT ORDERS that, notwithstanding anything else contained herein, from and after June 2, 2015, without further order of the Court, the Applicants shall not make any payments (including but not limited to interest and professional fees and expenses) to the First Lien Lenders, the First Lien Agent, the Second Lien Lenders or the Second Lien Agent.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

9. THIS COURT ORDERS that until and including July 17, 2015, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

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

CONTINUATION OF SERVICES

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

NON-DEROGATION OF RIGHTS

13. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

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

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

15. THIS COURT ORDERS that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

16. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2.2 million, as security for the indemnity provided in paragraph 15 of this Order. The Directors' Charge shall have the priority set out in paragraphs 26 and 28 herein.

17. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 15 of this Order.

APPOINTMENT OF MONITOR

18. THIS COURT ORDERS that, effective May 29, 2015, FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, employees, consultants, agents, experts, accountants, counsel and such other persons currently retained or employed by them shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

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

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicants in their preparation of their cash flow statements, which information shall be reviewed with the Monitor, as required from time to time, which may be used in these proceedings;

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

(e) take such steps as the Monitor considers necessary or desirable in reviewing the SISP and the activities undertaken by the Applicants and their advisors in connection with the SISP and any sale approval motion;

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

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

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

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

22. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is

confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

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

24. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

25. THIS COURT ORDERS that the Monitor, counsel to the Monitor, counsel to the Applicants and the financial advisor to the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $750,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor, counsel to the Monitor, counsel to the Applicants and the financial advisor to the Applicants both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 26 and 28 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

26. THIS COURT ORDERS that the priorities of the Administration Charge, the Directors' Charge and the Cash Management Charge, as among them, shall be as follows, subject to paragraph 28 of this Order:

(a) First – Administration Charge (to the maximum amount of $750,000);

(b) Second – Directors' Charge (to the maximum amount of $2.2 million); and

(c) Third – Cash Management Charge.

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

28. THIS COURT ORDERS that the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, notwithstanding the order of perfection or attachment, except for any validly perfected security interest in favour of a "secured creditor" as defined in the CCAA existing as at the date hereof other than any validly perfected security interest in favour of the First Lien Agent, the First Lien Lenders, the Second Lien Agent or the Second Lien Lenders. Nothing in this Order affects the priority of the First Lien Agent, the Second Lien Agent, the First Lien Lenders and the Second Lien Lenders against the rights of each other and third parties (other than beneficiaries of the Charges) as of the date of this Order. The Applicants shall be entitled to seek priority of the Charges ahead of all or certain of the other Encumbrances on a subsequent motion on notice to those parties likely to be affected thereby.

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

(a) neither the creation of the Charges nor the execution, delivery, perfection registration or performance of any documents in respect thereof shall create or be deemed to constitute a breach by an Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicants pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

30. THIS COURT ORDERS that the Charges created by this Order over leases of real property in Canada shall only be a charge in the Applicants' interest in such real property leases.

SEALING ORDER

31. THIS COURT ORDERS that each of (i) the summary of the key employee retention program attached as Exhibit J to the May Affidavit, and (ii) the Stockholders and Registration Rights Agreement attached as Exhibit H to the May Affidavit be sealed, kept confidential and not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

SERVICE AND NOTICE

32. THIS COURT ORDERS that the Monitor shall, without delay, publish in *The Globe and Mail* a notice containing the information prescribed under the CCAA, and shall not, without further order of the Court, (i) send any prescribed notices to creditors, or (ii) make

publicly available any list showing the names and addresses of creditors or the estimated amounts of creditors' claims.

33. THIS COURT ORDERS that the E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at: www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: http://cfcanada.fticonsulting.com/NelsonEducationLtd/.

34. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Guide is not practicable, the Applicants and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or distribution by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

35. THIS COURT ORDERS that, except with respect to an urgent motion subject to further Order of this Court, any interested party that wishes to object to the relief to be sought in a motion brought in these proceedings shall, subject to further Order of this Court, provide the Service List with responding motion materials or a written notice (including by e-mail) stating its objection to the motion no later than three (3) business days prior to the date such motion is returnable (the "**Objection Deadline**"). The Monitor shall have the right to extend the Objection Deadline after consulting with the Applicants.

36. THIS COURT ORDERS that following the expiry of the Objection Deadline, the Monitor or counsel to the Applicants shall inform the Court, including by way of a 9:30 a.m. appointment, of the absence or the status of any objections to the motion and the judge having carriage of the motion may determine (a) whether a hearing in respect of the motion is necessary, (b) whether such hearing will be in person, by telephone or by written submissions only and (c) the parties from whom submissions are required. In the absence of any such determination, a hearing will be held in the ordinary course on the date specified in the notice of motion.

GENERAL

37. THIS COURT ORDERS that each of the Applicants and the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

38. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

39. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

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

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN - 8 2015

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

Court File No: CV15-10961-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

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Lawyers for the Applicants

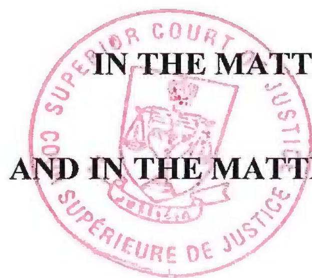
6459823

TAB X

Court File No. 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	**TUESDAY, THE 23RD**
	)	
JUSTICE MORAWETZ	)	**DAY OF APRIL, 2013**



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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

PLAN SANCTION ORDER

THIS MOTION made by SkyLink Aviation Inc. (the "**Applicant**") for an order (the "**Plan Sanction Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), sanctioning the plan of compromise and arrangement dated April 18, 2013, which is attached as **Schedule "A"** hereto (and as it may be further amended, varied or supplemented from time to time in accordance with the terms thereof, the "**Plan**"), was heard on April 23, 2013 at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Jan Ottens sworn April 21, 2013 (the "**Ottens Affidavit**"), filed, the second report (the "**Second Report**") of Duff & Phelps Canada Restructuring Inc. in its capacity as monitor of the Applicant (the "**Monitor**"), filed, and the third report of the Monitor (the "**Third Report**"), filed, and on hearing the submissions of counsel for each of the Applicant, the Monitor, the Initial Consenting Noteholders and DIP Lenders, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service, filed.

DEFINED TERMS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Plan Sanction Order shall have the meanings ascribed to such terms in the Plan and the Meetings Order granted by this Court on March 8, 2013 (the "**Meetings Order**"), as applicable.

SERVICE, NOTICE AND MEETING

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion, the Motion Record in support of this motion, the Second Report and the Third Report be and are hereby abridged and validated so that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with.

3. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient notice, service and delivery of the Meetings Order and the Information Package (including, without limitation, the Plan) to all Persons upon which notice, service and delivery was required.

4. **THIS COURT ORDERS AND DECLARES** that the Meetings were duly convened and held on April 19, 2013, all in conformity with the CCAA and the Initial Order granted by this Court on March 8, 2013 (the "**Initial Order**"), the Meetings Order, and the Claims Procedure Order granted by this Court on March 8, 2013 (the "**Claims Procedure Order**", and collectively with the Initial Order and the Meetings Order, the "**Orders**").

5. **THIS COURT ORDERS AND DECLARES** that: (i) the hearing of the Plan Sanction Order was open to all of the Affected Creditors and all other Persons with an interest in the Applicant and that such Affected Creditors and all such other Persons were permitted to be heard at the hearing in respect of the Plan Sanction Order; and (ii) prior to the hearing, all of the Affected Creditors and all such other Persons on the service list in respect of the CCAA Proceedings were given notice thereof.

SANCTION OF THE PLAN

6. **THIS COURT DECLARES** that the relevant classes of Affected Creditors of the Applicant for the purpose of voting to approve the Plan are the Secured Noteholders Class and the Affected Unsecured Creditors Class.

7. **THIS COURT DECLARES** that the Plan, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair and reasonable.

8. **THIS COURT ORDERS AND DECLARES** that the Plan has been approved by the Required Majorities of Affected Creditors in each Voting Class, as required by the Meetings Order, and in conformity with the CCAA.

9. **THIS COURT ORDERS AND DECLARES** that the activities of the Applicant have been in compliance with the provisions of the CCAA and the Orders of the Court made in the CCAA Proceedings, and the Court is satisfied that the Applicant has not done or purported to do anything that is not authorized by the CCAA.

10. **THIS COURT ORDERS** that the Plan is hereby sanctioned and approved pursuant to section 6 of the CCAA.

PLAN IMPLEMENTATION

11. **THIS COURT ORDERS AND DECLARES** that the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are hereby approved and shall be deemed to be implemented, binding and effective in accordance with the provisions of the Plan as of the Plan Implementation Date at the time or times and in the manner set forth in the Plan, and shall inure to the benefit of and be binding upon the Applicant, the Released Parties, the Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim or a Released Claim, and all other Persons and parties named or referred to in, affected by, or subject to the Plan, including, without limitation, their respective heirs, administrators, executors, legal representatives, successors, and assigns.

12. **THIS COURT ORDERS** that each of the Applicant and the Monitor are authorized and directed to take all steps and actions, and do all things, necessary or appropriate to implement the Plan in accordance with its terms and to enter into, execute, deliver, complete, implement and consummate all of the steps, transactions, distributions, deliveries, allocations, and agreements contemplated by the Plan, and such steps and actions are hereby authorized, ratified and approved. Neither the Applicant nor the Monitor shall incur any liability as a result of acting in accordance with the terms of the Plan and the Plan Sanction Order.

13. **THIS COURT ORDERS** that the Applicant, the Monitor, the First Lien Agent, the Secured Note Indenture Trustee, the New Second Lien Notes Indenture Trustee, CDS, the CDS Participants and any other Person required to make any distributions, deliveries or allocations or take any steps or actions related thereto pursuant to the Plan are hereby authorized and directed to complete such distributions, deliveries or allocations and to take any such related steps or actions, as the case may be, in accordance with the terms of the Plan, and such distributions, deliveries and allocations, and steps and actions related thereto, are hereby approved.

14. **THIS COURT ORDERS** that upon the satisfaction or waiver of the conditions precedent set out in section 9.1 of the Plan in accordance with the terms of the Plan, as confirmed by the Applicant and the Majority Initial Consenting Noteholders (or their respective counsel) in writing, the Monitor is authorized and directed to deliver to the Initial Consenting Noteholders and the Applicant (or their respective counsel) a certificate substantially in the form attached hereto as **Schedule "B"** (the "**Monitor's Certificate**") signed by the Monitor, certifying that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Plan Sanction Order. The Monitor shall file the Monitor's Certificate with this Court promptly following the Plan Implementation Date.

15. **THIS COURT ORDERS** that the Applicant, the Monitor and the Majority Initial Consenting Noteholders are hereby authorized and empowered to exercise all consent

and approval rights provided for in the Plan in the manner set forth in the Plan, whether prior to or after the Plan Implementation Date.

16. **THIS COURT ORDERS** that the steps to be taken and the compromises and releases to be effected on the Plan Implementation Date are and shall be deemed to occur and be effected in the sequential order and at the times contemplated in section 5.4 of the Plan, without any further act or formality, on the Plan Implementation Date, beginning at the Effective Time.

17. **THIS COURT ORDERS** that the New Shareholders' Agreement shall be effective and binding on all holders of the New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan immediately upon issuance of the New Common Shares to such Persons, with the same force and effect as if such Persons were signatories to the New Shareholders' Agreement.

18. **THIS COURT ORDERS** that, subject to the payment of any amounts secured by the Charges that remain owing on the Plan Implementation Date, if any, each of the Charges shall be terminated, discharged and released on the Plan Implementation Date.

COMPROMISE OF CLAIMS AND EFFECT OF PLAN

19. **THIS COURT ORDERS** that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, any and all Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, subject only to the right of the applicable Persons to receive the distributions to which they are entitled pursuant to the Plan.

20. **THIS COURT ORDERS AND DECLARES** that on the Plan Implementation Date, pursuant to and in accordance with the Plan, the Applicant shall be forever released and discharged from any and all obligations in respect of the Affected Claims and the ability of any Person to proceed against the Applicant in respect of or relating to any Affected Claims shall be permanently and forever barred, estopped, stayed and enjoined, and all proceedings with respect to, in connection with or relating to such Affected Claims shall

be permanently stayed, subject only to the right of Affected Creditors to receive distributions pursuant to the Plan in respect of their Affected Claims.

21. **THIS COURT ORDERS** that, without limiting the provisions of the Claims Procedure Order or the Meetings Order, any Person that did not file a Proof of Claim, a Notice of Dispute or a Notice of Dispute of Revision or Disallowance, as applicable, by the Claims Bar Date or such other bar date provided for in the Claims Procedure Order, as applicable, whether or not such Affected Creditor received direct notice of the claims process established by the Claims Procedure Order, shall be and is hereby forever barred from making any Claim or any Director/Officer Claim and shall not be entitled to any distribution under the Plan, and such Person's Claim or Director/Officer Claim, as applicable, shall be and is hereby forever barred and extinguished. Nothing in the Plan extends or shall be interpreted as extending or amending the Claims Bar Date or any other bar date provided for in the Claims Procedure Order, or gives or shall be interpreted as giving any rights to any Person in respect of Claims or Director/Officer Claims that have been barred or extinguished pursuant to the Claims Procedure Order, the Plan, this Plan Sanction Order, or the Meetings Order.

22. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in the Plan or paragraphs 21, 23, 24 and 34 hereof, and based on the consent of the Applicant and the Monitor, any Person having a claim that is expressly designated as an "Excluded Claim" in a settlement agreement entered into between the Applicant and such Person after the Filing Date and prior to April 19, 2013 (each a "**CCAA Settlement Agreement**") shall be permitted to file a statement of claim in respect of such Excluded Claim for the purpose of preserving such Person's rights to pursue such Excluded Claim in accordance with, and subject to, the terms, conditions and limitations of such CCAA Settlement Agreement and on the basis that there shall be no recourse whatsoever, directly or indirectly, to the Applicant or any of the SkyLink Subsidiaries or their respective assets or property in respect of such Excluded Claim.

23. **THIS COURT ORDERS** that, pursuant to and in accordance with the terms of the Plan, on the Plan Implementation Date, any and all Released Director/Officer Claims shall be

fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred, subject to sections 3.7(b) and 7.1(b) of the Plan and subject to paragraph 22 of this Plan Sanction Order.

24. **THIS COURT ORDERS AND DECLARES** that, on the Plan Implementation Date, pursuant to and in accordance with the terms of the Plan, the ability of any Person to proceed against the Released Directors/Officers in respect of or relating to any Released Directors/Officers Claims shall be permanently and forever barred, estopped, stayed and enjoined, and all proceedings with respect to, in connection with or relating to such Released Director/Officer Claims shall be permanently stayed, subject to section 7.3 of the Plan and subject to paragraph 22 of this Plan Sanction Order.

25. **THIS COURT ORDERS** that, on the Plan Implementation Date, each Affected Creditor and any person having a Released Claim shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety, and each Affected Creditor and any Person having a Released Claim shall be deemed to have executed and delivered all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

26. **THIS COURT ORDERS** that, pursuant to section 6(2) of the CCAA, the Articles of the Applicant shall be amended on the Plan Implementation Date in accordance with the Articles of Reorganization.

27. **THIS COURT ORDERS** that (i) in accordance with the Articles of Reorganization, any fractional Class A Shares held by any holder of Class A Shares immediately following the consolidation of the Class A Shares referred to in section 5.4(j) of the Plan shall be cancelled without any liability, payment or other compensation in respect thereof; and (ii) all Equity Interests (for greater certainty, not including any Class A Shares that remain issued and outstanding immediately following the cancellation of fractional interests pursuant to section 5.4(k) of the Plan) and the Shareholder Agreement shall be cancelled without any liability, payment or other compensation in respect thereof.

28. **THIS COURT ORDERS AND DECLARES** that, subject to performance by the Applicant of its obligations under the Plan and except as provided in the Plan, all obligations, agreements or leases to which any of the Applicant or the SkyLink Companies is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason: (i) of any event which occurred prior to the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies; (ii) that the Applicant has sought or obtained relief or has taken steps in connection with the Plan or under the CCAA; (iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicant on or prior to the Plan Implementation Date; (iv) of the effect upon the Applicant of the completion of any of the transactions contemplated under the Plan; or (v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan.

29. **THIS COURT ORDERS AND DECLARES** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition or non-solicitation agreement or obligation in respect of the Applicant that exists on the Plan Implementation Date, including for greater certainty any non-competition or non-solicitation agreement or obligation that is expressly preserved or continued pursuant to a CCAA Settlement Agreement, provided that any such agreement or obligation shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicant and the applicable Persons.

30. **THIS COURT ORDERS** that, on the Plan Implementation Date, following completion of the steps in the sequence set forth in section 5.4 of the Plan, all debentures, notes, certificates, agreements, invoices and other instruments evidencing Affected Claims (including, for greater certainty, the Secured Notes) shall not entitle any holder thereof to

any compensation or participation and shall be and are hereby deemed to be cancelled and shall be and are hereby deemed to be null and void.

RELEASES AND INJUNCTIONS

31. **THIS COURT ORDERS** that, subject to paragraph 32 of this Plan Sanction Order, on the Plan Implementation Date, in accordance with section 7.1 of the Plan and the sequence set forth in section 5.4 of the Plan, the Released Parties shall be released and discharged from any and all Released Claims, and all Released Claims shall be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, all to the fullest extent permitted by Applicable Law.

32. **THIS COURT ORDERS** that, notwithstanding paragraph 31 of this Plan Sanction Order, Insured Claims and Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled or barred by this Plan Sanction Order or the Plan, provided that from and after the Plan Implementation Date, any Person having, or claiming any entitlement or compensation relating to, an Insured Claim or a Director/Officer Wages Claim will be irrevocably limited to recovery in respect of such Insured Claim or Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claim or Director/Officer Wages Claims will have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from the Applicant, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. Nothing in this Plan Sanction Order prejudices, compromises, releases or otherwise affects any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of an Insured Claim or a Director/Officer Wages Claim.

33. **THIS COURT ORDERS** that on the Plan Implementation Date, all Persons shall be permanently and forever barred, estopped, stayed and enjoined with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral,

administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of the Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan.

34. **THIS COURT ORDERS** that on the Plan Implementation Date, all Persons shall be permanently and forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with in respect of any Insured Claim or Director/Officer Wages Claim, except as against the applicable insurer(s) to the extent that rights to enforce such Insured Claims and/or Director/Officer Wages Claims against such insurer(s) in respect of an Insurance Policy are expressly preserved pursuant to sections 3.5(b), 3.7(b) and/or 7.1(b) of the Plan, and provided that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b) of the Plan, any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to sections 3.5(b), 3.7(b) and/or

7.1(b) of the Plan. For greater certainty, nothing in this paragraph 34 restricts or limits the application of paragraph 22 of this Plan Sanction Order.

THE MONITOR

35. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Plan, shall be and is hereby authorized, directed and empowered to perform its functions and fulfill its obligations under the Plan to facilitate the implementation of the Plan.

36. **THIS COURT ORDERS** that (i) in carrying out the terms of this Plan Sanction Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of this Plan Sanction Order and/or the Plan, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicant and any information provided by the Applicant without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

37. **THIS COURT ORDERS** that upon completion by the Monitor of its duties in respect of the Applicant pursuant to the CCAA, the Plan and the Orders, the Monitor may file with the Court a certificate stating that all of its duties in respect of the Applicant pursuant to the CCAA, the Plan and the Orders have been completed and thereupon, Duff & Phelps Canada Restructuring Inc. shall be deemed to be discharged from its duties as Monitor and released of all claims relating to its activities as Monitor.

BOARD OF DIRECTORS OF SKYLINK AVIATION INC.

38. **THIS COURT ORDERS AND DECLARES** that the Persons to be appointed to the board of directors on the Plan Implementation Date are Harry Green, Rael Nurick, Andrew Hamlin and Philip Hampson or such other persons listed on a certificate filed with the Court by the Applicant prior to the Plan Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior written consent

of the Majority Initial Consenting Noteholders. Concurrently with the appointment of such directors, all directors serving immediately prior to the Plan Implementation Date shall be deemed to resign.

SEALING ORDER

39. **THIS COURT ORDERS** that the Confidential Appendix #1 to the Third Report 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 which 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.

EXTENSION OF THE STAY OF PROCEEDINGS

40. **THIS COURT ORDERS** that the Stay Period, as such term is defined in and used throughout the Initial Order, be and is hereby extended to and including 11:59 p.m. on May 31, 2013, and that all other terms of the Initial Order shall remain in full force and effect, unamended, except as may be required to give effect to this paragraph or otherwise provided in the Plan or this Plan Sanction Order.

EFFECT, RECOGNITION AND ASSISTANCE

41. **THIS COURT ORDERS** that the Applicant and the Monitor may apply to this Court for advice and direction with respect to any matter arising from or under the Plan or this Plan Sanction Order.

42. **THIS COURT ORDERS** that this Plan Sanction Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

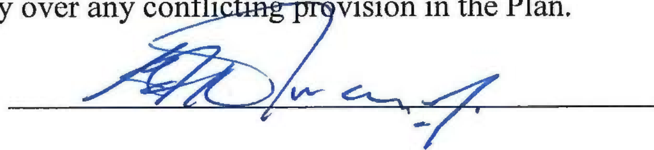
43. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order or to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such

orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant or the Monitor and their respective agents in carrying out the terms of this Order.

GENERAL

44. **THIS COURT ORDERS** that this Plan Sanction Order shall be posted on the Monitor's Website at http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx and is only required to be served upon the parties on the Service List and those parties who appeared at the hearing of the motion for this Plan Sanction Order.

45. **THIS COURT ORDERS AND DECLARES** that any conflict or inconsistency between the Plan and this Plan Sanction Order shall be governed by the terms, conditions and provisions of the Plan, which shall take precedence and priority, provided that any provision of this Plan Sanction Order that expressly provides that it supersedes the provisions of the Plan or that it operates notwithstanding anything to the contrary in the Plan shall take precedence and priority over any conflicting provision in the Plan.



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APR 23 2013

Schedule "A"

(Plan of Compromise and Arrangement)

Court File No. 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

APPLICANT

PLAN OF COMPROMISE AND ARRANGEMENT
pursuant to the *Companies' Creditors Arrangement Act* concerning, affecting and involving

SKYLINK AVIATION INC.

APRIL 18, 2013

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PLAN OF
COMPROMISE AND ARRANGEMENT

WHEREAS SkyLink Aviation Inc. (the "**Applicant**" or "**SkyLink Aviation**") is a debtor company under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**");

AND WHEREAS the Applicant has entered into a Recapitalization Support Agreement dated March 7, 2013 (as it may be amended, restated and varied from time to time in accordance with the terms thereof, the "**Support Agreement**"), between the Applicant and certain parties (the "**Consenting Noteholders**" and each a "**Consenting Noteholder**") that are holders of, and/or investment advisors or managers with investment discretion over, the $110 million aggregate principal amount of 12.25% senior secured second lien notes due 2016 issued by SkyLink Aviation (the "**Secured Notes**");

AND WHEREAS the Support Agreement contemplates the implementation of the Recapitalization (as defined below) pursuant to a plan of compromise and arrangement under the CCAA, which plan will provide for, among other things, the exchange of the Secured Notes for new equity and new notes in SkyLink Aviation, which is expected to result in, among other things, greater liquidity for, and the continued viability of, the Applicant;

AND WHEREAS the Applicant obtained an order (as may be amended, restated or varied from time to time, the "**Initial Order**") of the Ontario Superior Court of Justice (the "**Court**") under the CCAA dated March 8, 2013 (the "**Filing Date**");

AND WHEREAS the Applicant filed a plan of compromise and arrangement with the Court on March 8, 2013 under and pursuant to the CCAA, and the Applicant has made certain amendments thereto in accordance with the terms thereof and hereby proposes and presents this amended plan of compromise and arrangement to the Affected Unsecured Creditors Class (as defined below) and the Secured Noteholders Class (as defined below) under and pursuant to the CCAA.

ARTICLE 1
INTERPRETATION

1.1 Definitions

In the Plan, unless otherwise stated or unless the subject matter or context otherwise requires:

"**Affected Claim**" means any Claim that is not an Unaffected Claim, and, for greater certainty, includes any Equity Claim.

"**Affected Creditor**" means any Creditor with an Affected Claim, but only with respect to and to the extent of such Affected Claim, including Secured Noteholders who have beneficial ownership of an Affected Claim pursuant to the Secured Notes.

"**Affected Unsecured Claims**" means all Affected Claims other than (i) the Claims comprising the Secured Noteholders Allowed Secured Claim and (ii) Equity Claims, and for the avoidance of doubt includes the Claims comprising the Secured Noteholders Allowed Unsecured Claim.

"**Affected Unsecured Creditor**" means any holder of an Affected Unsecured Claim, but only with respect to and to the extent of such Affected Unsecured Claim.

"**Affected Unsecured Creditors Class**" means the class of Affected Unsecured Creditors entitled to vote on this Plan at the Unsecured Creditors Meeting in accordance with the terms of the Meetings Order.

"**Agreed Number**" means, with respect to the New Common Shares, that number of New Common Shares to be issued on the Plan Implementation Date pursuant to the Plan as agreed to by the Applicant, the Monitor and the Majority Initial Consenting Noteholders.

"**Allowed**" means, with respect to a Claim, any Claim or any portion thereof that has been finally allowed as a Distribution Claim (as defined in the Claims Procedure Order) for purposes of receiving distributions under the Plan in accordance with the Claims Procedure Order or a Final Order of the Court.

"**Applicable Law**" means any law, statute, order, decree, consent decree, judgment, rule regulation, ordinance or other pronouncement having the effect of law whether in Canada, the United States or any other country, or any domestic or foreign state, county, province, city or other political subdivision or of any Governmental Entity.

"**Articles**" means the articles of amalgamation of SkyLink Aviation.

"**Articles of Amalgamation**" means the articles of amalgamation pursuant to the OBCA, the form and substance as agreed by the Applicant and the Majority Initial Consenting Noteholders, to effectuate the amalgamation of SkyLink Aviation and SkyLink Canadian Subsidiary.

"**Articles of Reorganization**" means the articles of reorganization pursuant to the OBCA, the form and substance as agreed by the Applicant, the Monitor and the Majority Initial Consenting Noteholders, to be filed by the Applicant on the Plan Implementation Date amending the Articles in accordance with the Plan.

"**Business Day**" means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Toronto, Ontario and New York, New York.

"**Canadian Tax Act**" means the *Income Tax Act* (Canada), as amended.

"**CCAA**" has the meaning ascribed thereto in the recitals.

"**CCAA Proceeding**" means the proceeding commenced by the Applicant under the CCAA on the Filing Date.

"**CDS**" means CDS Clearing and Depositary Services Inc. or any successor thereof.

"**CDS Participants**" has the meaning ascribed thereto in section 4.1(c)(A).

"**Charges**" means the Administration Charge, the Directors' Charge, the KERP Charge and the DIP Lenders' Charge, each as defined in the Initial Order.

"**Claim**" means:

(a) any right or claim of any Person against the Applicant, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind whatsoever of the Applicant in existence on the Filing Date, and costs payable in respect thereof to and including the Filing Date, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts which existed prior to the Filing Date and any other claims that would have been claims provable in bankruptcy had the Applicant become bankrupt on the Filing Date, including for greater certainty any Equity Claim and any claim for indemnification by any Director or Officer in respect of a Director/Officer Claim (but excluding any such claim for indemnification that is covered by the Directors' Charge (as defined in the Initial Order)); and

(b) any right or claim of any Person against the Applicant in connection with any indebtedness, liability or obligation of any kind whatsoever owed by the Applicant to such Person arising out of the restructuring, disclaimer, resiliation, termination or breach by the Applicant on or after the Filing Date of any contract, lease or other agreement whether written or oral,

provided that, for greater certainty, the definition of "Claim" shall not include any Director/Officer Claim.

"**Claims Bar Date**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Claims Procedure Order**" means the Order under the CCAA establishing a claims procedure in respect of the Applicant, as same may be further amended, restated or varied from time to time.

"**Class A Shares**" means the common shares in the capital of SkyLink Aviation designated in the Articles as Class A Common Shares.

"**Class B Shares**" means the common shares in the capital of SkyLink Aviation designated in the Articles as Class B Common Shares.

"**Company Advisors**" means Goodmans LLP and Ernst & Young Inc.

"**Company Stock Option Plans**" means the 2008 Stock Award Plan adopted by SL Aviation Bidco Inc. (as predecessor to SkyLink Aviation) on November 6, 2008, and any other options plans or other obligations of the Applicant in respect of options or warrants for equity in SkyLink

Aviation, in each case as such plan or other obligation may be amended, restated or varied from time to time in accordance with the terms thereof.

"**Consenting Noteholder**" has the meaning ascribed thereto in the recitals.

"**Consolidation Ratio**" means, with respect to the Class A Shares, the ratio by which Class A Shares outstanding on the Plan Implementation Date at the relevant time (including, for the avoidance of doubt, any Class A Shares that are Existing Shares and New Common Shares issued pursuant to the Plan) are consolidated pursuant to the Plan, as agreed by the Applicant, the Monitor and the Majority Initial Consenting Noteholders.

"**Court**" has the meaning ascribed thereto in the recitals.

"**Creditor**" means any Person having a Claim, but only with respect to and to the extent of such Claim, including the transferee or assignee of a transferred Claim that is recognized as a Creditor in accordance with the Claims Procedure Order or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through such Person.

"**DIP Agreement**" means the debtor-in-possession credit agreement between the Applicant, as borrower, the SkyLink Guarantors, as guarantors, and the DIP Lenders, as such agreement may be modified, amended or supplemented in accordance with the terms thereof, the Initial Order or any other Order of the Court, which DIP Agreement will cease to be a debtor-in-possession credit agreement and will take effect as a new first lien credit agreement on the Plan Implementation Date in accordance with the terms hereof and thereof, and, accordingly, any reference herein to the DIP Agreement also means the New First Lien Credit Agreement, as applicable.

"**DIP Backstop**" means the commitment to fund the entire DIP Loan Amount provided by the DIP Backstop Parties subject to the terms of and in accordance with the DIP Backstop Commitment Letter.

"**DIP Backstop Commitment Letter**" means the commitment letter entered into by SkyLink Aviation and the DIP Backstop Parties pursuant to which the DIP Backstop Parties have committed to funding the entire DIP Loan Amount, subject to and in accordance with the terms thereof.

"**DIP Backstop Parties**" means those Noteholders that have executed the Support Agreement and are signatories to the DIP Backstop Commitment Letter, and "**DIP Backstop Party**" means any one of them.

"**DIP Backstop Party's Pro Rata Share**" means with respect to each DIP Backstop Party, (x) the amount of the DIP Backstop committed by such DIP Backstop Party pursuant to the DIP Backstop Commitment Letter divided by (y) the DIP Loan Amount.

"**DIP Facility**" means the interim financing facility committed by the DIP Lenders pursuant to the DIP Agreement.

"**DIP Lenders**" means, collectively, the DIP Backstop Parties and the Qualifying Noteholders who become lenders of the DIP Facility under the DIP Agreement in accordance with the terms of the Initial Order, and "**DIP Lender**" means any one of them.

"**DIP Loan Amount**" means US$18 million.

"**Directors**" means all current and former directors (or their estates) of the Applicant, in such capacity, and "**Director**" means any one of them.

"**Director/Officer Claim**" means any right or claim of any Person against one or more of the Directors or Officers of the Applicant howsoever arising, whether or not such right or claim is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, known, or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, including any right of contribution or indemnity, for which any Director or Officer of the Applicant is alleged to be by statute or otherwise by law liable to pay in his or her capacity as a Director or Officer.

"**Director/Officer Wages Claim**" means the Director/Officer Claims for unpaid employment remuneration delivered to the Monitor on or prior to 5:00 p.m. (Toronto Time) on March 28, 2013 in accordance with the Claims Procedure Order, which are described on Schedule "D" hereto.

"**Disputed Distribution Claim**" means an Affected Unsecured Claim (including a contingent Affected Unsecured Claim which may crystallize upon the occurrence of an event or events occurring after the Filing Date) or such portion thereof which has not been Allowed, which is validly disputed for distribution purposes in accordance with the Claims Procedure Order and which remains subject to adjudication for distribution purposes in accordance with the Claims Procedure Order.

"**Disputed Distribution Claims Reserve**" means the reserve, if any, to be established by the Applicant on the Unsecured Promissory Note Maturity Date, which shall be comprised of the Unsecured Promissory Note Proceeds that would have been paid in respect of Unsecured Promissory Note Entitlements, if such Disputed Distribution Claims had been Allowed Claims as of such date.

"**Distribution Date**" means the date or dates from time to time set in accordance with the provisions of the Plan to effect distributions in respect of the Allowed Claims, excluding the Initial Distribution Date, and in the case of distributions from Unsecured Promissory Note Proceeds, means the Unsecured Promissory Note Maturity Date or such later date from time to time in accordance with the provisions of the Plan if any Affected Unsecured Claim is a Disputed Distribution Claim on the Unsecured Promissory Note Maturity Date.

"**Effective Time**" means 12:01 a.m. (Toronto time) on the Plan Implementation Date or such other time on such date as the Applicant and the Majority Initial Consenting Noteholders may agree.

"**Employee Priority Claims**" means the following Claims of Employees and former employees of SkyLink Aviation:

(c) Claims equal to the amounts that such Employees and former employees would have been entitled to receive under paragraph 136(l)(d) of the *Bankruptcy and Insolvency Act* (Canada) if SkyLink Aviation had become bankrupt on the Filing Date; and

(d) Claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date together with, in the case of travelling salespersons, disbursements properly incurred by them in and about SkyLink Aviation's business during the same period.

"**Employees**" means any and all (a) employees of SkyLink Aviation who are actively at work (including full-time, part-time or temporary employees) and (b) employees of SkyLink Aviation who are on approved leaves of absence (including maternity leave, parental leave, short-term disability leave, workers' compensation and other statutory leaves), and who have not tendered notice of resignation as of the Filing Date, in each case.

"**Encumbrance**" means any charge, mortgage, lien, pledge, claim, restriction, hypothec, adverse interest, security interest or other encumbrance whether created or arising by agreement, statute or otherwise at law, attaching to property, interests or rights and shall be construed in the widest possible terms and principles known under the law applicable to such property, interests or rights and whether or not they constitute specific or floating charges as those terms are understood under the laws of the Province of Ontario.

"**Equity Claim**" means a Claim that meets the definition of "equity claim" in section 2(1) of the CCAA.

"**Equity Claimants**" means any Person with an Equity Claim or holding an Equity Interest, but only in such capacity, and for greater certainty includes the Existing Shareholders in their capacity as such.

"**Equity Interests**" has the meaning ascribed thereto in section 2(1) of the CCAA and, for greater certainty, includes the Existing Shares, the shares in the capital of the Applicant referred to in the Articles as the "Class B Common Shares", the Options and any other interest in or entitlement to shares in the capital of the Applicant but, for greater certainty, does not include the New Common Shares issued on the Plan Implementation Date in accordance with the Plan.

"**Existing Shareholder**" means any Person who holds or is entitled to the Existing Shares or any shares in the authorized capital of the Applicant immediately prior to the Effective Time, but only in such capacity, and for greater certainty does not include any Person that is issued New Common Shares on the Plan Implementation Date, in such capacity.

"**Existing Shares**" means all shares in the capital of SkyLink Aviation that are issued and outstanding immediately prior to the Effective Time.

"**Expense Reimbursement**" means the reasonable and documented fees and expenses of the Noteholder Advisors (to the extent not already satisfied by the Applicant).

"**Filing Date**" has the meaning ascribed thereto in the recitals.

"**Final Order**" means any order, ruling or judgment of the Court, or any other court of competent jurisdiction, which has not been reversed, modified or vacated, and is not subject to any stay.

"**First Lien Agent**" means Deans Knight Capital Management Ltd., in its capacity as agent of the First Lien Credit Facility.

"**First Lien Credit Agreement**" means the credit agreement dated as of March 15, 2011 between, among others, the Applicant, as borrower, and the SkyLink Guarantors, as guarantors, as amended and modified from time to time, which credit agreement was assigned to and assumed by the First Lien Agent and the First Lien Lenders pursuant to a Loan Purchase Agreement dated as of February 28, 2013.

"**First Lien Credit Facility**" means the credit facility provided pursuant to the First Lien Credit Agreement.

"**First Lien Lenders**" means the lenders pursuant to the First Lien Credit Facility, at the relevant time, in their capacity as such.

"**Fractional Interests**" has the meaning given in section 4.10 hereof.

"**Government Priority Claims**" means all Claims of Governmental Entities against the Applicant in respect of amounts that are outstanding and that are of a kind that could reasonably be subject to a demand under:

(a) subsections 224(1.2) of the Canadian Tax Act;

(b) any provision of the Canada Pension Plan or the *Employment Insurance Act* (Canada) that refers to subsection 224(1.2) of the Canadian Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, or employee's premium or employer's premium as defined in the *Employment Insurance Act* (Canada), or a premium under Part VII. I of that 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 Canadian 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 Canadian 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.

"**Governmental Entity**" means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.

"**Incentive Plan**" has the meaning ascribed thereto in section 5.4(m).

"**Information Statement**" means the information statement distributed (or to be distributed) by SkyLink Aviation concerning the Plan, the Meetings and the hearing in respect of the Sanction Order, as contemplated in the Meetings Order.

"**Initial Consenting Noteholder's Pro-Rata Share**" means with respect to each Initial Consenting Noteholder, (x) the principal amount of Secured Notes held by such Initial Consenting Noteholder as at the relevant date divided by (y) the aggregate principal amount of Secured Notes held by all of the Initial Consenting Noteholders collectively.

"**Initial Consenting Noteholders**" means those Secured Noteholders that were the original signatories to the Support Agreement (as distinct from a Support Agreement Joinder).

"**Initial Distribution Date**" means a date no more than two (2) Business Days after the Plan Implementation Date or such other date as the Applicant, the Monitor and the Majority Initial Consenting Noteholders may agree.

"**Initial Order**" has the meaning ascribed thereto in the recitals.

"**Insurance Policy**" means any insurance policy maintained by SkyLink Aviation pursuant to which SkyLink Aviation or any Director or Officer is insured.

"**Insured Claim**" means all or that portion of a Claim arising from a cause of action for which the applicable insurer has definitively and unconditionally confirmed that SkyLink Aviation is insured under an Insurance Policy, to the extent that such Claim, or portion thereof, is so insured.

"**Intercompany Claim**" means any claim by any SkyLink Company or related entity against SkyLink Aviation.

"**IPSA**" means the Interest Payment Support Agreement dated as of September 17, 2012, as amended and supplemented from time to time, among the IPSA Noteholder Participants, SkyLink Aviation and certain guarantors party to the Secured Note Indenture.

"**IPSA Noteholder Participants**" means those Secured Noteholders that executed the IPSA.

"**KERP**" means the payments to be made to certain key employees of the Applicant upon the implementation of the Plan, as described in the key employee retention plan letters attached to,

and filed with the Court together with, the confidential supplement to the Pre-Filing Report of the Monitor dated as of the Filing Date.

"**Majority Initial Consenting Noteholders**" means Initial Consenting Noteholders holding not less than a majority of the principal amount of the Notes held by all Initial Consenting Noteholders, in each case as communicated to the Applicant by counsel to the Initial Consenting Noteholders, in accordance with section 10.6 hereof.

"**Material**" means a fact, circumstance, change, effect, matter, action, condition, event, occurrence or development that, individually or in the aggregate, is, or would reasonably be expected to be, material to the business, affairs, results of operations or financial condition of the Applicant (taken as a whole).

"**Material Adverse Effect**" means a fact, event, change, occurrence or circumstance that, individually or together with any other fact, event, change, occurrence or circumstance, has, or could reasonably be expected to have, a material adverse impact on the business, assets, liabilities, capitalization, obligations (whether absolute, accrued, conditional or otherwise), condition (financial or otherwise), operations or prospects of the Applicant and its subsidiaries (taken as a whole) and shall include, without limitation, the disposition by the Applicant or any of its subsidiaries of any material asset without the prior consent of the Majority Initial Consenting Noteholders; provided, however, that a Material Adverse Effect shall not include, and shall be deemed to exclude the impact of: (A) any change in Applicable Laws of general applicability or interpretations thereof by courts or governmental or regulatory authorities, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), (B) any change in the aviation transport and logistics services industry generally, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), (C) actions and omissions of the Applicant taken with the prior written consent of the Majority Initial Consenting Noteholders or required pursuant to the Support Agreement, the Plan or any related document, (D) the public announcement of the Support Agreement, the DIP Agreement, the Plan or any related document or the transactions contemplated by thereby, (E) SkyLink Aviation entering into the DIP Agreement, (F) the CCAA Proceedings, (G) any material change in the market price or trading volume of the Secured Notes or Equity Interests (it being understood that any cause or causes of any such change may be taken into consideration when determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur), (H) any act of war, armed hostilities or terrorism or any worsening thereof, which does not disproportionately adversely affect the Applicant or its subsidiaries (taken as a whole), or (I) any material failure by the Applicant to meet internal projections or forecasts or third party revenue or earnings predictions for any period (it being understood that any cause or causes of any such failure may be taken into consideration when determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur).

"**Meeting Date**" means the date on which the Meetings are held in accordance with the Meetings Order.

"**Meetings**" means, collectively, the Unsecured Creditors Meeting and the Secured Noteholders Meeting.

"**Meetings Order**" means the Order under the CCAA that, among other things, sets the date for the Meetings, as same may be amended, restated or varied from time to time.

"**Monitor**" means Duff & Phelps Canada Restructuring Inc., as Court-appointed Monitor in the CCAA Proceeding of the Applicant.

"**New Common Shares**" means the new Class A Shares of SkyLink Aviation to be issued pursuant to section 5.2(1) hereof.

"**New First Lien Credit Agreement**" means the DIP Agreement, which credit agreement will cease to be a debtor-in-possession credit agreement and will take effect as a new first lien credit agreement on the Plan Implementation Date in accordance with the terms hereof and thereof and, accordingly, any reference herein to the New First Lien Credit Agreement also means the DIP Agreement, as applicable.

"**New First Lien Loan**" means the secured, first lien loans in the aggregate principal amount of the New Loan Amount that are to take effect on the Plan Implementation Date in accordance with the terms hereof and the DIP Agreement.

"**New Loan Amount**" means US$18 million.

"**New Lenders**" means the DIP Lenders, all of whom will cease to be DIP Lenders on the Plan Implementation Date and will automatically become lenders pursuant to the New First Lien Loan on the Plan Implementation Date in accordance with the terms hereof and the DIP Agreement.

"**New Lender's Pro Rata Share**" means with respect to each New Lender, (x) the amount of the New Loan Amount committed (including, for greater certainty, any amount funded) by such New Lender as at the Plan Implementation Date, divided by (y) the New Loan Amount.

"**New Second Lien Notes**" means the secured, second lien notes in the aggregate principal amount of $10 million to be issued on the Plan Implementation Date pursuant to section 5.2(2) hereof, the terms of which shall be consistent with the summary of terms set forth in Schedule "A".

"**New Second Lien Notes Indenture**" means the note indenture dated as of the Plan Implementation Date among SkyLink Aviation, the guarantors party thereto and the New Second Lien Notes Indenture Trustee pursuant to which the New Second Lien Notes will be issued.

"**New Second Lien Notes Indenture Trustee**" means Computershare Trust Company of Canada or such other trustee as may be agreed to by the Applicant and the Majority Initial Consenting Noteholders, as trustee under the New Second Lien Notes Indenture.

"**New Shareholders' Agreement**" means the shareholders' agreement among SkyLink Aviation and each of the holders of the New Common Shares, which shall be declared to be effective and binding on all such Persons pursuant to the Sanction Order.

"**Noteholder Advisors**" means Bennett Jones LLP and PwC.

"**Notice of Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**OBCA**" means the *Business Corporations Act* (Ontario), as amended.

"**Officers**" means all current and former officers (or their estates) of the Applicant, in such capacity, and "**Officer**" means any one of them.

"**Options**" means any options, warrants, conversion privileges, puts, calls, subscriptions, exchangeable securities, or other rights, entitlements, agreements, arrangements or commitments (pre-emptive, contingent or otherwise) obligating SkyLink Aviation to issue, acquire or sell shares in the capital of SkyLink Aviation or to purchase any shares, securities, options or warrants, or any securities or obligations of any kind convertible into or exchangeable for shares in the capital of SkyLink Aviation, in each case that are existing or issued and outstanding immediately prior to the Effective Time, including any options to acquire common shares of SkyLink Aviation issued under the Company Stock Option Plans, any warrants exercisable for common shares or other equity securities of SkyLink Aviation, any put rights exercisable against the Applicant in respect of any shares, options, warrants or other securities, and any rights, entitlements or other claims of any kind to receive any other form of consideration in respect of any prior or future exercise of any of the foregoing.

"**Order**" means any order of the Court made in connection with the CCAA Proceeding.

"**Person**" means any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, government or any agency, officer or instrumentality thereof or any other entity.

"**Plan**" means this Plan of Compromise and Arrangement filed by the Applicant under the CCAA, as it may be amended, supplemented or restated from time to time in accordance with the terms hereof.

"**Plan Implementation Date**" means the Business Day on which this Plan becomes effective, which shall be the Business Day on which, pursuant to section 9.2, the Applicant and Majority Initial Consenting Noteholders deliver written notice to the Monitor that the conditions set out in section 9.1 have been satisfied or waived in accordance with the terms hereof.

"**Post-Filing Trade Payables**" means trade payables that were incurred by the Applicant (a) after the Filing Date but before the Plan Implementation Date; and (b) in compliance with the Initial Order and other Orders issued in connection with the CCAA Proceeding.

"**Prior Ranking Secured Claims**" means Claims existing on both the Filing Date and the Plan Implementation Date, other than Government Priority Claims, Employee Priority Claims, and Claims secured by the Charges, that (a) have the benefit of a valid and enforceable security interest in, mortgage or charge over, lien against or other similar interest in, any of the assets that the Applicant owns or to which the Applicant is entitled, but only to the extent of the realizable value of the property subject to such security; and (b) would have ranked senior in priority to the Secured Noteholders Allowed Secured Claim if the Applicant had become bankrupt on the Filing Date.

"**Proof of Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**PwC**" means PricewaterhouseCoopers LLP.

"**Qualifying Noteholder**" means a Secured Noteholder as of the Filing Date that: (a) in the case of a Secured Noteholder resident in the United States, is a "qualified institutional buyer" within the meaning of Rule 144A under the 1933 Act; (b) in the case of a Secured Noteholder resident in a province or territory of Canada, is an "accredited investor" as such term is defined in the National Instrument 45-106 Prospectus and Registration Exemptions ("**NI 45-106**"); or (c) in the case of a Secured Noteholder resident outside of Canada or the United States, would qualify as an "accredited investor" as such term is defined in NI-45-106 as if such Secured Noteholder was resident in Canada and can demonstrate to SkyLink Aviation that it is qualified to participate as a lender in the DIP Facility in accordance with the laws of its jurisdiction of residence.

"**Recapitalization**" means the transactions contemplated by this Plan.

"**Released Claim**" has the meaning ascribed thereto in section 7.1(a).

"**Released Director/Officer Claim**" means any Director/Officer Claim that is released pursuant to section 7.1.

"**Released Directors/Officers**" means the Persons listed on Schedule "B", in their capacity as Directors and/or Officers, and "**Released Director/Officer**" means any one of them.

"**Released Party**" and "**Released Parties**" have the meaning ascribed thereto in section 7.1(a).

"**Released Shareholders**" means those holders of the Existing Shares as of the Filing Date who are listed on Schedule "C", in their capacity as holders of Existing Shares.

"**Required Majorities**" means with respect to each Voting Class, a majority in number of Affected Creditors representing at least two thirds in value of the Voting Claims of Affected Creditors, in each case who are entitled to vote at the Meetings in accordance with the Meetings Order and who are present and voting in person or by proxy on the resolution approving the Plan at the applicable Meeting.

"**Sanction Date**" means the date that the Sanction Order is made by the Court.

"**Sanction Order**" means the Order of the Court sanctioning and approving this Plan.

"**Secured Noteholder's Pro-Rata Share**" means, with respect to each Secured Noteholder, (x) the principal amount of Secured Notes held by such Secured Noteholder as at the Filing Date divided by (y) $110,000,000 (being the aggregate principal amount of all of the Secured Notes).

"**Secured Noteholders**", and each a "**Secured Noteholder**", means the holders of the Secured Notes.

"**Secured Noteholders Allowed Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Secured Noteholders Allowed Secured Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Secured Noteholders Allowed Unsecured Claim**" has the meaning ascribed thereto in the Claims Procedure Order.

"**Secured Noteholders Class**" means the class of Secured Noteholders collectively holding the Secured Noteholders Allowed Secured Claim entitled to vote on this Plan at the Secured Noteholders Meeting in accordance with the terms of the Meetings Order.

"**Secured Noteholders Meeting**" means the meeting of the Secured Noteholders Class to be held on the Meeting Date for the purpose of considering and voting on the Plan pursuant to the CCAA and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meetings Order.

"**Secured Note Indenture**" means the note indenture dated March 15, 2011 that was entered into between SkyLink Aviation, certain guarantor parties and the Secured Note Indenture Trustee in connection with the issuance of the Secured Notes, as amended by the First Supplemental Indenture dated as of October 19, 2012.

"**Secured Note Indenture Trustee**" means Computershare Trust Company of Canada, as trustee under the Secured Note Indenture.

"**Secured Note Obligations**" means all obligations, liabilities and indebtedness of SkyLink Aviation or any of the other SkyLink Companies (whether as guarantor, surety or otherwise) to the Secured Note Indenture Trustee and/or the Secured Noteholders (including, for greater certainty, in their capacity as holders of the Secured Notes and in their capacity as IPSA Noteholder Participants) under, arising out of or in connection with the Secured Notes, the IPSA, the Secured Note Indenture or the guarantees granted in connection with any of the foregoing as well as any other agreements or documents relating thereto as at the Plan Implementation Date.

"**Secured Notes**" has the meaning ascribed thereto in the recitals.

"**Shareholder Agreement**" means the shareholder agreement dated November 13, 2008 by and among SL Aviation Bidco Inc. (as predecessor to SkyLink Aviation) and the holders of the Existing Shares, as amended and as it may be further amended from time to time.

"**SkyLink Aviation**" has the meaning ascribed thereto in the recitals.

"**SkyLink Canadian Subsidiary**" means 2273853 Ontario Inc.

"**SkyLink Companies**" means the Applicant, the SkyLink Guarantors, SkyLink Aeromanagement (Kenya) Ltd., SkyLink Aviation FZE, SkyLink Air & Logistic Support (Sudan) Co. Ltd., SkyLink Air and Logistic Service Italy Srl, CAS FZE, Aerostan Holdings Company, Aerostan Limited Liability Company and Canadian Force Logistics Augmentation Group Inc.

"**SkyLink Guarantors**" means SkyLink Canadian Subsidiary, SkyLink Air and Logistic Support (USA) Inc., SkyLink USA II and SkyLink Aviation (Wyoming) Inc.

"**SkyLink Subsidiaries**" means the SkyLink Companies other than the Applicant.

"**SkyLink USA II**" means SkyLink Air and Logistic Support (USA) II Inc.

"**Structuring Equity**" means the 5% of the New Common Shares issued and outstanding on the Plan Implementation Date to be issued to the Initial Consenting Noteholders by the Applicant pursuant to this Plan in recognition of the significant time and effort spent by the Initial Consenting Noteholders in working with the Applicant to develop, structure and facilitate the Recapitalization.

"**Support Agreement**" has the meaning ascribed thereto in the recitals.

"**Support Agreement Joinder**" means a joinder agreement in the form set out as a schedule to the Support Agreement pursuant to which a Secured Noteholder agrees to become a Consenting Noteholder and to be bound by the terms of the Support Agreement.

"**Tax**" or "**Taxes**" means any and all federal, provincial, municipal, local and foreign taxes, assessments, reassessments and other governmental charges, duties, impositions and liabilities including for greater certainty taxes based upon or measured by reference to income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Quebec and other government pension plan premiums or contributions, together with all interest, penalties, fines and additions with respect to such amounts.

"**Taxing Authorities**" means anyone of Her Majesty the Queen, Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of any province or territory of Canada, the Canada Revenue Agency, any similar revenue or taxing authority of Canada and each and every province or territory of Canada and any political subdivision thereof, the United States Internal Revenue Service, any similar revenue or taxing authority of the United States and each and every state of the United States, and any Canadian, United States or other government, regulatory authority, government department, agency, commission, bureau, minister, court, tribunal or body or regulation making entity exercising taxing authority or power, and "Taxing Authority" means any one of the Taxing Authorities.

"**Unaffected Claim**" means any:

(a) Claim of the First Lien Agent and/or the First Lien Lenders in respect of the First Lien Credit Agreement or the First Lien Facility;

(b) Claim secured by any of the Charges;

(c) Insured Claim;

(d) Claim by the DIP Lenders arising under the DIP Agreement;

(e) Intercompany Claim;

(f) Post-Filing Trade Payables;

(g) Claim by an Unaffected Trade Creditor arising from an Unaffected Trade Claim;

(h) Prior Ranking Secured Claims;

(i) Claim that is not permitted to be compromised pursuant to section 19(2) of the CCAA;

(j) Employee Priority Claims; and

(k) Government Priority Claims.

"**Unaffected Creditor**" means a Creditor who has an Unaffected Claim, but only in respect of and to the extent of such Unaffected Claim.

"**Unaffected Trade Claim**" means a Claim of an Unaffected Trade Creditor that is not a Post-Filing Trade Payable and that arises out of or in connection with any contract, license, lease, agreement, obligation, arrangement or document with the Applicant related to the business of the Applicant.

"**Unaffected Trade Creditor**" means any Person that has been designated by SkyLink Aviation, with the consent of the Monitor and the Majority Initial Consenting Noteholders, as a critical supplier in accordance with the Initial Order.

"**Undeliverable Distribution**" has the meaning ascribed thereto in section 4.8 hereof.

"**Unsecured Creditor's Pro-Rata Share**" means, at the relevant time, with respect to each Affected Unsecured Creditor, (x) the Allowed Affected Unsecured Claim of such Affected Unsecured Creditor divided by (y) the total of all Allowed Affected Unsecured Claims and Disputed Distribution Claims of Affected Unsecured Creditors.

"**Unsecured Creditors Meeting**" means a meeting of Affected Unsecured Creditors to be held on the Meeting Date called for the purpose of considering and voting on the Plan pursuant to the CCAA, and includes any adjournment, postponement or other rescheduling of such meeting in accordance with the Meetings Order.

"**Unsecured Promissory Note**" means the unsecured, subordinated promissory note in the principal amount of $300,000 due and payable on the Unsecured Promissory Note Maturity Date, subject to the provisions thereof, to be issued by SkyLink Aviation on the Plan Implementation Date in favour of the Affected Unsecured Creditors with Allowed Affected Unsecured Claims and held by the Applicant, for the benefit of the beneficiaries of such promissory note, pending distribution of the Unsecured Promissory Note Proceeds, which promissory note shall accrue 2% payment-in-kind interest annually (which payment-in-kind interest shall be held by the Applicant in a segregated account for the benefit of beneficiaries of the Unsecured Promissory Note), shall be subordinated to all indebtedness and trade obligations of SkyLink Aviation and may be repaid by the Applicant at any time without penalty.

"**Unsecured Promissory Note Entitlement**" means, with respect to each Affected Unsecured Creditor with an Allowed Unsecured Claim, its entitlement to its Unsecured Creditor's Pro-Rata Share of the Unsecured Promissory Note Proceeds.

"**Unsecured Promissory Note Maturity Date**" means the earlier of the date that is 5 years following the Plan Implementation Date and the date on which the Applicant repays the Unsecured Promissory Note in accordance with its terms.

"**Unsecured Promissory Note Proceeds**" means the amount payable to the beneficiaries of the Unsecured Promissory Note on the Unsecured Promissory Note Maturity Date (including the principal amount of the Unsecured Promissory Note and the interest thereon), subject to the terms and conditions of the Unsecured Promissory Note.

"**Voting Claims**" means any Claim or portion thereof that has been finally allowed as a Voting Claim (as defined in the Claims Procedure Order) for purposes of voting at a Meeting in accordance with the Claims Procedure Order or a Final Order of the Court.

"**Voting Classes**" means the Secured Noteholders Class and the Affected Unsecured Creditors Class.

"**Website**" means:

http://www.duffandphelps.com/services/restructuring/Pages/RestructuringCases.aspx.

1.2 Certain Rules of Interpretation

For the purposes of the Plan:

(a) any reference in the Plan to a contract, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that such document shall be substantially in such form or substantially on such terms and conditions;

(b) any reference in the Plan to an Order or an existing document or exhibit filed or to be filed means such Order, document or exhibit as it may have been or may be amended, modified, or supplemented;

(c) unless otherwise specified, all references to currency are in Canadian dollars;

(d) the division of the Plan into "articles" and "sections" and the insertion of a table of contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "articles" and "sections" intended as complete or accurate descriptions of the content thereof;

(e) the use of words in the singular or plural, or with a particular gender, including a definition, shall not limit the scope or exclude the application of any provision of the Plan or a schedule hereto to such Person (or Persons) or circumstances as the context otherwise permits;

(f) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including

but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(g) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Toronto, Ontario and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Toronto time) on such Business Day;

(h) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(i) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation; and

(j) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article or section of the Plan, whereas the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular "article", "section" or other portion of the Plan and include any documents supplemental hereto.

1.3 Successors and Assigns

The Plan shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person or party named or referred to in the Plan.

1.4 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the jurisdiction of the Court.

1.5 Schedules

The following are the Schedules to the Plan, which are incorporated by reference into the Plan and form a part of it:

Schedule "A"	Terms of New Second Lien Notes
Schedule "B"	Released Directors/Officers
Schedule "C"	Released Shareholders

Schedule "D" Director/Officer Wages Claims

ARTICLE 2
PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of the Plan is:

(a) to implement a recapitalization of SkyLink Aviation, which will significantly reduce its indebtedness;

(b) to provide for a settlement of, and consideration for, all Allowed Affected Claims;

(c) to effect a release and discharge of all Affected Claims and Released Claims;

(d) to provide SkyLink Aviation with essential committed financing to address its current and future liquidity needs; and

(e) to ensure the continued viability and ongoing operations of SkyLink Aviation,

in the expectation that the Persons who have an economic interest in the Applicant, when considered as a whole, will derive a greater benefit from the implementation of the Plan than would result from a bankruptcy of the Applicant.

2.2 Persons Affected

The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant. The Plan will become effective at the Effective Time in accordance with its terms and in the sequence set forth in section 5.4 and shall be binding on and enure to the benefit of the Applicant, the Affected Creditors, the Released Parties and all other Persons named or referred to in, or subject to, the Plan.

2.3 Persons Not Affected

The Plan does not affect the Unaffected Creditors, subject to the express provisions hereof providing for the treatment of Insured Claims. Nothing in the Plan shall affect the Applicant's rights and defences, both legal and equitable, with respect to any Unaffected Claims including all rights with respect to legal and equitable defences or entitlements to set-offs or recoupments against such Unaffected Claims.

2.4 Equity Claimants

On the Plan Implementation Date, the Plan will be binding on SkyLink Aviation and all Equity Claimants. Equity Claimants shall not receive a distribution under the Plan or otherwise recover anything in respect of their Equity Claims or Equity Interests. On the Plan Implementation Date, in accordance with the steps and sequences set out in section 5.4, all Equity Interests shall be

cancelled and extinguished and all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred.

ARTICLE 3
CLASSIFICATION AND TREATMENT OF CREDITORS AND RELATED MATTERS

3.1 Claims Procedure

The procedure for determining the validity and quantum of the Affected Claims for voting and distribution purposes under the Plan shall be governed by the Claims Procedure Order, the Meetings Order, the CCAA, the Plan and any further Order of the Court.

3.2 Classification of Creditors

In accordance with the Meetings Order, the only classes of creditors for the purposes of considering and voting on the Plan will be the Secured Noteholders Class and the Affected Unsecured Creditors Class. For greater certainty, Equity Claimants shall not be entitled to vote on the Plan or to receive any distributions hereunder.

3.3 Creditors' Meetings

The Meetings shall be held in accordance with the Meetings Order and any further Order of the Court. The only Persons entitled to attend the Meetings are those specified in the Meetings Order.

3.4 Treatment of Affected Claims

An Affected Claim shall receive distributions as set forth below only to the extent that such Claim is an Allowed Affected Claim and has not been paid, released, or otherwise satisfied prior to the Plan Implementation Date.

(1) <u>Secured Noteholders Class</u>

In accordance with the steps and sequence set forth in section 5.4, each Secured Noteholder will, in full and final satisfaction of the Secured Noteholders Allowed Secured Claim, receive its Secured Noteholder's Pro-Rata Share of:

(a) 25% of the New Common Shares issued and outstanding on the Plan Implementation Date; and

(b) the New Second Lien Notes.

The Claims comprising the Secured Noteholders Allowed Claim and the Secured Note Obligations shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

(2) Affected Unsecured Creditors Class

In accordance with the steps and sequence set forth in section 5.4, and in full and final satisfaction of all Affected Unsecured Claims, each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim will receive its Unsecured Promissory Note Entitlement. All Affected Unsecured Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred on the Plan Implementation Date.

(3) Equity Claimants

In accordance with the steps and sequences set forth in section 5.4, all Equity Claims shall be fully, finally, irrevocably and forever compromised, released, discharged cancelled and barred on the Plan Implementation Date. Equity Claimants will not receive any consideration or distributions under the Plan and shall not be entitled to vote on the Plan at the Meetings in respect of their Equity Claims.

3.5 Unaffected Claims

(a) Unaffected Creditors will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of section 5.4), and they shall not be entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims.

(b) Notwithstanding anything to the contrary herein, Insured Claims shall not be compromised, released, discharged, cancelled and barred by this Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim shall be irrevocably limited to recovery in respect of such Insured Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any Person, including SkyLink Aviation, any SkyLink Subsidiary or any Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. This section 3.5(b) may be relied upon and raised or pled by SkyLink Aviation, any SkyLink Subsidiary or any Released Party in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section. Nothing in this Plan shall prejudice, compromise, release or otherwise affect any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of an Insured Claim.

3.6 Disputed Distribution Claims

Any Affected Unsecured Creditor with a Disputed Distribution Claim shall not be entitled to receive any distribution hereunder with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Unsecured Claim. A Disputed Distribution Claim shall be resolved in the manner set out in the Claims Procedure Order. Distributions pursuant to section 3.4 shall be paid in respect of any Disputed Distribution Claim that is finally

determined to be an Allowed Affected Unsecured Claim in accordance with the Claims Procedure Order.

3.7 Director/Officer Claims

(a) All Released Director/Officer Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled and barred without consideration on the Plan Implementation Date. Any Director/Officer Claim that is not a Released Director/Officer Claim will not be compromised, released, discharged, cancelled and barred. For greater certainty, any Claim of a Director or Officer for indemnification from the Applicant in respect of any Director/Officer Claim that is not otherwise covered by the Directors' Charge shall be treated for all purposes under this Plan as an Affected Unsecured Claim.

(b) Notwithstanding anything to the contrary herein, the Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled or barred by this Plan, provided that from and after the Plan Implementation Date, any Person having Director/Officer Wages Claim shall be irrevocably limited to recovery in respect of such Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Director/Officer Wages Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any Person, including SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies. This section 3.7(b) may be relied upon and raised or pled by SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party in defence or estoppel of or to enjoin any claim, action or proceeding brought in contravention of this section. Nothing in this Plan shall prejudice, compromise, release or otherwise affect any right or defence of any insurer in respect of an Insurance Policy or any insured in respect of Director/Officer Claims or Director/Officer Wages Claims.

3.8 Extinguishment of Claims

On the Plan Implementation Date in accordance with its terms and in the sequence set forth in section 5.4 and in accordance with the provisions of the Sanction Order, the treatment of Affected Claims (including Allowed Claims and Disputed Distribution Claims) and all Released Claims, in each case as set forth herein, shall be final and binding on the Applicant, all Affected Creditors (and their respective heirs, executors, administrators, legal personal representatives, successors and assigns) and any Person holding a Released Claim, and all Affected Claims and all Released Claims shall be fully, finally, irrevocably and forever released, discharged, cancelled and barred, and the Released Parties shall thereupon have no further obligation whatsoever in respect of the Affected Claims and the Released Claims, as applicable; *provided that* nothing herein releases the Applicant or any other Person from their obligations to make distributions in the manner and to the extent provided for in the Plan and *provided further* that such discharge and release of the Applicant shall be without prejudice to the right of a Creditor in respect of a Disputed Distribution Claim to prove such Disputed Distribution Claim in

accordance with the Claims Procedure Order so that such Disputed Distribution Claim may become an Allowed Unsecured Claim entitled to receive consideration under section 3.4 hereof.

3.9 Guarantees and Similar Covenants

No Person who has a Claim under any guarantee, surety, indemnity or similar covenant in respect of any Claim which is compromised and released under this Plan or who has any right to claim over in respect of or to be subrogated to the rights of any Person in respect of a Claim which is compromised under this Plan shall be entitled to any greater rights as against the Applicant than the Person whose Claim is compromised under the Plan.

3.10 Set-Off

The law of set-off applies to all Claims.

ARTICLE 4
PROVISIONS REGARDING DISTRIBUTIONS AND PAYMENTS

4.1 Distributions to Secured Noteholders

(a) This section 4.1 sets forth the distribution mechanics with respect to the New Common Shares and the New Second Lien Notes that are to be distributed to the Secured Noteholders in accordance with section 3.4(1).

(b) Upon receipt of and in accordance with written instructions from the Monitor, the Secured Note Indenture Trustee shall instruct CDS to and CDS shall: (i) establish an escrow position representing the respective positions of the Secured Noteholders as of the Plan Implementation Date for the purpose of making distributions to the Secured Noteholders on and after the Plan Implementation Date; and (ii) block any further trading in the Secured Notes, effective as of the close of business on the Business Day immediately prior to the Plan Implementation Date, all in accordance with the customary procedures of CDS.

(c) (i) The delivery of New Second Lien Notes to the Secured Noteholders will be made through the facilities of CDS to CDS Participants, who, in turn, shall make delivery of interests in such New Second Lien Notes to the beneficial holders of such Secured Notes pursuant to standing instructions and customary practices; provided that, if the New Second Lien Notes are not CDS eligible, delivery of any such New Second Lien Notes will be made to the Secured Note Indenture Trustee who, in turn, will make delivery of the applicable New Second Lien Notes to each of the Secured Noteholders through the direct registration system of Computershare (or such other transfer agent as SkyLink Aviation may appoint); and (ii) the delivery of New Common Shares to the Secured Noteholders will be made as follows:

(A) immediately following the close of business on the Business Day prior to the Plan Implementation Date, CDS shall provide the Monitor with a list showing the names and addresses of all Persons who are CDS participant holders of the Secured Notes ("**CDS**

Participants") and the principal amount of Secured Notes held by each CDS Participant as at the close of business on the Business Day prior to the Plan Implementation Date;

(B) the Monitor shall forthwith provide all such information to the Applicant; and

(C) on the Plan Implementation Date, the Applicant shall, in accordance with the information provided by the Monitor pursuant to section 4.1(c)(ii)(B), register or deliver, as applicable, to the CDS Participants, the applicable amount of New Common Shares,

provided that, subject to the consent of the Monitor and the Majority Initial Consenting Noteholders, the Applicant shall be entitled to make such modifications to the administrative process for distributing New Common Shares and New Second Lien Notes as it deems necessary in order to achieve the proper distribution and allocation of New Common Shares and New Second Lien Notes as set forth herein.

(d) The Applicant and the Monitor shall have satisfied their responsibilities in respect of the distribution of New Common Shares and New Second Lien Notes to the Secured Noteholders in accordance with section 3.4(1) once such New Common Shares and New Second Lien Notes have been delivered to CDS, the CDS Participants or the Secured Note Indenture Trustee, as applicable. The SkyLink Companies and the Monitor will have no liability or obligation in respect of deliveries from CDS, or its nominee, to CDS Participants or from CDS Participants to beneficial holders of the Secured Notes or from the Secured Note Indenture Trustee to beneficial holders of the Secured Notes.

4.2 Distribution Mechanics with Respect to the Unsecured Promissory Note

(a) The Unsecured Promissory Note shall be issued by SkyLink Aviation and shall be held by the Applicant on behalf of all Affected Unsecured Creditors with an Allowed Affected Unsecured Claim and, subject to the terms and conditions thereof, each such Affected Unsecured Creditor shall become entitled to its Unsecured Promissory Note Entitlement on the Plan Implementation Date without any further steps or actions by the Applicant, such Affected Unsecured Creditor or any other Person.

(b) From and after the Plan Implementation Date, and until all Unsecured Promissory Note Proceeds have been distributed in accordance with this Plan, the Applicant shall maintain a register of the Unsecured Promissory Note Entitlement of each applicable Affected Unsecured Creditor as well as the address and notice information set forth on such Affected Unsecured Creditor's Notice of Claim or Proof of Claim or, with respect to any Affected Unsecured Creditor that is a Secured Noteholder, the delivery details of the Secured Note Indenture Trustee. Any applicable Affected Unsecured Creditor whose address or notice information

changes shall be solely responsible for notifying the Applicant of such change. The Applicant shall also record on the register the aggregate amount of any Disputed Distribution Claims.

(c) On the Unsecured Promissory Note Maturity Date, the Applicant shall calculate the amount to be paid to each Affected Unsecured Creditor with an Allowed Unsecured Claim or the Secured Note Indenture Trustee. The Applicant shall also calculate the amount of the Unsecured Promissory Note Proceeds that are not to be distributed as a result of Disputed Distribution Claims that remain outstanding, if any. The Applicant shall then distribute to each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim the applicable amount:

(i) in the case of distributions to Secured Noteholders, in the manner described in section 4.1; and

(ii) in the case of distributions to all other Affected Unsecured Creditors, by way of cheque sent by prepaid ordinary mail.

With respect to any portion of the Unsecured Promissory Note Proceeds that are reserved in respect of Disputed Distribution Claims, the Applicant shall forthwith segregate such amounts to establish the Disputed Distribution Claims Reserve.

4.3 Other Distributions

(a) The distributions to be made to: the DIP Backstop Parties pursuant to section 5.3(1), the New Lenders pursuant to section 5.3(2) and the Initial Consenting Noteholders pursuant to section 5.3(3) shall be made in accordance with this section 4.3.

(b) At least ten (10) Business Days prior to the Plan Implementation Date, the Applicant shall provide the Monitor with copies of the DIP Backstop Commitment Letter, the DIP Participation Documents (as defined in the Initial Order), if any, and the Support Agreement. Based on the foregoing, the Monitor shall forthwith (A) contact each DIP Backstop Party, New Lender and Initial Consenting Noteholder to ascertain its registration and delivery details for purposes of registering or delivering distributions to such Person, and (b) calculate the following:

(i) with respect to each DIP Backstop Party, such DIP Backstop Party's Pro-Rata Share;

(ii) with respect to each of the New Lenders, such New Lender's Pro-Rata Share; and

(iii) with respect to each of the Initial Consenting Noteholders, such Initial Consenting Noteholder's Pro-Rata Share,

and the Monitor shall provide all such information to the Applicant at least two (2) Business Days prior to the Plan Implementation Date.

(c) On the Plan Implementation Date, the Applicant shall, upon receipt of and in accordance with a written direction of the Monitor prepared based on the information received by the Monitor pursuant to section 4.3(b), register or deliver, as applicable, to the DIP Backstop Parties, the New Lenders and the Initial Consenting Noteholders, the applicable amount of New Common Shares as so directed by the Monitor.

4.4 Cancellation of Certificates and Notes

Following completion of the steps in the sequence set forth in section 5.4, all debentures, notes (including the Secured Notes and the Secured Note Obligations), certificates, agreements, invoices and other instruments evidencing Affected Claims or Equity Interests will not entitle any holder thereof to any compensation or participation other than as expressly provided for in the Plan and will be cancelled and will be null and void. Notwithstanding the foregoing, the Secured Note Indenture shall remain in effect for the purpose of and to the extent necessary to: (i) allow the Secured Note Indenture Trustee to make distributions to the Secured Noteholders on the Initial Distribution Date and each subsequent Distribution Date thereafter; and (ii) maintain all of the protections the Secured Note Indenture Trustee enjoys as against the Secured Noteholders, including its lien rights with respect to any distributions under this Plan, until all distributions are made to Secured Noteholders hereunder. For greater certainty, any and all obligations, including the Secured Note Obligations, of the Applicant and the SkyLink Companies (as guarantor, surety or otherwise) under and with respect to the Secured Notes and the Secured Note Indenture shall not continue beyond the Plan Implementation Date.

4.5 Currency

Unless specifically provided for in the Plan or the Sanction Order, for the purposes of distributions under the Plan, a Claim shall be denominated in Canadian dollars and all payments and distributions to the Affected Creditors on account of their Claims shall be made in Canadian dollars. Any Claims denominated in a foreign currency shall be converted to Canadian dollars at the Bank of Canada noon exchange rate in effect at the Filing Date.

4.6 Interest

Interest shall not accrue or be paid on Affected Claims on or after the Filing Date, and no holder of an Affected Claim shall be entitled to interest accruing on or after the Filing Date.

4.7 Allocation of Distributions

All distributions made pursuant to the Plan shall be allocated first towards the repayment of the principal amount in respect of such Affected Creditor's Affected Claim and second, if any, towards the repayment of all accrued but unpaid interest in respect of such Affected Creditor's Affected Claim.

4.8 Treatment of Undeliverable Distributions

If any Affected Creditor's distribution under this Article 4 is returned as undeliverable (an "**Undeliverable Distribution**"), no further distributions to such Affected Creditor shall be made unless and until the Applicant is notified by such Affected Creditor of such Affected Creditor's current address, at which time all such distributions shall be made to such Affected Creditor. All claims for Undeliverable Distributions in respect of Allowed Claims must be made on or before the date that is six months following the final Distribution Date, after which date any entitlement with respect to such Undeliverable Distribution shall be forever discharged and forever barred, without any compensation therefor, notwithstanding any federal, state or provincial laws to the contrary, at which time any such Undeliverable Distributions in relation to the Allowed Claim shall be returned to SkyLink Aviation. Nothing contained in the Plan shall require the Applicant to attempt to locate any holder of an Allowed Claim. No interest is payable in respect of an Undeliverable Distribution. Any distribution under this Plan on account of the Secured Notes shall be deemed made when delivered to CDS, the CDS Participants or the Secured Note Indenture Trustee, as applicable, for subsequent distribution to Secured Noteholders in accordance with this Article 4.

4.9 Withholding Rights

SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor shall be entitled to deduct and withhold from any consideration payable to any Person such amounts as SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor is required to deduct and withhold with respect to such payment under the Canadian Tax Act, or other Applicable Laws, or entitled to withhold under section 116 of the Canadian Tax Act or corresponding provision of provincial or territorial law. To the extent that amounts are so withheld or deducted, such withheld or deducted amounts shall be treated for all purposes hereof as having been paid to the Person in respect of which such withholding was made, provided that such amounts are actually remitted to the appropriate Taxing Authority. SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor are hereby authorized to sell or otherwise dispose of such portion of the consideration as is necessary to provide sufficient funds to SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor, as the case may be, to enable it to comply with such deduction or withholding requirement or entitlement, and SkyLink Aviation, CDS, the Secured Note Indenture Trustee and/or the Monitor, shall notify the Person thereof and remit to such Person any unapplied balance of the net proceeds of such sale.

4.10 Fractional Interests

No fractional interests of New Common Shares or New Second Lien Notes ("**Fractional Interests**") will be issued under this Plan. Recipients of New Common Shares and New Second Lien Notes will have their entitlements adjusted downwards to the nearest whole number of New Common Shares or New Second Lien Notes, as applicable, to eliminate any such Fractional Interests and no compensation will be given for the Fractional Interest.

4.11 Calculations

All amounts of consideration to be received hereunder will be calculated to the nearest cent ($0.01). All calculations and determination made by the Monitor and/or SkyLink Aviation and

agreed to by the Monitor for the purposes of and in accordance with the Plan, including, without limitation, the allocation of consideration, shall be conclusive, final and binding upon the Affected Creditors and the Applicant.

ARTICLE 5
RECAPITALIZATION

5.1 Corporate Actions

The adoption, execution, delivery, implementation and consummation of all matters contemplated under the Plan involving corporate action of the Applicant will occur and be effective as of the Plan Implementation Date, and will be authorized and approved under the Plan and by the Court, where appropriate, as part of the Sanction Order, in all respects and for all purposes without any requirement of further action by shareholders, directors or officers of the Applicant. All necessary approvals to take actions shall be deemed to have been obtained from the directors or the shareholders of the Applicant, as applicable, including the deemed passing by any class of shareholders of any resolution or special resolution and no shareholders' agreement or agreement between a shareholder and another Person limiting in any way the right to vote shares held by such shareholder or shareholders with respect to any of the steps contemplated by the Plan shall be deemed to be effective and shall have no force and effect.

5.2 Issuance of New Common Shares, New Second Lien Notes and the Unsecured Promissory Note

(1) <u>New Common Shares</u>

On the Plan Implementation Date, SkyLink Aviation shall issue the Agreed Number of New Common Shares, and such New Common Shares shall be allocated and distributed in the manner set forth in this Plan.

(2) <u>Issuance of New Second Lien Notes</u>

On the Plan Implementation Date, SkyLink Aviation shall issue the New Second Lien Notes pursuant to the New Second Lien Indenture, and such New Second Lien Notes shall be allocated and distributed in the manner set forth in this Plan.

(3) <u>Unsecured Promissory Note</u>

On the Plan Implementation Date, SkyLink Aviation shall issue the Unsecured Promissory Note and the Unsecured Promissory Note Entitlement shall be allocated in the manner set forth in this Plan.

5.3 DIP Backstop and New First Credit Facility

(1) <u>DIP Backstop</u>

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, each DIP Backstop Party shall receive its DIP Backstop Party's Pro Rata Share of 10% of the New Common Shares issued and outstanding on the Plan Implementation Date.

(2) New First Lien Credit Facility

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, the DIP Facility shall be converted into the New First Lien Loan in accordance with the DIP Agreement and each New Lender shall receive its New Lender's Pro-Rata Share of 60% of the New Common Shares issued and outstanding on the Plan Implementation Date.

(3) Structuring Equity

On the Plan Implementation Date, in accordance with the steps and sequence set out in Section 5.4, each Initial Consenting Noteholder shall receive its Initial Consenting Noteholder's Pro-Rata Share of 5% of the New Common Shares issued and outstanding on the Plan Implementation Date in respect of the Structuring Equity.

5.4 Plan Implementation Date Transactions

The following steps and compromises and releases to be effected in the implementation of the Plan shall occur, and be deemed to have occurred in the following order in five minute increments (unless otherwise noted), without any further act or formality on the Plan Implementation Date beginning at the Effective Time:

(a) all Options shall be cancelled and terminated without any liability, payment or other compensation in respect thereof;

(b) the Company Stock Option Plans shall be terminated;

(c) the Applicant shall borrow such amounts from the DIP Facility as are necessary to repay in full all amounts owing in respect of the First Lien Credit Facility, and the Applicant shall thereupon pay all such amounts to the First Lien Agent in full and final satisfaction of the First Lien Credit Facility;

(d) the First Lien Credit Agreement and the First Lien Credit Facility shall be deemed to be terminated and the Applicant and the SkyLink Companies shall be fully, finally, irrevocably and forever released from any and all claims, liabilities or obligations of any kind to the First Lien Agent or the First Lien Lenders in respect of the First Lien Credit Agreement and the First Lien Credit Facility;

(e) SkyLink Aviation shall issue to each Secured Noteholder its Secured Noteholder's Pro-Rata Share of the New Common Shares and New Second Lien Secured Notes to be issued to it in accordance with section 3.4(1) in full consideration for the irrevocable, final and full compromise and satisfaction of the Secured Noteholders Allowed Secured Claim;

(f) simultaneously with step 5.4(e), the DIP Facility shall be deemed to be converted into the New First Lien Loans in accordance with the DIP Agreement and SkyLink Aviation shall issue to each New Lender its New Lender's Pro Rata Share of the New Common Shares to be issued to it in accordance with section 5.3(2);

(g) simultaneously with step 5.4(e), SkyLink Aviation shall issue to each DIP Backstop Party its DIP Backstop Party's Pro-Rata Share of New Common Shares to be issued to it in accordance with section 5.3(1);

(h) simultaneously with step 5.4(e), each Affected Unsecured Creditor with an Allowed Affected Unsecured Claim shall become entitled to its Unsecured Promissory Note Entitlement in accordance with section 3.4(2) (as such Unsecured Promissory Note Entitlement may be adjusted based on the final determination of Disputed Distribution Claims in the manner set forth herein) in full consideration for the irrevocable, final and full compromise and satisfaction of such Affected Unsecured Creditor's Affected Unsecured Claim;

(i) simultaneously with step 5.4(e), SkyLink Aviation shall issue to each of the Initial Consenting Noteholders its Initial Consenting Noteholder's Pro-Rata Share of the New Common Shares to be issued to it on account of the Structuring Equity in accordance with section 5.3(3);

(j) the Articles shall be amended, pursuant to the Articles of Reorganization, to, among other things, (i) consolidate the issued and outstanding Class A Shares (including, for the avoidance of doubt, Class A Shares that are Existing Shares and New Common Shares issued pursuant to the preceding paragraphs of this Section 5.4) on the basis of the Consolidation Ratio; (ii) eliminate the Class B Shares; and (iii) provide for such additional changes to the rights and conditions attached to the Class A Shares as may be agreed to by the Applicant, the Monitor and the Majority Initial Consenting Noteholders;

(k) pursuant to the Articles of Reorganization, any fractional Class A Shares held by any holder of Class A Shares immediately following the consolidation of the Class A Shares referred to in section 5.4(j) shall be cancelled without any liability, payment or other compensation in respect thereof;

(l) all Equity Interests (for greater certainty, not including any Class A Shares that remain issued and outstanding immediately following the cancellation of fractional interests in section 5.4(k)) and the Shareholder Agreement shall be cancelled without any liability, payment or other compensation in respect thereof;

(m) a number of New Common Shares representing up to 10% of the number of New Common Shares issued and outstanding immediately following step 5.4(k) shall be reserved for issuance by the Applicant after the Plan Implementation Date to directors, officers and employees of the Applicant pursuant to equity-based compensation arrangements to be determined at the discretion of the new board of directors of SkyLink Aviation appointed pursuant to the Sanction Order (the "**Incentive Plan**"), provided that, for greater certainty, the New Common Shares reserved in respect of such Incentive Plan will, if granted, dilute the New Common Shares to be issued to the Secured Noteholders, the New Lenders, the DIP Backstop Parties and the Initial Consenting Noteholders on the Plan Implementation Date in accordance with this Plan;

(n) SkyLink Aviation shall pay in cash all fees and expenses incurred by the Secured Note Indenture Trustee, including its reasonable legal fees, in connection with the performance of its duties under the Secured Note Indenture or this Plan;

(o) all of the Secured Notes and the Secured Note Indenture and all Secured Note Obligations shall be deemed to be fully, finally, irrevocably and forever compromised, released, discharged cancelled and barred;

(p) SkyLink Aviation shall make all distributions to KERP participants in accordance with the terms of the KERP;

(q) SkyLink Aviation shall pay to each of the Noteholder Advisors such Noteholder Advisor's pro rata share of the Expense Reimbursement;

(r) each of the Charges shall be terminated, discharged and released;

(s) the releases set forth in Article 7 shall become effective; and

(t) the stated capital account in respect of the issued and outstanding shares in the capital of SkyLink Canadian Subsidiary shall be reduced to $1.00 with no payment thereon.

The steps described in sub-sections (j), (k) and (t) of this section 5.4 will be implemented pursuant to section 6(2) of the CCAA as if such steps were implemented pursuant to a plan of reorganization under section 186 of the OBCA.

5.5 Issuances Free and Clear

Any issuance of any securities or other consideration pursuant to the Plan will be free and clear of any Encumbrances.

5.6 Stated Capital

The aggregate stated capital for purposes of the OBCA for the New Common Shares issued pursuant to this Plan will be as determined by the new board of directors of SkyLink Aviation appointed pursuant to the Sanction Order.

5.7 Post-Plan Implementation Date Amalgamation

On the Business Day following the Plan Implementation Date or a later date to be agreed between the Applicant and the Majority Initial Consenting Noteholders, the Articles of Amalgamation will be filed such that SkyLink Aviation will be amalgamated with SkyLink Canadian Subsidiary pursuant to the OBCA.

ARTICLE 6
PROCEDURE FOR DISTRIBUTIONS REGARDING DISPUTED DISTRIBUTION CLAIMS

6.1 No Distribution Pending Allowance

An Affected Unsecured Creditor holding a Disputed Distribution Claim will not be entitled to receive a distribution under the Plan in respect of such Disputed Distribution Claim or any portion thereof unless and until, and then only to the extent that, such Disputed Distribution Claim becomes an Allowed Unsecured Claim.

6.2 Distributions After Disputed Distribution Claims Resolved

(a) Distributions from Unsecured Promissory Note Proceeds in relation to a Disputed Distribution Claim of an Affected Unsecured Creditor in existence at the Unsecured Promissory Note Maturity Date will be held by the Applicant, in a segregated account constituting the Disputed Distribution Claims Reserve, for the benefit of the Affected Unsecured Creditors with Allowed Affected Unsecured Creditor Claims until the final determination of the Disputed Distribution Claim in accordance with the Claims Procedure Order and this Plan.

(b) To the extent that any Disputed Distribution Claim becomes an Allowed Affected Unsecured Claim in accordance with this Plan, the Applicant shall distribute (on the next Distribution Date) to the holder of such Allowed Affected Unsecured Claim, an amount from the Disputed Distribution Claims Reserve equal to the Unsecured Promissory Note Entitlement that such Affected Unsecured Creditor would have been entitled to receive in respect of its Allowed Affected Unsecured Claim on the Unsecured Promissory Note Distribution Date had such Disputed Distribution Claim been an Allowed Affected Unsecured Claim on such date.

(c) On the date that all Disputed Distribution Claims have been finally resolved in accordance with the Claims Procedure Order and any required distributions contemplated in paragraph 6.2(b) have been made, if (i) the aggregate value of Unsecured Promissory Note Proceeds remaining in the Disputed Distribution Claims Reserve is less than $10,000, the Applicant shall release to SkyLink Aviation any proceeds held in the Disputed Distribution Claims Reserve and such proceeds shall be returned to SkyLink Aviation; or (ii) the aggregate value of Unsecured Promissory Note Proceeds remaining in the Disputed Distribution Claims Reserve is greater than or equal to $10,000, the Applicant shall distribute such proceeds to the Affected Unsecured Creditors with Allowed Affected Unsecured Claims such that after giving effect to such distributions each such Affected Unsecured Creditor has received its applicable Unsecured Creditor's Pro-Rata Share of such proceeds.

ARTICLE 7
RELEASES

7.1 Plan Releases

(a) On the Plan Implementation Date, in accordance with the sequence set forth in section 5.4,(i) the Applicant, the Applicant's employees, auditors, financial advisors, legal counsel and agents, the Released Shareholders, the Released Directors/Officers, the SkyLink Subsidiaries and the directors and officers of any SkyLink Subsidiary, and each and every auditor, financial advisor and legal counsel of the foregoing Persons (in each case, in that capacity only) and (ii) the Monitor, the Monitor's counsel the Secured Note Indenture Trustee, the Consenting Noteholders, the DIP Lenders, the Company Advisors, the Noteholder Advisors and each and every present and former shareholder, affiliate, subsidiary, director, officer, member (including members of any committee or governance council), partner, employee, auditor, financial advisor, legal counsel and agent of any of the foregoing Persons (in each case, in that capacity only) (each of the Persons named in (i) or (ii) of this section 7.1(a), in their capacity as such, being herein referred to individually as a "**Released Party**" and all referred to collectively as "**Released Parties**") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, orders, including for injunctive relief or specific performance and compliance orders, expenses, executions, Encumbrances and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature, including claims for contribution or indemnity which any Creditor or other Person may be entitled to assert (including any and all of the foregoing in respect of the payment and receipt of proceeds and statutory or common law liabilities of Directors or Officers, current or former directors or officers of the SkyLink Subsidiaries, members or employees of the Applicant and any alleged fiduciary or other duty (in any capacity whatsoever)), whether known or unknown, matured or unmatured, direct, indirect or derivative, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act, omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan, that are in any way relating to, arising out of or in connection with the Secured Notes and related guarantees, the Secured Note Indenture, the Secured Note Obligations, the IPSA, the Support Agreement, any Support Agreement Joinder, the DIP Backstop Commitment Letter, the DIP Agreement, the DIP Facility, the First Lien Facility, the Equity Interests, the Company Stock Option Plans, the New First Lien Loans, the New Common Shares, the New Second Lien Notes, the Unsecured Promissory Note, any Claims, any Director/Officer Claims, the business and affairs of the Applicant whenever or however conducted, the administration and/or management of the Applicant, the Recapitalization, the Plan, the CCAA Proceeding or any matter or transaction involving any of the SkyLink Companies taking place in connection with the Recapitalization or the Plan (referred to collectively as the "**Released**

Claims"), and all Released Claims shall be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, all to the fullest extent permitted by Applicable Law; provided that nothing herein will release or discharge (w) the right to enforce the Applicant's obligations under the Plan, (x) any Released Party if the Released Party is determined by a Final Order of a court of competent jurisdiction to have committed fraud or wilful misconduct, (y) the Applicant from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA, or (z) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

(b) Notwithstanding anything to the contrary in section 7.1(a), Insured Claims and Director/Officer Wages Claims shall not be compromised, released, discharged, cancelled and barred by this Plan, provided that from and after the Plan Implementation Date, any Person having an Insured Claim or a Director/Officer Wages Claim shall be irrevocably limited to recovery in respect of such Insured Claim or Director/Officer Wages Claim solely from the proceeds of the applicable Insurance Policies, and Persons with any Insured Claim or Director/Officer Wages Claims shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from SkyLink Aviation, any SkyLink Subsidiary, any Released Director/Officer or any other Released Party, other than enforcing such Person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable Insurance Policies.

7.2 [Intentionally Deleted]

7.3 Injunctions

All Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all Released Claims, from (i) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or (v) taking any actions to interfere with the implementation or consummation of this Plan; provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan. For greater certainty, the provisions of this section 7.3 shall apply to Insured Claims and Director/Officer Wages Claims in the same manner as Released Claims, except to the extent that the rights of

such Persons to enforce such Insured Claims and/or Director/Officer Wages Claims against an insurer in respect of an Insurance Policy are expressly preserved pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b), and provided further that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b), any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b).

ARTICLE 8
COURT SANCTION

8.1 Application for Sanction Order

If the Required Majorities of the Affected Creditors in each Voting Class approves the Plan, the Applicant shall apply for the Sanction Order on or before the date set for the hearing of the Sanction Order or such later date as the Court may set. The Sanction Order shall not become effective until the Plan Implementation Date.

8.2 Sanction Order

The Sanction Order shall, among other things:

(a) declare that (i) the Plan has been approved by the Required Majorities of Affected Creditors in each Voting Class in conformity with the CCAA; (ii) the activities of the Applicant have been in reasonable compliance with the provisions of the CCAA and the Orders of the Court made in this CCAA Proceeding in all respects; (iii) the Court is satisfied that the Applicant has not done or purported to do anything that is not authorized by the CCAA; and (iv) the Plan and the transactions contemplated thereby are fair and reasonable;

(b) declare that as of the Effective Time, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby are approved, binding and effective as herein set out upon and with respect to the Applicant, all Affected Creditors, the Directors and Officers, any Person with a Director/Officer Claim, the Released Parties and all other Persons named or referred to in, or subject to, the Plan;

(c) declare that the steps to be taken and the compromises and releases to be effective on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated by section 5.4 on the Plan Implementation Date, beginning at the Effective Time;

(d) declare that the New Shareholders' Agreement shall be effective and binding on all holders of the New Common Shares and any Person entitled to receive New Common Shares pursuant to the Plan immediately upon issuance of the New

Common Shares to such Person, with the same force and effect as if such Persons were signatories to the New Sharesholders' Agreement;

(e) compromise, discharge and release the Applicant from any and all Affected Claims of any nature in accordance with the Plan, and declare that the ability of any Person to proceed against the Applicant in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims be permanently stayed, subject only to the right of Affected Creditors to receive distributions pursuant to the Plan in respect of their Affected Claims;

(f) subject to section 3.7(b) and section 7.1(b), compromise, discharge and release the Released Directors/Officers from any and all Released Director/Officer Claims of any nature in accordance with the Plan, and declare that the ability of any Person to proceed against the Released Directors/Officers in respect of or relating to any Released Directors/Officers Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Released Director/Officer Claims be permanently stayed;

(g) declare that, subject to performance by the Applicant of its obligations under the Plan and except as provided in the Plan, all obligations, agreements or leases to which any of the Applicant or SkyLink Companies is a party on the Plan Implementation Date shall be and remain in full force and effect, unamended, as at the Plan Implementation Date and no party to any such obligation or agreement shall on or following the Plan Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise disclaim or resiliate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such obligation or agreement, by reason:

(i) of any event which occurred prior to, and not continuing after, the Plan Implementation Date, or which is or continues to be suspended or waived under the Plan, which would have entitled any other party thereto to enforce those rights or remedies;

(ii) that the Applicant has sought or obtained relief or has taken steps as part of the Plan or under the CCAA;

(iii) of any default or event of default arising as a result of the financial condition or insolvency of the Applicant;

(iv) of the effect upon the Applicant of the completion of any of the transactions contemplated under the Plan; or

(v) of any compromises, settlements, restructurings, recapitalizations or reorganizations effected pursuant to the Plan,

and declare that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any non-competition agreement or obligation, provided that such agreement shall terminate or expire in accordance with the terms thereof or as otherwise agreed by the Applicant and the applicable Persons;

(h) bar, stop, stay and enjoin the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any matter which is released pursuant to Article 7 hereof;

(i) bar, stop, stay and enjoin the commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including without limitation, administrative hearings and orders, declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with in respect of any Insured Claim or Director/Officer Wages Claim, except as against the applicable insurer(s) to the extent that rights to enforce such Insured Claims and/or Director/Officer Wages Claims against such insurer(s) in respect of an Insurance Policy are expressly preserved pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b), and provided that, notwithstanding the restrictions on making a claim that are set forth in sections 3.5(b), 3.7(b) and 7.1(b), any claimant in respect of an Insured Claim or a Director/Officer Wages Claim that was duly filed with the Monitor by the Claims Bar Date shall be permitted to file a statement of claim in respect thereof to the extent necessary solely for the purpose of preserving such claimant's ability to pursue such Insured Claim or Director/Officer Wages Claim against an insurer in respect of an Insurance Policy in the manner authorized pursuant to section 3.5(b), section 3.7(b) and/or section 7.1(b);

(j) authorize the Monitor to perform its functions and fulfil its obligations under the Plan to facilitate the implementation of the Plan;

(k) declare that upon completion by the Monitor of its duties in respect of the Applicant pursuant to the CCAA and the Orders, the Monitor may file with the Court a certificate stating that all of its duties in respect of the Applicant pursuant to the CCAA and the Orders have been completed and thereupon, Duff & Phelps Canada Restructuring Inc. shall be deemed to be discharged from its duties as Monitor of the Applicant and released of all claims relating to its activities as Monitor;

(l) subject to payment of any amounts secured thereby, declare that each of the Charges shall be terminated, discharged and released;

(m) declare that the Applicant and the Monitor may apply to the Court for advice and direction in respect of any matters arising from or under the Plan; and

(n) declare the Persons to be appointed to the board of directors of SkyLink Aviation on the Plan Implementation Date shall be the Persons on a certificate to be filed with the Court by SkyLink Aviation prior to the Plan Implementation Date, provided that such certificate and the Persons listed thereon shall be subject to the prior consent of the Majority Initial Consenting Noteholders.

ARTICLE 9
CONDITIONS PRECEDENT AND IMPLEMENTATION

9.1 Conditions Precedent to Implementation of the Plan

The implementation of the Plan shall be conditional upon satisfaction of the following conditions prior to or at the Effective Time, each of which is for the benefit of the Consenting Noteholders and may be waived by the Majority Initial Consenting Noteholders; provided, however, that the conditions in sub-paragraphs (a), (c), (d), (e), (g), (h), (i), (j) (as applicable), (l), (m) (as applicable), (n), (q), (r) and (r) shall also be for the benefit of the Applicant and, if not satisfied on or prior to the Effective Time, can only be waived by both the Applicant and Majority Initial Consenting Noteholders (provided that such conditions shall not be enforceable by the Applicant or the Majority Initial Consenting Noteholders if any failure to satisfy such conditions results from an action, error, omission by or within the control of the party seeking enforcement):

(a) all definitive agreements in respect of the Recapitalization and the new (or amended) articles, by-laws and other constating documents, and all definitive legal documentation in connection with all of the foregoing shall be in a form agreed to in advance by the Applicant and the Majority Initial Consenting Noteholders;

(b) the steps required to complete the Recapitalization shall be in form and in substance satisfactory to the Majority Initial Consenting Noteholders and shall not result in material adverse tax consequences for the Consenting Noteholders, which Consenting Noteholders shall, in each case, act reasonably;

(c) New Second Lien Notes Indenture governing the New Second Lien Notes, together with all guarantees and security agreements contemplated thereunder, shall have been entered into and become effective, subject only to the implementation of the Plan, and all required filings related to the security as contemplated in the security agreements shall have been made;

(d) the New First Lien Credit Agreement, together with all guarantees, intercreditor agreements and security agreements contemplated thereunder, shall have become effective;

(e) the terms of the New Common Shares shall be satisfactory to the Applicant and the Majority Initial Consenting Noteholders;

(f) all of the following shall be in form and in substance reasonably satisfactory to the Majority Initial Consenting Noteholders: (i) all materials filed by the Applicant with the Court that relate to the Recapitalization; (ii) the Initial Order,

as such Order may be amended or restated; (iii) the Meetings Order; (iv) the Claims Procedure Order; (v) the Sanction Order; and (vi) any other order granted in connection with the Recapitalization by the Court;

(g) any and all court-imposed charges on any assets, property or undertaking of the Applicant shall have been discharged as at the Effective Time on terms acceptable to the Majority Initial Consenting Noteholders and the Applicant, acting reasonably;

(h) all Material filings under Applicable Laws shall have been made and any Material regulatory consents or approvals that are required in connection with the Recapitalization shall have been obtained and, in the case of waiting or suspensory periods, such waiting or suspensory periods shall have expired or been terminated;

(i) there shall not be in effect any preliminary or final decision, order or decree by a Governmental Entity, no application shall have been made to any Governmental Entity, and no action or investigation shall have been announced, threatened or commenced by any Governmental Entity, in consequence of or in connection with the Recapitalization that restrains, impedes or prohibits (or if granted could reasonably be expected to restrain, impede or inhibit), the Recapitalization or any part thereof or requires or purports to require a variation of the Recapitalization;

(j) the representations and warranties of the Applicant and the Consenting Noteholders set forth in the Support Agreement shall be true and correct in all material respects in accordance with the terms of the Support Agreement;

(k) there shall not exist or have occurred any Material Adverse Effect;

(l) all securities of the Applicant, when issued and delivered, shall be duly authorized, validly issued and fully paid and non-assessable and the issuance thereof shall be exempt from all prospectus and registration requirements of Applicable Laws;

(m) all conditions set out in the Support Agreement shall have been satisfied or waived by the applicable parties pursuant to the terms of the Support Agreement;

(n) the Support Agreement shall not have been terminated;

(o) the Applicant's counsel shall have rendered customary opinions concerning the issuance of the new securities to be issued under the Plan;

(p) the Articles of Reorganization shall have been filed on terms providing that they will become effective in accordance with and at the times of section 5.4(j), 5.4(k), 5.4(l);

(q) all fees and expenses owing to the Company Advisors and the Noteholder Advisors shall have been paid as of the Plan Implementation Date, and SkyLink Aviation and the Majority Initial Consenting Noteholders shall be satisfied that

adequate provision has been made for any fees and expenses due or accruing due to the Company Advisors and the Majority Initial Consenting Noteholders from and after the Plan Implementation Date; and

(r) the Sanction Order shall have been made and shall have become a Final Order.

9.2 Monitor's Certificate

Upon delivery of written notice from the Applicant and Majority Initial Consenting Noteholders of the satisfaction or waiver of the conditions set out in section 9.1, the Monitor shall forthwith deliver to Bennett Jones LLP and the Applicant a certificate stating that the Plan Implementation Date has occurred and that the Plan is effective in accordance with its terms and the terms of the Sanction Order. As soon as practicable following the Plan Implementation Date, the Monitor shall file such certificate with the Court.

ARTICLE 10
GENERAL

10.1 Binding Effect

The Plan will become effective on the Plan Implementation Date. On the Plan Implementation Date:

(a) the treatment of Affected Claims and Released Claims under the Plan shall be final and binding for all purposes and shall be binding upon and enure to the benefit of the Applicant, all Affected Creditors, any Person having a Released Claim and all other Persons named or referred to in, or subject to, the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(b) all Affected Claims shall be forever discharged and released, excepting only the obligations in the manner and to the extent provided for in the Plan;

(c) all Released Claims shall be forever discharged and released;

(d) each Affected Creditor and each Person holding a Released Claim shall be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety; and

(e) each Affected Creditor and each Person holding a Released Claim shall be deemed to have executed and delivered to the Applicant and to the Directors and Officers, as applicable, all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

10.2 Waiver of Defaults

From and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Applicant then existing or previously committed by the Applicant, or caused by the Applicant, by any of the provisions in the Plan or steps contemplated in the Plan,

or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, indenture, note, lease, guarantee, agreement for sale or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Applicant and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Applicant from performing its obligations under the Plan or be a waiver of defaults by the Applicant under the Plan and the related documents.

10.3 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

10.4 Non-Consummation

Subject to the terms of the Support Agreement, the Applicant reserves the right to revoke or withdraw the Plan at any time prior to the Sanction Date. If the Applicant revokes or withdraws the Plan, or if the Sanction Order is not issued or if the Plan Implementation Date does not occur, (a) the Plan shall be null and void in all respects, (b) any settlement or compromise embodied in the Plan, including the fixing or limiting to an amount certain any Claim, any document or agreement executed pursuant to the Plan shall be deemed null and void, and (c) nothing contained in the Plan, and no acts taken in preparation for consummation of the Plan, shall (i) constitute or be deemed to constitute a waiver or release of any Claims by or against the Applicant or any other Person; (ii) prejudice in any manner the rights of the Applicant or any other Person in any further proceedings involving the Applicant; or (iii) constitute an admission of any sort by the Applicant or any other Person.

10.5 Modification of the Plan

(a) The Applicant reserves the right, at any time and from time to time, to amend, restate, modify and/or supplement the Plan, but only with the consent of the Majority Initial Consenting Noteholders, provided that any such amendment, restatement, modification or supplement must be contained in a written document which is filed with the Court and (i) if made prior to or at the Meetings, communicated to the Affected Creditors; and (ii) if made following the Meetings, approved by the Court following notice to the Affected Creditors.

(b) Notwithstanding section 10.5(a), any amendment, restatement, modification or supplement may be made by the Applicant with the consent of the Monitor and the Majority Initial Consenting Noteholders, without further Court Order or approval, provided that it concerns a matter which, in the opinion of the Applicant, acting reasonably, is of an administrative nature required to better give effect to the implementation of the Plan and the Sanction Order or to cure any errors, omissions or ambiguities and is not materially adverse to the financial or economic interests of the Affected Creditors.

(c) Any amended, restated, modified or supplementary plan or plans of compromise filed with the Court and, if required by this section, approved by the Court, shall, for all purposes, be and be deemed to be a part of and incorporated in the Plan.

10.6 Majority Initial Consenting Noteholders

For the purposes of this Plan, the Applicant shall be entitled to rely on written confirmation from Bennett Jones LLP that the Majority Initial Consenting Noteholders have agreed to, waived, consented to or approved a particular matter. Bennett Jones LLP shall be entitled to rely on a communication in any form acceptable to Bennett Jones LLP, in its sole discretion, from any Initial Consenting Noteholder for the purpose of determining whether such Initial Consenting Noteholder has agreed to, waived, consented to or approved a particular matter, and the principal amount of Notes held by such Initial Consenting Noteholder.

10.7 Paramountcy

From and after the Effective Time on the Plan Implementation Date, any conflict between:

(a) the Plan or the Sanction Order; and

(b) the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, note, loan agreement, commitment letter, agreement for sale, lease or other agreement, written or oral and any and all amendments or supplements thereto existing between one or more of the Affected Creditors and the Applicant as at the Plan Implementation Date and the notice of articles, articles or bylaws of the Applicant at the Plan Implementation Date;

will be deemed to be governed by the terms, conditions and provisions of the Plan and the Sanction Order, which shall take precedence and priority, provided that any settlement agreement executed by the Applicant and any Person asserting a Claim or a Director/Officer Claim that was entered into from and after the Filing Date shall be read and interpreted in a manner that assumes that such settlement agreement is intended to operate congruously with, and not in conflict with, the Plan.

10.8 Severability of Plan Provisions

If, prior to the Sanction Date, any term or provision of the Plan is held by the Court to be invalid, void or unenforceable, the Court, at the request of the Applicant and with the consent of the Monitor and the Majority Initial Consenting Noteholders, shall have the power to either (a) sever such term or provision from the balance of the Plan and provide the Applicant with the option to proceed with the implementation of the balance of the Plan as of and with effect from the Plan Implementation Date, or (b) alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, and provided that the Applicant proceeds with the implementation of the Plan, the

remainder of the terms and provisions of the Plan shall remain in full force and effect and shall in no way be affected, impaired or invalidated by such holding, alteration or interpretation.

10.9 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceeding and the Plan with respect to the Applicant and will not be responsible or liable for any obligations of the Applicant.

10.10 Different Capacities

Persons who are affected by this Plan may be affected in more than one capacity. Unless expressly provided herein to the contrary, a Person will be entitled to participate hereunder in each such capacity. Any action taken by a Person in one capacity will not affect such Person in any other capacity, unless expressly agreed by the Applicant and the Person in writing or unless its Claims overlap or are otherwise duplicative.

10.11 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail or by facsimile or email addressed to the respective parties as follows:

If to the Applicant:

c/o SkyLink Aviation Inc.
1027 Yonge Street,
Toronto, ON, Canada
M4W 2K9

Attention: David Miller, General Counsel
Fax: (416) 924-9006
Email: dmiller@skylinkaviation.com

with a copy to:

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Ontario M5H 2S7

Attention: Robert Chadwick/ Logan Willis
Fax: (416) 979-1234
Email: rchadwick@goodmans.ca/lwillis@goodmans.ca

If to the Consenting Noteholders represented by Bennett Jones LLP:

c/o Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

Attention: S. Richard Orzy /Sean Zweig
Fax: (416) 863-1716
Email: orzyr@bennettjones.com/zweigs@bennettjones.com

If to an Affected Creditor (other than a Consenting Noteholder represented by Bennett Jones LLP), to the mailing address, facsimile address or email address provided on such Affected Creditor's Notice of Claim or Proof of Claim;

If to the Monitor:

Duff & Phelps Canada Restructuring Inc.

333 Bay Street
14th Floor
Toronto, Ontario M5H 2R2
Attention: Robert Kofman/David Sieradzki
Fax: (647) 497-9490/(647) 497-9470
Email bobby.kofman@duffandphelps.com / david.sieradzki@duffandphelps.com

with a copy to:

Lax O'Sullivan Scott Lisus LLP

Attention: Matthew Gottlieb
Fax: (416) 598-3730
Email: mgottlieb@counsel-toronto.com

or to such other address as any party may from time to time notify the others in accordance with this section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or sending by other means of recorded electronic communication, provided that such day in either event is a Business Day and the communication is so delivered, faxed or sent before 5:00 p.m. (Toronto time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

10.12 Further Assurances

Each of the Persons named or referred to in, or subject to, the Plan will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of the Plan and to give effect to the transactions contemplated herein.

DATED as of the 18th day of April, 2013.

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SCHEDULE A

SUMMARY OF TERMS OF NEW SECOND LIEN NOTES

- $10 million aggregate principal amount
- 5 year term
- 12.25% annual interest rate
- Each individual note will represent a principal amount of $1000
- The governing trust indenture will be substantially similar to the Secured Note Indenture, with certain exceptions, including:
  - PIK toggle feature pursuant to which, at the Applicant's option, interest may be paid in kind rather than in cash in the first 2 years
  - Optional redemptions at the following amounts:

    2013 – 109.188%
    2014 – 106.125%
    2015 – 103.063%
    2016 and thereafter – 100.000%

SCHEDULE B

RELEASED DIRECTORS/OFFICERS

Jan Ottens
David Miller
Eitan Dehtiar
Mark Thielmann
Harry Green
Peter Scala
Mark Massad
Tom White
Rosalyn Samtleben
Matthew Constantino
Samuel Hines
Rob Seminara
Brenna Haysom
Kenneth Taylor
Stephen Arbib
Walter Arbib
Surjit Babra
Harjit Kalsi

SCHEDULE C

RELEASED SHAREHOLDERS

SL Aviation Group, S.a r.l
AlpInvest Partners SL B.V.
Apollo Management VII, L.P.
Sandton SkyLink Acquisition, LLC
WSA (2008) Holdings Inc.
WSA (2008) Transactions Inc.
SSB (2008) Transactions Inc.

SCHEDULE D

DIRECTOR/OFFICER WAGES CLAIMS

1. Director/Officer Claim by Olavo Valaderes in the amount of $1,413,700 for alleged unpaid remuneration consisting of (a) $1,200,000 in respect of certain options issued by SkyLink Aviation, (b) $150,000 for a bonus allegedly payable for the year ended December 31, 2012 and (c) $63,700 for alleged unpaid vacation pay.

2. Director/Officer Claim by Vito Morriello in the amount of $3,379,726 for alleged unpaid remuneration consisting of (a) $3,000,000 in respect of certain options issued by SkyLink Aviation and (b) $379,726 for alleged unpaid vacation pay.

3. Director/Officer Claim by Jan Ottens in the amount of $1,568,233.56 for alleged unpaid remuneration consisting of (a) $288,832, representing the alleged unpaid balance owing in respect a signing bonus and (b) $1,279,401 in respect of certain options issued by SkyLink Aviation.

4. Director/Officer Claim by Stephen Arbib in the amount of $600,000 for alleged unpaid remuneration consisting of $600,000 in respect of certain options issued by SkyLink Aviation.

Schedule "B"

Monitor's Certificate of Plan Implementation

Court File No. 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

CERTIFICATE OF DUFF & PHELPS CANADA RESTRUCTURING INC. AS THE COURT-APPOINTED MONITOR OF SKYLINK AVIATION INC.

(Plan Implementation)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Plan of Compromise and Arrangement concerning, affecting and involving SkyLink Aviation Inc. (the "**Applicant**") dated April 18, 2013 (the "**Plan**"), which is attached as Schedule "A" to the Plan Sanction Order of the Honourable Justice Morawetz made in these proceedings on the ● day of April, 2013 (the "**Plan Sanction Order**"), as the Plan may be further amended, varied or supplemented from time to time in accordance with its terms.

Pursuant to section 9.2 of the Plan and paragraph 14 of the Plan Sanction Order, Duff & Phelps Canada Restructuring Inc. in its capacity as the Court-appointed monitor of the Applicant (the "**Monitor**") delivers this certificate to counsel to the Initial Consenting Noteholders (on behalf of the Initial Consenting Noteholders) and counsel to the Applicant (on behalf of the Applicant) and hereby certifies that:

1. The Monitor has received written confirmation from the Applicant and the Majority Initial Consenting Noteholders (or their respective counsel) that the conditions precedent set out in section 9.1 of the Plan have been satisfied or waived, as applicable.

2. Pursuant to the terms of the Plan, the Plan Implementation Date has occurred.

3. The Plan is effective in accordance with its terms.

4. This Certificate will be filed with the Court.

DATED at the City of Toronto, in the Province of Ontario, this ● day of ●, 2013.

DUFF & PHELPS CANADA RESTRUCTURING INC.,
in its capacity as Court-appointed Monitor of SkyLink Aviation Inc.

By:

____
Name:

Title:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SKYLINK AVIATION INC.

Court File No.: 13-1003300-CL

ONTARIO
SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

Proceeding commenced at Toronto

PLAN SANCTION ORDER (returnable April 23, 2013)

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick (LSUC# 35165K)
Logan Willis (LSUC# 53894K)

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicant

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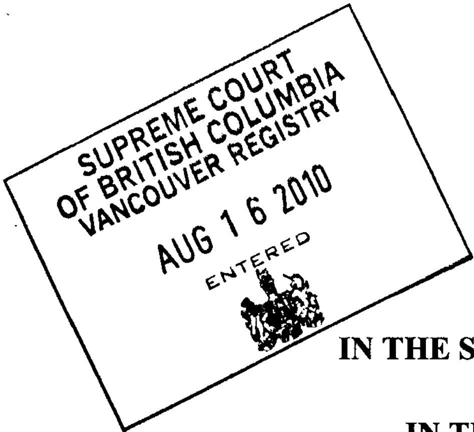
TAB Y



No. S-105095
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF SECTION 192 OF THE
***CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44, AS AMENDED**

AND

IN THE MATTER OF A PROPOSED ARRANGEMENT INVOLVING
7588674 CANADA INC.,
GATEWAY CASINOS & ENTERTAINMENT INC. AND
GATEWAY CASINOS & ENTERTAINMENT LIMITED

Re: 7588674 CANADA INC.,
GATEWAY CASINOS & ENTERTAINMENT INC. AND
GATEWAY CASINOS & ENTERTAINMENT LIMITED

PETITIONERS

ORDER MADE AFTER APPLICATION

FINAL ORDER

BEFORE THE HONOURABLE	)	MONDAY THE 16th
MR JUSTICE HARRIS	)	
	)	DAY OF AUGUST, 2010

ON THE APPLICATION of the Petitioners, 7588674 Canada Inc. ("**Holdco**"), Gateway Casinos & Entertainment Inc. ("**Gateway Casinos**") and Gateway Casinos & Entertainment Limited ("**New Gateway**") pursuant to section 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended ("**CBCA**"), coming on for hearing at Vancouver, British Columbia, on the 16th day of August, 2010,

AND ON HEARING, Bill Kaplan, QC, counsel for Holdco and Gateway Casinos, and S. Richard Orzy and Anthony L. Friend, QC, counsel for New Gateway, AND ON being advised that the Director appointed under the CBCA does not intend to appear at this application,

AND UPON READING the material filed herein, including the Affidavit #1 of Gabriel De Alba sworn on July 9, 2010, the Affidavit #1 of Jason O'Connor sworn on July 13, 2010, the Affidavit #2 of Jason O'Connor sworn on August 13, 2010, and the Order of this Court dated July 14, 2010 (the "**Interim Order**"),

AND UPON BEING ADVISED that New Gateway will rely upon the approval of the Arrangement for purposes of an exemption from the registration requirements under 3(a)(10) of the *United States Securities Act of 1933*, with respect to the New Common Shares to be issued pursuant to the Plan of Arrangement,

THIS COURT ORDERS AND DECLARES THAT:

1. As used in this Order, unless otherwise defined herein, capitalized terms have the respective meanings set out in the Plan of Arrangement (the "**Plan**") attached as Schedule "A" to this Order.

2. The Petitioners have complied with all actions and steps required to be taken by them pursuant to the Interim Order or in connection with documents or acts contemplated by the Interim Order, including, without limitation, that the Meeting Materials as defined in the Interim Order were distributed in compliance with the Interim Order and that the First Lien Claimholders' Meeting and the Second Lien Claimholders' Meeting, each as defined in the Interim Order, were called, held and conducted in compliance with the Interim Order.

3. The arrangement and the terms and conditions thereof, as described in the Plan (the "**Arrangement**"), is an arrangement within the meaning of section 192 of the CBCA.

4. The Arrangement be and is hereby approved, and the terms, provisions and effects of the Arrangement, including all documents, steps, transactions, discharges, cancellations, extinguishments, terminations and releases set out in or contemplated by the Plan, shall be

binding and given full force and effect in the manner and in the sequences and at the times specified therein.

5. The Arrangement and the terms, provisions and effects thereof, including all documents, steps, transactions, discharges, cancellations, extinguishments, terminations and releases set out in or contemplated by the Plan, are fair and reasonable to all Persons affected thereby and shall not be void or voidable by any shareholder or creditor of New Gateway, Gateway Casinos, Holdco, Amalco or any other Person.

6. The Plan and all transactions contemplated thereby or related thereto, including pursuant to the Asset Conveyance, once completed, do not constitute a fraudulent conveyance or preference, transfer at undervalue or reviewable transaction and are not oppressive of or unfairly prejudicial to, or conduct that unduly or unfairly disregards the interest of, any creditor or shareholder of New Gateway, Gateway Casinos, Holdco or Amalco under any applicable law.

7. Upon the execution and delivery of the Asset Conveyance pursuant to Section 4.2(f)(i) of the Plan, all of Amalco's right, title and interest in and to the Acquired Assets, as that term is described in the Asset Conveyance, shall vest absolutely in New Gateway, free and clear of and from any and all security interest (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trust (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, other than: (i) instruments registered in the applicable land title office against title to the real and immovable property and assets of Amalco as of the date hereof; (ii) instruments registered in the applicable land title office against title to real and immovable property that affect or attach to Amalco's leasehold interests as of the date hereof; (iii) inchoate liens for taxes not yet due and payable; (iv) statutory liens, reservations and exceptions to title to real and immovable property applicable in the jurisdiction in which such real and immovable property is situate; and (v) financing statements registered or filed in the applicable personal property security registry as of the date hereof listing Amalco or Gateway Casinos as debtor; provided, however, that Amalco shall continue to hold legal and registered title to the Beneficially Acquired Assets, as described in the Asset Conveyance, as nominee and bare trustee for and on behalf of New Gateway until

such time as New Gateway determines otherwise. Gateway Casinos and Amalco shall thereby be dispossessed of, and New Gateway shall thereafter carry on, the activities and business previously carried on by Gateway Casinos.

8. Notwithstanding any *Personal Property Security Act* registrations or filings, any registrations against title to real property registered under the *Land Title Act* (British Columbia) or the *Land Titles Act* (Alberta), in each case registered in the name of or against Gateway Casinos, Holdco, Amalco or New Gateway (or any of their respective predecessors), or other registrations and filings that may be effected in respect of or pursuant to the New First Lien Debt Security Agreements, the security interests, mortgages, liens and charges granted pursuant to the New First Lien Debt Security Agreements secure indebtedness, obligations and liabilities effectively exchanged for the First Lien Debt and shall have the same priority and ranking over the Acquired Assets and other real and personal property of New Gateway and Amalco (as against any other competing security interests, mortgages, liens and charges over such assets and property) as the security interests, mortgages, liens and charges with respect to the First Lien Debt had over the Acquired Assets and other real and personal property of Gateway Casinos prior to the making of this Order.

9. The Shareholders' Agreement shall be effective and binding on all holders of New Common Shares and Persons entitled to receive New Common Shares pursuant to the Plan immediately upon the issuance of New Common Shares to such Persons, with the same force and effect as if such Persons were signatories to the Shareholders' Agreement.

10. The New First Lien Debt Credit Agreement shall be deemed to be effective and binding on all holders of the New First Lien Debt pursuant to the Plan at the same time as the New First Lien Debt Credit Agreement becomes effective, with the same force and effect as if such Persons were signatories to the New First Lien Debt Credit Agreement.

11. The Petitioners are authorized and directed to take all steps and actions necessary or appropriate to implement the Arrangement, including the transactions contemplated by the Plan in accordance with the terms of the Plan and such other steps or actions as New Gateway considers necessary or advisable in connection therewith or in furtherance thereof (including

entering into any agreements or other documents which are to come into effect in connection with the Arrangement).

12. BNY Trust Company of Canada, the New First Lien Agent, the First Lien Agents and the Second Lien Agents are authorized and directed to take all steps and actions necessary or appropriate to implement the Arrangement and the transactions contemplated thereby in accordance with the terms of the Plan and to provide the Petitioners with such documents, information and assistance as New Gateway may request in connection therewith or in furtherance thereof.

13. The Existing Gateway Common Shares shall be cancelled upon the Amalgamation without any repayment of capital thereof or any other compensation therefor and all Entitlements that any Person may have that are directly or indirectly related to or are derived from the Existing Gateway Equity shall be released and extinguished in full without any compensation.

14. All Entitlements that any Person may have that are directly or indirectly related to or are derived from the Holdco Equity (other than the rights of holders of Holdco Class A Shares and the rights of holders of Holdco Class B Shares to receive Class A Shares and Class B Shares of Amalco) shall be released and extinguished in full without any compensation.

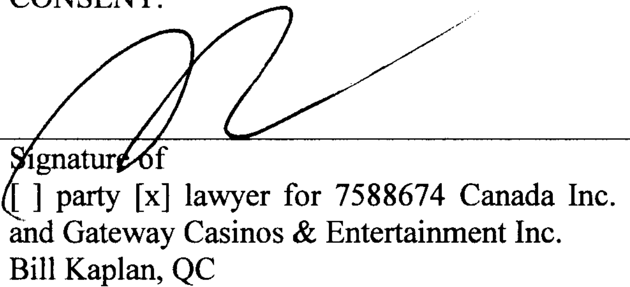
15. The Priority Portion, the Amalco Priority Debt and the Debt of Holdco shall all be extinguished for no consideration pursuant to the Plan at the times specified therein.

16. The releases set out in the Plan in favour of the Amalco Releasees and the Claimholder Released Parties shall be binding in accordance with their terms and shall be deemed to have been given by each of the Releasors and other Persons contemplated thereby and shall be effective immediately following the completion of the final step of the Arrangement and after giving effect to the provisions thereof.

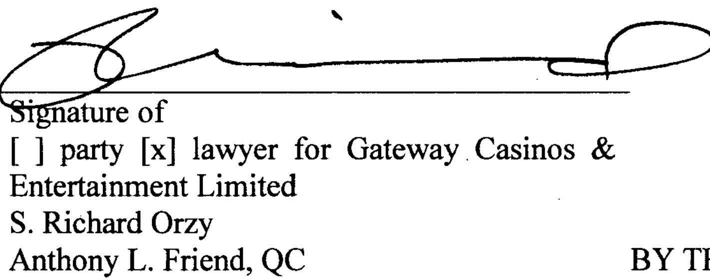
17. This Court respectfully seeks and requests the aid and recognition of any court or any judicial, regulatory or administrative body constituted pursuant to the Parliament of Canada or the legislature of any province and any court or any judicial, regulatory or administrative body of the United States of America or any other applicable jurisdiction to act in aid of and to assist this Court in carrying out the terms of this Order.

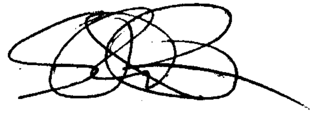
18. New Gateway shall be entitled to seek leave to vary this Order upon such terms and upon the giving of such notice as this Honourable Court may direct, to seek the advice and direction of this Honourable Court as to the implementation of this Order and/or to apply for such further orders as may be appropriate.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



Signature of
[ ] party [x] lawyer for 7588674 Canada Inc. and Gateway Casinos & Entertainment Inc.
Bill Kaplan, QC





Signature of
[ ] party [x] lawyer for Gateway Casinos & Entertainment Limited
S. Richard Orzy
Anthony L. Friend, QC

BY THE COURT.

Registrar

SCHEDULE "A"

PLAN OF ARRANGEMENT

SCHEDULE "A"

GATEWAY CASINOS & ENTERTAINMENT LIMITED

AND

7588674 CANADA INC.

AND

GATEWAY CASINOS & ENTERTAINMENT INC.

PLAN OF ARRANGEMENT PURSUANT TO THE CANADA BUSINESS CORPORATIONS ACT

ARTICLE 1

DEFINITIONS AND INTERPRETATION

Section 1.1 Definitions

In this Plan of Arrangement, unless there is something in the subject matter or context inconsistent therewith, the following words and terms will have the meanings hereinafter set forth:

"**Accrual Factor**" means the fraction which has as its numerator the total First Lien Debt as at the Effective Time and as its denominator US$747,260,758.52.

"**Additional Cash Amount**" means the estimated excess cash of Gateway as at the Election Deadline according to its books and records, after deducting an estimate of the total restructuring transaction costs, $15 million for an additional cash reserve, $35 million of encumbered cash currently held (in some cases as required under applicable gaming laws or contracts) and designated as "Total encumbrances" (as that term is defined in Gateway's 13-week cash-flow statements) and such other amounts as may be required by any Governmental Authority to be held by Newco.

"**Amalco**" means the company formed under the CBCA upon the Amalgamation.

"**Amalco Excluded Assets**" means all assets of Amalco which the Backstop Parties in their sole discretion decide not to include in the Asset Conveyance.

"**Amalco Priority Debt**" means (i) C$4,000,000 in principal amount of Shareholder Loans owing by Amalco to Crown (Cyprus) Limited, (ii) C$2,517,920 in principal amount of Shareholder Loans owing by Amalco to Macquarie Investments Australia Pty Ltd. and (iii) C$1,482,080 in principal amount of Shareholder Loans owing by Amalco to MGOP New World Gaming Holdings S.à.r.l.

"**Amalco Releasees**" has the meaning given to it in Section 7.1.

"Amalco Trade Payables" means Gateway's accounts payable to trade creditors according to the books and records of Gateway in respect of goods and services actually supplied to Gateway prior to the Effective Time, subject to all allowances, warranties, rebates, rights of set off and other rights of Gateway in relation to such accounts payable, but excluding the amount of any taxes, assessments or levies included therein or imposed in respect thereof, pursuant to Part IX of the Excise Tax Act (Canada) or otherwise.

"Amalgamation" means the amalgamation of Holdco and Gateway to form Amalco.

"Arrangement" means the arrangement under section 192 of the CBCA, on the terms and subject to the conditions set forth in this Plan of Arrangement, subject to any amendments or variations thereto made in accordance with Article 6 of this Plan of Arrangement or made pursuant to an order of the Court, including, but not limited to, the Final Order.

"Asset Conveyance" means the agreement between Amalco and Newco, in form and substance satisfactory to Newco, whereby Amalco conveys, assigns and transfers all of its assets and property other than the Amalco Excluded Assets to Newco.

"Assumption Agreement" means the assumption agreement between Amalco and Newco, in form and substance satisfactory to Newco, whereby Newco agrees to assume liability from and after the Effective Date for all Amalco Trade Payables.

"Backstop Agreement" means the backstop agreement, dated as of June 24, 2010, by and among the Company, Newco, Catalyst and Tennenbaum.

"Backstop Commitment" means the commitment of the Backstop Parties pursuant to, and subject to the terms and conditions of, the Backstop Agreement to (i) invest the portion of the New Investment that is not invested by the other Second Lien Claimholders, and (ii) subject to the adjustments referred to in Section 2.2, assign a sufficient amount of their First Lien Debt in exchange for New Common Shares such that the amount of New First Lien Debt on the Effective Date will equal US$500 million.

"Backstop Parties" means Catalyst and Tennenbaum.

"Business Day" means any day other than a Saturday or a Sunday on which commercial banks are generally open for business in Vancouver, British Columbia, Toronto, Ontario and New York, New York.

"Catalyst" means The Catalyst Capital Group Inc., on behalf of investment funds managed by it.

"CBCA" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as now in effect and as it may be amended from time to time prior to the Effective Date.

"Certificate of Arrangement" means the certificate giving effect to the Arrangement, which shall be issued by the Director pursuant to section 192(7) of the CBCA upon receipt of the articles of arrangement in accordance with section 262 of the CBCA.

"Claimant" has the meaning given to it in Section 7.2.

"Claimholder Released Parties" has the meaning given to it in Section 7.2.

"Claimholders' Meetings" means, collectively, the meeting of the First Lien Claimholders and the meeting of the Second Lien Claimholders, in accordance with the provisions of the Interim Order for the purpose of, among other things, considering and if deemed appropriate, voting on the Claimholders' Resolutions, and includes any adjournment, postponement or other rescheduling of such meetings.

"Claimholders' Resolutions" means, collectively, the resolutions of the First Lien Claimholders and the resolutions of the Second Lien Claimholders approving, among other things, the Plan of Arrangement at the Claimholders' Meetings.

"Court" means the Supreme Court of British Columbia.

"Credit Agreements" means, collectively, the First Lien Debt Credit Agreement and the Second Lien Debt Credit Agreement.

"Crown Lux" means Crown Gateway Luxembourg S.à.r.l.

"Debt of Holdco" means any or all indebtedness, liabilities or obligations of any kind of Holdco or Amalco (following the Amalgamation) including, without limitation, indebtedness, liabilities and obligations of Holdco or Amalco (following the Amalgamation) to their respective shareholders, but not including the Amalco Trade Payables or the Existing Debt, and costs payable in respect thereof, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known, unknown, by guarantee, surety, insurance deductible or otherwise, and whether or not such right is executory or anticipatory in nature including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or to be commenced in the future.

"Debtor Affiliates" means, collectively, Crown Limited, Crown Lux, MGOP New World Gaming Canada Ltd., MGOP New World Gaming Partnership, Macquarie New World Gaming Canada Ltd., Macquarie New World Gaming Partnership, Macquarie Investments Australia Pty Ltd., MGOP New World Gaming Holdings S.à.r.l., New World Gaming International S.à.r.l., Holdco, and Crown (Cyprus) Limited.

"Demand" has the meaning given to it in Section 7.1.

"Director" means the Director appointed under section 260 of the CBCA.

"Effective Date" means the date shown on the Certificate of Arrangement, being the date upon which this Plan of Arrangement becomes effective and is implemented.

"Effective Time" means 12:01 a.m., or such other time as may be designated in writing by Newco, on the Effective Date.

"Elected Cash Amount" means, for each First Lien Claimholder, the principal amount of First Lien Debt such First Lien Claimholder elected to exchange into cash on its First Lien Election.

"Elected Debt Amount" means, for each First Lien Claimholder, the principal amount of First Lien Debt such First Lien Claimholder elected to exchange into New First Lien Debt on its First Lien Election.

"Elected Share Amount" means, for each First Lien Claimholder, the principal amount of First Lien Debt that such First Lien Claimholder elected to exchange into New Common Shares on its First Lien Election.

"Election Deadline" means 4:00 p.m., August 11, 2010.

"Elections" has the meaning given to it under "First Lien Election" in this Section 1.1.

"Employee Assumption Agreement" means the assumption agreement between Amalco and Newco, in form and substance satisfactory to Newco, whereby, among other things, Newco (i) offers employment to certain non-unionized employees of Amalco, and (ii) confirms the continued employment of the unionized employees of Amalco.

"Entitlements" means the legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to or arising out of, or in connection with any or all of: (a) the Existing Gateway Equity; and (b) the Holdco Equity.

"Existing Debt" means, collectively, the First Lien Debt and Second Lien Debt.

"Existing Gateway Common Shares" means the common shares without par value in the capital of Gateway that are duly issued and outstanding immediately prior to the Effective Time.

"Existing Gateway Equity" means any and all equity of Gateway existing immediately prior to the Effective Time, including the Existing Gateway Common Shares, any preferred shares or other classes of shares, any options, warrants and agreements to acquire such shares and any Entitlements in respect of the foregoing.

"Final Order" means the final order of the Court approving the Arrangement under section 192 of the CBCA, in acceptable form and substance in accordance with Section 5.1 hereof, as such order may be amended by the Court at any time prior to the Effective Date providing, among other things, that the Arrangement and the terms and conditions thereof are fair and reasonable to all Persons affected thereby, that the Plan of Arrangement shall not be void or voidable by any shareholder or creditor of Newco, Gateway, Holdco, Amalco or any other Person, that the Plan of Arrangement and transactions related thereto, including pursuant to the Asset Conveyance, do not constitute a fraudulent conveyance or preference, transaction at undervalue or reviewable transaction and are not oppressive of or unfairly prejudicial to, or conduct that unduly or unfairly disregards the interest of, any creditor or shareholder of Newco, Gateway, Holdco, Amalco or any other Person under any applicable law, that the releases in favour of the Amalco Releasees shall be binding on all Releasors and shall be deemed to have been given by each of the Releasors and shall be effective immediately following the completion of the final step in the

Plan of Arrangement and giving effect to the provisions hereof, that the Shareholders' Agreement shall be effective and binding on all holders of New Common Shares and Persons entitled to receive New Common Shares pursuant to this Plan of Arrangement, and that the New First Lien Debt Credit Agreement shall be effective and binding on all holders of the New First Lien Debt pursuant to this Plan of Arrangement.

"First Lien Agents" means collectively, (i) The Bank of New York Mellon, as U.S. administrative agent and collateral agent under the First Lien Debt Credit Agreement, and (ii) Royal Bank of Canada, as Canadian administrative agent and supplemental collateral agent under the First Lien Debt Credit Agreement.

"First Lien Claimholder" means a holder of First Lien Debt.

"First Lien Debt" means (a) all indebtedness, liabilities and obligations of Gateway or Amalco (following the Amalgamation) to the First Lien Agents and the Lender Parties (as defined in the First Lien Debt Credit Agreement) pursuant to the First Lien Debt Credit Agreement; and (b) all indebtedness, liabilities and obligations of Gateway or Amalco (following the Amalgamation) to: (i) the Hedge Banks pursuant to the Secured Hedge Agreements (each as defined in the First Lien Debt Credit Agreement); and (ii) any Person to whom a Hedge Bank has assigned and transferred all or any of its rights and obligations under any Secured Hedge Agreement (each as defined in the First Lien Debt Credit Agreement).

"First Lien Debt Credit Agreement" means the first lien credit agreement dated November 14, 2007 among, *inter alia*, New World Gaming Partners Holdings Ltd. (now Gateway), the subsidiary guarantors named therein, the initial lenders named therein, Bear Stearns Corporate Lending Inc. (as succeeded by The Bank of New York Mellon), as U.S. administrative agent and collateral agent, HSBC Bank Canada, as letter of credit B issuing bank, and Royal Bank of Canada, as Canadian administrative agent, syndication agent and swingline lender, as amended.

"First Lien Election" means the irrevocable election by a First Lien Claimholder setting out its Elected Cash Amount, Elected Debt Amount and Elected Share Amount (collectively, its **"Elections"**), which for those First Lien Claimholders who have previously provided indications of their Elections to Bennett Jones LLP in writing pursuant to a process undertaken in March, April and May, 2010 (and in any event prior to the date of the Interim Order), such prior written Elections shall be the operative Elections for such First Lien Claimholders (and no additional election form shall be required of them or be operative with respect to them), and for all other First Lien Claimholders, their Elections shall be the Elections indicated by such First Lien Claimholders on the election form for First Lien Claimholders included with the materials for the Meetings, which election form, in order to avoid the application of Section 2.2(b) hereof to such First Lien Claimholder, must be submitted to BNY Trust Company of Canada, with a copy to Newco and to Bennett Jones LLP on or prior to the Election Deadline.

"First Lien Forbearance Agreement" means the forbearance agreement and first amendment to the first lien credit agreement dated as of January 4, 2010, by and among Gateway, as borrower, The Bank of New York Mellon, as collateral agent and U.S. administrative agent, Royal Bank of Canada, as Canadian administrative agent, supplemental collateral agent and initial revolving l/c issuing bank and the required lenders party thereto, as amended.

"**Gateway**" means Gateway Casinos & Entertainment Inc., a corporation incorporated under the CBCA.

"**Gateway Matters**" has the meaning given to it in Section 7.1.

"**Governmental Authority**" means:

(a) any multinational, federal, provincial, territorial, state, regional, municipal, local or other government or any governmental or public department, court, tribunal, arbitral body, commission, board or agency; or

(b) any subdivision, agent, commission, board or authority of any of the foregoing.

For greater certainty, "**Governmental Authority**" includes the British Columbia Lottery Corporation, the Gaming Policy and Enforcement Branch created under the *Gaming Control Act* (British Columbia) and the Alberta Gaming and Liquor Commission created under the *Gaming and Liquor Act* (Alberta).

"**Holdco**" means 7588674 Canada Inc., a company governed by the CBCA, having been continued from the laws of British Columbia pursuant to a certificate of continuance dated June 28, 2010.

"**Holdco Class A Shares**" means the Class A common shares without par value in the capital of Holdco that are duly issued and outstanding immediately prior to the Effective Time.

"**Holdco Class B Shares**" means the Class B common shares without par value in the capital of Holdco that are duly issued and outstanding immediately prior to the Effective Time.

"**Holdco Equity**" means any and all equity of Holdco existing immediately prior to the Effective Time, including the Holdco Class A Shares and the Holdco Class B Shares, any preferred shares or other classes of shares and any options, warrants and agreements to acquire such shares and any Entitlements in respect of the foregoing.

"**Holdco Shareholders**" means the holders of Holdco Class A Shares and Holdco Class B Shares and upon the Amalgamation, holders of Class A Shares and Class B Shares of Amalco.

"**Initial Parties**" means, collectively, Catalyst, Tennenbaum, Babson Capital Management LLC, General Electric Capital Corporation, Royal Bank of Canada and Solus Alternative Asset Management LP.

"**Initial Parties' Consent**" means the consent of members of the Initial Parties collectively holding at least 66 2/3% of the aggregate principal amount of the First Lien Debt held by all of the Initial Parties and at least 66 2/3% of the aggregate principal amount of the Second Lien Debt held by all of the Initial Parties.

"**Interim Order**" means the interim order of the Court dated July 14, 2010, as the same may be amended by the Court, providing for, among other things, the calling of the Claimholders'

Meetings, the setting of the Record Date, the quorum for the Claimholders' Meetings and the application date for the Final Order.

"**Material Adverse Change**" means any event, circumstance, occurrence, fact, condition, change or effect that would be materially adverse to the business, results of operations or conditions (financial or otherwise) of Gateway, provided however, that any event, circumstance, occurrence, fact, condition, change or effect:

(a) relating to the gaming industry generally or the gaming industry in British Columbia or Alberta;

(b) relating to, or arising from, general economic conditions;

(c) relating to the passage or implementation of any law or other initiative, or any proposed law or other initiative, expanding the scope of permissible gaming operations in British Columbia or Alberta;

(d) relating to the passage of any law or other initiative, or any proposed law or other initiative, restricting or adversely affecting the conduct of gaming operations generally;

(e) relating to, or arising from, any change in the global, national or regional political conditions (including the outbreak of hostilities or acts of terrorism);

(f) relating to, or arising from, any emergency in the geographic area where Gateway operates (including a power outage);

(g) relating to fluctuations in the earnings or liabilities of Gateway during the period commencing May 1, 2010 and ending two Business Days prior to the Effective Date, provided that Gateway's 'adjusted current assets' is greater than Gateway's 'adjusted current liabilities' in Gateway's most recently available monthly balance sheet; or

(h) relating to, or arising from, the Recapitalization;

shall be deemed not to constitute a "**Material Adverse Change**" and shall not be considered in determining whether a "**Material Adverse Change**" has occurred.

"**Macquarie Corco**" means Macquarie NWG Canada Holdings Ltd., a corporation incorporated under the laws of British Columbia.

"**MGOP Corco**" means MGOP NWG Canada Holdings Ltd., a corporation incorporated under the laws of British Columbia.

"**Newco**" means Gateway Casinos & Entertainment Limited, a corporation incorporated under the CBCA.

"**New Common Shares**" means the common shares in the capital of Newco to be issued pursuant to this Plan of Arrangement.

"**New First Lien Agent**" means BNY Trust Company of Canada, as administrative and collateral agent pursuant to the New First Lien Debt Credit Agreement.

"**New First Lien Debt**" means the first lien term debt of Newco in the principal amount of US$500 million, the terms and conditions of which are to be governed by the New First Lien Debt Credit Agreement.

"**New First Lien Debt Credit Agreement**" means the credit agreement among Newco, as borrower, the subsidiary guarantors named therein, the New First Lien Agent, certain of the First Lien Claimholders being the initial term lenders named therein and the New First Lien Revolving Lender.

"**New First Lien Debt Security Agreements**" has the meaning given to it in Section 4.1(e).

"**New First Lien Revolving Lender**" means [•], as revolving lender and revolving letter of credit issuing bank pursuant to the New First Lien Debt Credit Agreement.

"**New Investment**" means the US$100 million investment to be made in Newco by a combination of (i) the Second Lien Claimholders (other than the Backstop Parties) who have elected to participate therein pursuant to their Second Lien Election and thereby to acquire New Common Shares in accordance with Article 2; and (ii) the Backstop Parties, in their capacities as Backstop Parties, pursuant to the Backstop Commitment, who will be collectively investing the remainder of the US$100 million not invested pursuant to (i) above.

"**Person**" means and includes any individual, corporation, partnership, firm, joint venture, syndicate, association, trust, Governmental Authority or any other form of entity or organization.

"**Plan of Arrangement**" means this plan of arrangement and any amendments, modifications or supplements hereto made in accordance with the provisions of this Plan of Arrangement or made pursuant to an order of the Court, including, but not limited to, the Final Order, in all cases with the consent of the Backstop Parties and the Initial Parties' Consent, and, with respect to Section 2.4(e) and Section 7.1 only, also with the consent of Holdco and Gateway, each acting reasonably.

"**Priority Portion**" means the portion of the Second Lien Debt transferred and assigned by Second Lien Claimholders to Newco pursuant to Section 4.2(e)(iii) of this Plan of Arrangement, equal to the dollar amount of the number of New Common Shares to be issued to all Second Lien Claimholders pursuant to Section 2.4(f) of this Plan of Arrangement.

"**Promissory Note**" means the demand, non-interest bearing promissory note in the amount of the Total Cash Amount issued by Newco to BNY Trust Company of Canada as agent and nominee for the First Lien Claimholders.

"**Recapitalization**" means the restructuring contemplated by this Plan of Arrangement.

"**Record Date**" means July 19, 2010, being the date to determine the First Lien Claimholders and the Second Lien Claimholders who can attend and vote at the Claimholders' Meetings or submit a proxy in lieu thereof.

"**Regulatory Approvals**" means those sanctions, rulings, consents, orders, exemptions, permits, registrations, licenses and other approvals (including the approval by the British Columbia Lottery Corporation of the resulting structure arising from the implementation of the Recapitalization and the assignments and transfers related thereto, including the consent of the British Columbia Lottery Corporation to the transfer or assignment of the multiple casino operational services agreement in accordance with the Plan of Arrangement; completion of applicable background investigations with results satisfactory to, and approval of related gaming registration and liquor licence applications from each of the following, as applicable, in respect of new directors and officers of the Company, in respect of Catalyst, Tennenbaum and their respective affiliates, director and officers: (i) Gaming Policy and Enforcement Branch (British Columbia), (ii) Alberta Gaming and Liquor Commission, and (iii) British Columbia Liquor Control and Licensing Branch; and the termination of the Risk Mitigation Agreement between Holdco and BCLC dated as of November 16, 2007, and the return, undrawn, of (i) the Irrevocable Standby Letter of Credit No. BMTO196862OS dated November 16, 2007 issued by the Bank of Montreal for BCLC as beneficiary in the amount of C$30,000,000, and (ii) the Irrevocable Standby Letter of Credit No. BMTO196905OS dated November 16, 2007 issued by the Bank of Montreal for BCLC as beneficiary in the amount of C$10,000,000) and the expiration of any mandatory waiting periods of any Governmental Authority in connection with the Amalgamation, Recapitalization and Plan of Arrangement.

"**Releasors**" has the meaning given to it in Section 7.1.

"**Second Lien Agents**" means collectively (i) Deutsche Bank Trust Company Americas, as administrative agent and collateral agent under the Second Lien Debt Credit Agreement, and (ii) Royal Bank of Canada, as supplemental collateral agent under the Second Lien Debt Credit Agreement.

"**Second Lien Claimholder**" means a holder of Second Lien Debt.

"**Second Lien Debt**" means all indebtedness, liabilities and obligations of Gateway or Amalco (following the Amalgamation) to the Second Lien Agents and the Lenders (as defined in the Second Lien Debt Credit Agreement) pursuant to the Second Lien Debt Credit Agreement.

"**Second Lien Debt Credit Agreement**" means the second lien credit agreement dated November 14, 2007 among, *inter alia*, New World Gaming Partners Holdings Ltd. (now Gateway), the subsidiary guarantors named therein, the initial lenders named therein, Bear Stearns Corporate Lending Inc. (as succeeded by Deutsche Bank Trust Company Americas), as administrative agent and collateral agent, and Royal Bank of Canada, as syndication agent, as amended.

"**Second Lien Election**" means the irrevocable election by a Second Lien Claimholder, setting out its intention as to participation on a *pro rata* basis in the New Investment, which for those Second Lien Claimholders who have previously provided indications of their intentions to

Bennett Jones LLP in writing, pursuant to a process undertaken in March, April and May, 2010 (and in any event prior to the date of the Interim Order), such prior written intentions shall be the operative election for such Second Lien Claimholders (and no additional election form shall be required of them or be operative with respect to them), and for all other Second Lien Claimholders, shall be the elections indicated by such Second Lien Claimholders on the election form for Second Lien Claimholders included with the materials for the Meetings, which election form must be submitted to BNY Trust Company of Canada, with a copy to Newco and to Bennett Jones LLP on or prior to the Election Deadline, failing which, such Second Lien Claimholder will be deemed to have elected not to participate in the New Investment.

"Second Lien Forbearance Agreement" means the forbearance agreement and first amendment to the second lien credit agreement dated as of January 4, 2010, by and among Gateway, as borrower, Deutsche Bank Trust Company Americas, as collateral agent and administrative agent, Royal Bank of Canada, as supplemental collateral agent, and the required lenders party thereto, as amended.

"Second Lien Security" means all of the security interests, liens and security agreements granted by Gateway (and assumed by Amalco) in favour of the Second Lien Agents pursuant to the Second Lien Debt Credit Agreement to secure the Second Lien Debt.

"Shareholder Loans" means all indebtedness, liabilities and obligations of Gateway or Amalco (following the Amalgamation) to the Holdco Shareholders.

"Shareholders' Agreement" means the shareholders' agreement among Newco and each of the holders of New Common Shares, which shall be made available to Persons entitled to receive New Common Shares pursuant to this Plan of Arrangement.

"Shareholders' Resolutions" means, collectively, the unanimous resolutions of the Holdco Shareholders and the unanimous resolutions of holders of Existing Gateway Common Shares, in their capacities as both shareholders and holders of Shareholder Loans, approving, among other things, the Plan of Arrangement.

"Subordinate Portion" means the portion of the Second Lien Debt other than the Priority Portion.

"Tennenbaum" means Tennenbaum Opportunities Partners V, LP.

"Third Party" has the meaning given to it in Section 7.1.

"Total Cash Amount" means the total of US$100 million cash from the New Investment plus the Additional Cash Amount.

Section 1.2 Accounting Terms

All accounting terms not otherwise defined herein shall have the meaning ascribed to them in accordance with Canadian generally accepted accounting principles including those prescribed by the Canadian Institute of Chartered Accountants.

Section 1.3 Articles of Reference

The terms "hereof", "hereunder", "herein", and similar expressions refer to this Plan of Arrangement and not to any particular article, section, subsection, clause or subparagraph of this Plan of Arrangement and include any agreements supplemental hereto. In this Plan of Arrangement, a reference to an article, section, subsection, clause or paragraph shall, unless otherwise stated, refer to an article, section, subsection, clause or paragraph of this Plan of Arrangement.

Section 1.4 Interpretation Not Affected By Headings, etc.

The division of this Plan of Arrangement into articles, sections, subsections, clauses and paragraphs and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Plan of Arrangement.

Section 1.5 Gender and Number

Unless the context requires the contrary, words importing the singular only will include the plural and vice versa and words importing the use of any gender will include all genders.

Section 1.6 Date for Any Action

In the event that the date on which any action is required to be taken hereunder by any of the parties is not a Business Day, such action will be required to be taken on the next succeeding day which is a Business Day.

Section 1.7 Time

All times expressed herein are local time in Vancouver, British Columbia, Canada unless otherwise stipulated.

Section 1.8 Statutory References

Except as provided herein, any reference in this Plan of Arrangement to a statute includes all rules, regulations, policies and blanket orders made pursuant to such statute and, unless otherwise specified, the provisions of any statute, regulation, rule, policy or blanket order which amends, supplements, replaces or supersedes any such statute, regulation, rule, policy or blanket order.

Section 1.9 References to Contracts, Exhibits, etc.

For purposes of this Plan of Arrangement:

(a) any reference in this Plan of Arrangement to a contract, instrument, release, indenture, agreement or other document being in a particular form or on particular terms and conditions means that such contract, instrument, release, indenture, agreement or document shall be substantially in such form or substantially on such terms and conditions; and

(b) any reference in this Plan of Arrangement to an existing document or exhibit filed or to be filed means such document or exhibit as it may have been or may be amended, modified or supplemented in accordance with its terms.

Section 1.10 Interpretation Not Limiting

The use of the words "includes" and "including" are not limiting and the word "or" is not exclusive.

Section 1.11 Currency

Unless otherwise stated, all references herein to sums of money or currency are expressed in lawful money of Canada.

Section 1.12 Successors and Assigns

The Plan of Arrangement shall be binding upon and shall enure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person named or referred to in this Plan of Arrangement.

Section 1.13 Governing Law

This Plan of Arrangement shall be governed by and construed in accordance with the laws of British Columbia and the federal laws of Canada applicable therein. All questions as to the interpretation or application of this Plan of Arrangement and all proceedings taken in connection with this Plan of Arrangement shall be subject to the exclusive jurisdiction of the Court.

ARTICLE 2

COMPROMISE AND ARRANGEMENT

Section 2.1 Creditor Classes Voting on the Plan of Arrangement

For the purpose of voting on this Plan of Arrangement, there shall be two classes of creditors of Gateway entitled to a separate class vote. The classes shall be as follows: (i) the First Lien Claimholders, and (ii) the Second Lien Claimholders. Creditors of Holdco and Gateway other than First Lien Claimholders and Second Lien Claimholders on the Record Date will not have the right to vote on this Plan of Arrangement and shall not receive any consideration hereunder except as expressly set out in this Plan of Arrangement.

Section 2.2 Treatment of First Lien Claimholders (other than the Backstop Parties)

(a) In accordance with the sequences set forth in Article 4 hereof, on the Effective Date, each First Lien Claimholder (other than the Backstop Parties) shall receive, in full and final satisfaction of its First Lien Debt as at the Effective Date, in

accordance with its First Lien Election (either as made or as deemed to have been made, pursuant to Section 2.2(b) or Section 2.2(c)), the following:

(i) the number of New Common Shares equal to its Elected Share Amount multiplied by the Accrual Factor;

(ii) cash equal to the lesser of: (x) its Elected Cash Amount multiplied by the Accrual Factor, and (y) its Elected Cash Amount multiplied by the Accrual Factor and then multiplied by a fraction, the numerator of which is the Total Cash Amount and the denominator of which is the total of all Elected Cash Amounts of all First Lien Claimholders multiplied by the Accrual Factor; and

(iii) New First Lien Debt in an amount equal to its Elected Debt Amount multiplied by the Accrual Factor, plus the amount by which its Elected Cash Amount multiplied by the Accrual Factor exceeds the amount of cash actually received pursuant to Section 2.2(a)(ii),

provided, however, that no First Lien Claimholder shall receive more in total pursuant to Section 2.2(a) than the amount of its First Lien Debt as at the Effective Date.

(b) For purposes of Section 2.2(a), each First Lien Claimholder (other than the Backstop Parties) who has not made and does not make a First Lien Election before the Election Deadline, shall be deemed to have elected as its Elected Debt Amount the full principal amount of its First Lien Debt, such that its Elected Share Amount and Elected Cash Amount shall each be zero.

(c) Notwithstanding the foregoing, if as a result of the allocations pursuant to Section 2.2(a) and (b) above (excluding for greater certainty, any amount of New First Lien Debt to be received by the Backstop Parties) there would be New First Lien Debt outstanding as at the Effective Date in an amount less than US$450 million, then:

(i) the number of New Common Shares to be distributed to each First Lien Claimholder in accordance with Section 2.2(a)(i) will be reduced on a *pro rata* basis in proportion to each such First Lien Claimholder's respective Elected Share Amount to the extent necessary to cause the amount of outstanding New First Lien Debt (excluding any New First Lien Debt to be received by the Backstop Parties) as at the Effective Date to equal US$450 million; and

(ii) each such First Lien Claimholder shall receive additional New First Lien Debt (in addition to that received under Section 2.2(a), if any) in an amount equal to the reduction in the number of New Common Shares received by it under Section 2.2(c)(i).

Section 2.3 Distributions to Backstop Parties

In accordance with the sequences set forth in Article 4 hereof, on the Effective Date, in full and final satisfaction of the Backstop Parties' First Lien Debt:

(a) Tennenbaum shall receive New First Lien Debt in an amount equal to US$11,041,702.43 multiplied by the Accrual Factor in exchange for the same amount of its First Lien Debt;

(b) In exchange for their *pro rata* share (i.e. 93.7% for Catalyst and 6.3% for Tennenbaum) of an amount of their collective First Lien Debt as at the Effective Date (after the exchange in Section 2.3(a)) equal to (x) US$500 million minus (y) the amount of the New First Lien Debt to be issued to all First Lien Claimholders pursuant to Section 2.2 and to Tennenbaum pursuant to Section 2.3(a) hereof, the Backstop Parties shall receive collectively (on the same *pro rata* basis) an equal amount of New First Lien Debt;

(c) The First Lien Debt of Catalyst (as at the Effective Date) not exchanged for New First Lien Debt pursuant to Section 2.3(b) shall be exchanged for an equivalent number of New Common Shares; and

(d) The First Lien Debt of Tennenbaum (as at the Effective Date) not exchanged for New First Lien Debt pursuant to Section 2.3(a) or Section 2.3(b) shall be exchanged for an equivalent number of New Common Shares.

Section 2.4 New Common Shares

In accordance with the sequences set forth in Article 4 hereof, on the Effective Date, 400,000,000 New Common Shares shall be issued by Newco and distributed in the manner set out in Article 4 hereof to the participants in the New Investment, the Backstop Parties, certain of the First Lien Claimholders, the Second Lien Claimholders, Crown Lux, MGOP Corco and Macquarie Corco, all of whom shall be deemed to be parties to and bound by the Shareholders' Agreement, as follows:

(a) Each participant in the New Investment (including the Second Lien Claimholders who have made a Second Lien Election to participate and the Backstop Parties) shall receive its *pro rata* share (based on its level of participation in the New Investment) of 130,000,000 New Common Shares;

(b) The Backstop Parties, in their capacities as such and in addition to any other consideration to be received by them under this Plan of Arrangement, shall collectively, in proportions as directed by the Backstop Parties, receive 20,000,000 New Common Shares;

(c) First Lien Claimholders shall receive the New Common Shares, if any, required to be issued to them pursuant to Section 2.2(a)(i) hereof, subject to any adjustments as a result of Section 2.2(c)(i) hereof;

(d) The Backstop Parties, in their capacity as First Lien Claimholders, shall receive the New Common Shares required to be issued to them pursuant to Sections 2.3(c) and (d) hereof;

(e) Macquarie Corco shall receive 2,517,920 New Common shares, MGOP Corco shall receive 1,482,080 New Common Shares, and Crown Lux shall receive 4,000,000 New Common Shares; and

(f) Each Second Lien Claimholder (including for the avoidance of doubt, each Backstop Party in its capacity as a Second Lien Claimholder) shall receive, in full and final satisfaction of the Priority Portion of its Second Lien Debt assigned to Newco pursuant to Section 4.2(e)(iii), its *pro rata* share (based on the percentage interest such Second Lien Claimholder holds of the total amount of the Second Lien Debt as at the Election Deadline) of the remainder of the 400,000,000 New Common Shares referred to above, after effecting the distributions referred to in Sections 2.4(a), (b), (c), (d) and (e) above.

Section 2.5 Treatment of Existing Gateway Equity and Holdco Equity

In accordance with the sequences set forth in Article 4, the Existing Gateway Common Shares shall be cancelled upon the Amalgamation without any repayment of capital thereof or any other compensation therefor and all Entitlements that any Person may have that are directly or indirectly related to or are derived from the Existing Gateway Equity shall be released and extinguished in full without any compensation. In accordance with the steps and sequences set forth in Article 4 hereof, the holders of Holdco Class A Shares and the holders of Holdco Class B Shares shall receive Class A shares and Class B shares of Amalco upon the Amalgamation and all Entitlements that any Person may have that are directly or indirectly related to or are derived from the Holdco Equity (other than the rights of the holders of Holdco Class A Shares and the rights of the holders of Holdco Class B Shares to receive Class A shares and Class B shares of Amalco) shall be released and extinguished in full without any compensation.

ARTICLE 3

SHARE CAPITAL OF NEWCO FOLLOWING THE ARRANGEMENT

After giving effect to Articles 2 and 4, the issued and outstanding share capital of Newco shall consist only of 400,000,000 New Common Shares resulting from the issuances, distributions, and transfers described in Article 2 and implemented in accordance with Article 4. All New Common Shares issued and outstanding as a result of the application of this Plan of Arrangement shall be deemed to be issued and outstanding as fully-paid and non-assessable.

ARTICLE 4

MEANS FOR IMPLEMENTATION OF THE ARRANGEMENT

Section 4.1 Preliminary Steps Prior to the Arrangement

The satisfaction or performance of the following preliminary steps are conditions precedent to the implementation of the Plan of Arrangement:

(a) The approval of both the British Columbia Gaming Policy and Enforcement Branch and the board of the Alberta Gaming and Liquor Commission shall have been obtained;

(b) The Shareholders' Resolutions shall have been approved;

(c) Not less than 66 2/3% of the votes cast in person or by proxy by First Lien Claimholders and 66 2/3% of the votes cast in person or by proxy by Second Lien Claimholders at the respective Claimholders' Meetings shall have been cast in favour of the respective Claimholders' Resolutions;

(d) The board of directors of Newco shall have been replaced by a board of directors in accordance with the Shareholders' Agreement;

(e) Newco, the New First Lien Agent and the New First Lien Revolving Lender shall have entered into the New First Lien Debt Credit Agreement (which shall become effective pursuant to Section 4.2(e)(ii)), all guarantees, security agreements (collectively, the "**New First Lien Debt Security Agreements**"), and all other documents contemplated thereunder shall have been executed and delivered, and all required registrations and filings contemplated in the New First Lien Debt Credit Agreement shall have been made; and

(f) The cash in respect of the New Investment shall have been deposited by the participants in the New Investment with BNY Trust Company of Canada in escrow for Newco and the Additional Cash Amount shall have been deposited by Gateway with BNY Trust Company of Canada in escrow for Newco.

Notwithstanding any provision of this Plan of Arrangement, the transactions and steps in this Article 4 may be amended, varied or waived prior to the implementation of the Plan of Arrangement with the consent of the Backstop Parties and the Initial Parties' Consent and any such amendment, variation or waiver shall be binding on all Persons affected by this Plan of Arrangement including all First Lien Claimholders, Second Lien Claimholders, holders of Existing Gateway Common Shares, Holdco Shareholders, holders of New Common Shares, Gateway, Holdco, the Debtor Affiliates, MGOP Corco, Macquarie Corco, Amalco and Newco.

Section 4.2 Steps of the Arrangement

The articles of arrangement of Newco shall be filed by Newco pursuant to section 192(6) of the CBCA to implement this Plan of Arrangement. Starting at the Effective Time, the following shall occur, in the following order without any further act or formality:

(a) Holdco shall sell, transfer and convey all of the Existing Gateway Common Shares to Crown Lux, Macquarie New World Gaming Canada Ltd. and MGOP New World Gaming Canada Ltd. in proportion to the aggregate combined number of Holdco Class A Shares owned by each of the foregoing Holdco Shareholders in relation to the total number of Holdco Class A Shares issued and outstanding immediately prior to the Effective Time and each of the foregoing Holdco Shareholders shall pay $1.00 in aggregate to Holdco for the Existing Gateway Common Shares it receives.

(b) Immediately following the step in Section 4.2(a), the Amalgamation shall take place and:

(i) The Existing Gateway Common Shares shall be cancelled without any repayment of capital thereof or any other compensation therefor;

(ii) All indebtedness, liabilities and obligations owed by Gateway to Holdco shall be irrevocably and finally cancelled and eliminated without any compensation therefor;

(iii) The articles of amalgamation of Amalco shall be the same as the articles of continuance of Holdco and the issued and outstanding share capital of Amalco shall be the same as the issued and outstanding share capital of Holdco immediately prior to the Amalgamation;

(iv) The name of Amalco shall be 7588674 Canada Inc.

(v) Amalco shall execute such assumption documents as are determined by the Backstop Parties to be reasonably necessary or advisable in order to evidence its agreement to be fully bound by the Credit Agreements and all security executed by Gateway in connection therewith.

(c) Immediately following the steps in Section 4.2(b), the Subordinate Portion shall be subordinated and postponed in all respects to the prior repayment in full of the Priority Portion and the Amalco Priority Debt.

(d) Immediately following the step in Section 4.2(c):

(i) MGOP New World Gaming Holdings S.à.r.l. shall assign and transfer to MGOP Corco C$1,482,080 of the Amalco Priority Debt in consideration for a C$1,482,080 non-interest bearing demand note of MGOP Corco; and

(ii) Macquarie Investments Australia Pty Ltd. shall assign and transfer to Macquarie Corco C$2,517,920 of the Amalco Priority Debt in consideration for a C$2,517,920 non-interest bearing demand note of Macquarie Corco.

(e) Immediately following the step in Section 4.2(d):

(i) Each First Lien Claimholder (including the Backstop Parties pursuant to Section 2.3) shall be deemed to have assigned and transferred to Newco all of the First Lien Debt held by it. In consideration of those assignments and transfers, the First Lien Claimholders shall collectively receive from Newco (x) the Promissory Note; (y) the New First Lien Debt; and (z) the total number of New Common Shares to which First Lien Claimholders are entitled pursuant to Section 2.2 and Section 2.3 of this Plan of Arrangement, all of which consideration shall be paid by Newco and distributed to the First Lien Claimholders in accordance with Section 4.5(a) hereof;

(ii) The New First Lien Debt Credit Agreement shall become effective and the New First Lien Debt shall be evidenced and governed by the New First Lien Debt Credit Agreement (and any notes issued in accordance with the terms thereof) and secured by the New First Lien Debt Security Agreements. The New First Lien Debt Credit Agreement shall be deemed to be effective and binding on all holders of the New First Lien Debt pursuant to this Plan of Arrangement at the same time as the New First Lien Debt Credit Agreement becomes effective, with the same force and effect as if such Persons were signatories to the New First Lien Debt Credit Agreement;

(iii) Each Second Lien Claimholder shall be deemed to have assigned and transferred to Newco its pro rata share (based on the percentage interest such Second Lien Claimholder holds of the total amount of the Second Lien Debt as at the Election Deadline) of the Priority Portion. In consideration of the assignments and transfers of the Priority Portion, the Second Lien Claimholders shall receive from Newco the number of New Common Shares determined in accordance with Section 2.4(f) hereof, which consideration shall collectively be delivered by Newco and distributed to the Second Lien Claimholders in accordance with Section 4.5(b) hereof;

(iv) Amalco shall continue to be indebted to the Second Lien Claimholders in respect of the Subordinate Portion;

(v) BNY Trust Company of Canada shall pay to Newco the cash in respect of the New Investment deposited in escrow by the participants in the New Investment with BNY Trust Company of Canada and Newco shall issue and distribute, in accordance with Section 4.5(c), 130,000,000 New

Common Shares pursuant to the New Investment directly to those entitled thereto in accordance with Section 2.4(a) hereof;

(vi) Newco shall issue and distribute, in accordance with Section 4.5(d), the 20,000,000 New Common Shares directly to the Backstop Parties entitled thereto in accordance with Section 2.4(b) hereof;

(vii) Crown (Cyprus) Limited shall assign and transfer to Newco C$4,000,000 of the Amalco Priority Debt. In consideration of such assignment and transfer, Newco shall issue and distribute, in accordance with Section 4.5(e), 4,000,000 New Common Shares to Crown Lux, as nominee of Crown (Cyprus) Limited, free and clear of any withholding for any taxes in accordance with Section 2.4(e) hereof;

(viii) Macquarie Corco shall assign and transfer to Newco C$2,517,920 of the Amalco Priority Debt. In consideration of such assignment and transfer, Newco shall issue and distribute, in accordance with Section 4.5(e), 2,517,920 New Common Shares directly to Macquarie Corco in accordance with Section 2.4(e) hereof; and

(ix) MGOP Corco shall assign and transfer to Newco C$1,482,080 of the Amalco Priority Debt. In consideration of such assignment and transfer, Newco shall issue and distribute, in accordance with Section 4.5(e), 1,482,080 New Common Shares directly to MGOP Corco in accordance with Section 2.4(e) hereof.

(f) Immediately following the steps in Section 4.2(e):

(i) The Asset Conveyance shall be entered into and become effective and binding and the transactions described therein shall be deemed to be effective and in accordance with the provisions of the Asset Conveyance and the Final Order, Amalco shall sell, transfer and convey all of its property and assets to Newco, other than the Amalco Excluded Assets, in consideration for the settlement in full of the First Lien Debt, the Amalco Priority Debt, the Priority Portion, and the assumption by Newco of the Amalco Trade Payables pursuant to the Assumption Agreement, which agreement, along with the Employee Assumption Agreement, shall also become effective at the same time;

(ii) The First Lien Debt shall be extinguished and the First Lien Debt Credit Agreement shall be irrevocably and finally terminated and all guarantees, security agreements and other documents executed and delivered in connection therewith shall be irrevocably and finally terminated and all registrations and filings related thereto shall be discharged; and

(iii) The Priority Portion and the Amalco Priority Debt held by Newco shall be extinguished.

(g) Immediately following the steps in Section 4.2(f), the interest owed by Amalco on the Shareholder Loans that accrued during the 2009 calendar year shall be extinguished for no consideration;

(h) Immediately following the step in Section 4.2(g), Newco shall repay the Promissory Note in cash to BNY Trust Company of Canada for the benefit of the First Lien Claimholders, as their interests may be in accordance with Article 2, for distribution to those First Lien Claimholders in accordance with Section 4.5(a) hereof;

(i) The Shareholders' Agreement shall be deemed to be effective and binding on all holders of New Common Shares and Persons entitled to receive New Common Shares pursuant to this Plan of Arrangement immediately upon the issuance of New Common Shares to such Persons, with the same force and effect as if such Persons were signatories to the Shareholders' Agreement; and

(j) Two days after the Effective Date:

(i) The Debt of Holdco shall be extinguished for no consideration;

(ii) All accrued interest on the Second Lien Debt shall be extinguished for no consideration;

(iii) The Second Lien Debt Credit Agreement shall be deemed to be amended to provide that interest shall no longer be payable in respect of the Second Lien Debt; and

(iv) Each Second Lien Claimholder shall be deemed to have assigned and transferred to Newco the Subordinate Portion held by it for no consideration. Contemporaneously with such assignment and transfer of the Subordinate Portion, the Second Lien Agents shall assign all Second Lien Security to Newco, which shall be held by Newco as security for the repayment by Amalco of the Subordinate Portion to Newco.

Section 4.3 Other Steps

Gateway, Holdco, Amalco, Newco, the Debtor Affiliates, MGOP Corco, Macquarie Corco, the First Lien Agents, the New First Lien Agent, BNY Trust Company of Canada and the Second Lien Agents shall, at the request of the Backstop Parties, take any other steps or actions necessary or desirable to implement this Plan of Arrangement.

For greater certainty, the approval by the requisite majorities of First Lien Claimholders, Second Lien Claimholders, holders of Existing Gateway Common Shares and Holdco Shareholders of this Plan of Arrangement shall also constitute approval by all First Lien Claimholders, Second Lien Claimholders, holders of Existing Gateway Common Shares and Holdco Shareholders of all the steps set out in Sections 4.1 and 4.2 and all other steps, and transactions, documents and instruments contemplated by this Plan of Arrangement. Notwithstanding any provision of this Plan of Arrangement, the transactions and steps in this

Article 4 may be amended, varied or waived prior to the implementation of the Plan of Arrangement with the consent of the Backstop Parties and the Initial Parties' Consent and any such amendment, variation or waiver shall be binding on all Persons affected by this Plan of Arrangement including all First Lien Claimholders, Second Lien Claimholders, holders of Existing Gateway Common Shares, Holdco Shareholders, holders of New Common Shares, Gateway, Holdco, the Debtor Affiliates, MGOP Corco, Macquarie Corco, Amalco and Newco.

Section 4.4 Fractional Interests

No certificates or scrip representing fractional New Common Shares shall be allocated under this Plan of Arrangement, and fractional share interests shall not entitle the owner thereof to vote or to any rights of a shareholder of Newco. Any legal, equitable, contractual and any other rights or claims (whether actual or contingent, and whether or not previously asserted) of any Person with respect to fractional New Common Shares pursuant to this Plan of Arrangement shall be rounded down to the nearest whole New Common Share.

Section 4.5 Delivery of Cash and Securities and Distributions Pursuant to the Plan

(a) Delivery of cash and securities to the First Lien Claimholders pursuant to this Plan of Arrangement (including the Backstop Parties pursuant to Section 2.3) shall be made through BNY Trust Company of Canada, without personal liability on the part of BNY Trust Company of Canada except for its gross negligence or wilful misconduct, in the following sequential order and subject to the completion of each prior step:

(i) The Business Day after the Election Deadline, Bennett Jones shall provide to BNY Trust Company of Canada (with a copy to Newco, Gateway, Holdco and Blake, Cassels & Graydon LLP), copies of all elections of those First Lien Claimholders who previously provided indications of their Elections to Bennett Jones LLP in writing pursuant to a process undertaken in March, April and May, 2010 (and in any event prior to the date of the Interim Order);

(ii) The Business Day after the Election Deadline, The Bank of New York Mellon (as First Lien Agent) shall provide to BNY Trust Company of Canada (with a copy to Newco and to Bennett Jones LLP), a statement setting out the name and address of each First Lien Claimholder and the principal amount of First Lien Debt held by each such First Lien Claimholder as at the Election Deadline;

(iii) The Business Day after the Election Deadline, Gateway shall provide to BNY Trust Company of Canada (with a copy to Newco and to Bennett Jones LLP), a statement setting out a complete list of Gateway's swap claimholders and their respective holdings of First Lien Debt as at the Election Deadline;

(iv) Not later than two Business Days after the Election Deadline, BNY Trust Company of Canada shall verify the principal amount of First Lien Debt

each First Lien Claimholder elected on its First Lien Election by comparing such amount against the amount as set out in the records received pursuant to Section 4.5(a)(ii) and Section 4.5(a)(iii). In the case of a discrepancy, BNY Trust Company of Canada shall provide to Newco (with a copy to Bennett Jones LLP) copies of all such First Lien Elections, and Newco shall reconcile such discrepancies by adjusting each elected amount pro rata to the election made on such First Lien Claimholder's First Lien Election so that the principal amount of First Lien Debt elected equals the principal amount such First Lien Claimholder holds as per the records received pursuant to Section 4.5(a)(ii) and Section 4.5(a)(iii);

(v) Three Business Days after the Election Deadline, BNY Trust Company of Canada shall provide to Newco (with a copy to Bennett Jones LLP) a statement setting out the cash, New Common Shares and New First Lien Debt that each First Lien Claimholder is entitled to receive pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement;

(vi) On the Effective Date and in the sequence set out in Section 4.2(e)(i), Newco shall deliver to BNY Trust Company of Canada in trust for the First Lien Claimholders: (A) the Promissory Note, and (B) share certificates representing the New Common Shares to be distributed to First Lien Claimholders pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement, in certificated form in the name of each such First Lien Claimholder;

(vii) On the Effective Date and in the sequence set out in Section 4.2(h), Newco shall pay to BNY Trust Company of Canada in trust for the First Lien Claimholders, by direction to release from funds deposited to BNY Trust Company of Canada in escrow pursuant to Section 4.1(f), cash equal to the Total Cash Amount in payment of the Promissory Note;

(viii) No later than the third Business Day after the Effective Date, BNY Trust Company of Canada shall deliver the following by first class prepaid mail:

(A) to each First Lien Claimholder entitled to receive cash pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement, a cheque (or payment by wire transfer where requested in writing by such First Lien Claimholder prior to the Effective Date) drawn against the cash delivered by Newco pursuant to Section 4.5(a)(vii) above, in the amount of cash that such First Lien Claimholder is entitled to receive pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement as set out in the statement referred to in Section 4.5(a)(v) above;

(B) to each First Lien Claimholder entitled to receive New Common Shares pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement, the share certificate issued by Newco in the name of such First Lien Claimholder and delivered by Newco to BNY Trust Company of Canada pursuant to Section 4.5(a)(vi) above;

(C) to each First Lien Claimholder entitled to receive New First Lien Debt pursuant to Section 2.2 (and Section 2.3 in respect of the Backstop Parties) of this Plan of Arrangement, a statement setting out the amount of New First Lien Debt allocated to such First Lien Claimholder, as set out in the statement referred to in Section 4.5(a)(v), held by the New First Lien Agent on behalf of such First Lien Claimholder.

(b) Delivery of securities to the Second Lien Claimholders pursuant to this Plan of Arrangement shall be made through BNY Trust Company of Canada, without personal liability on the part of BNY Trust Company of Canada except for its gross negligence or wilful misconduct, in the following sequential order and subject to the completion of each prior step:

(i) The Business Day after the Election Deadline, Bennett Jones shall provide to BNY Trust Company of Canada (with a copy to Newco, Gateway, Holdco and Blake, Cassels & Graydon LLP), copies of the intentions of those Second Lien Claimholders who previously provided indications of their intentions as to whether to participate in the New Investment to Bennett Jones LLP in writing, pursuant to a process undertaken in March, April and May, 2010 (and in any event prior to the date of the Interim Order);

(ii) The Business Day after the Election Deadline, Deutsche Bank Trust Company Americas (as Second Lien Agent) shall provide to BNY Trust Company of Canada (with a copy to Newco and to Bennett Jones LLP) a statement setting out the name and address of each Second Lien Claimholder and the amount of Second Lien Debt held by each such Second Lien Claimholder as at the Election Deadline;

(iii) Not later than two Business Days after the Election Deadline, BNY Trust Company of Canada shall verify the principal amount of Second Lien Debt each Second Lien Claimholder elected on its Second Lien Election by comparing such amount against the amount as set out in the records received pursuant to Section 4.5(b)(ii). In the case of a discrepancy, BNY Trust Company of Canada shall provide to Newco (with a copy to Bennett Jones LLP) copies of all such Second Lien Elections, and Newco shall reconcile such discrepancies by adjusting each elected amount pro rata to the election made on such Second Lien Claimholder's Second Lien Election so that the principal amount of Second Lien Debt elected equals

the principal amount such Second Lien Claimholder holds as per the records received pursuant to Section 4.5(b)(ii);

(iv) Three Business Days after the Election Deadline, BNY Trust Company of Canada shall provide to Newco (with a copy to Bennett Jones LLP) a statement setting out the New Common Shares that each Second Lien Claimholder is entitled to receive pursuant to Section 2.4(f) of this Plan of Arrangement;

(v) Three Business Days after the Election Deadline, BNY Trust Company of Canada shall provide to Newco (with a copy to Bennett Jones LLP) a statement setting out the amount of the New Investment that each Second Lien Claimholder (including the Backstop Parties) is to contribute pursuant to this Plan of Arrangement;

(vi) On the Effective Date and in the sequence set out in Section 4.2(e)(iii) Newco shall deliver to BNY Trust Company of Canada in trust for the Second Lien Claimholders share certificates representing the New Common Shares to be distributed to Second Lien Claimholders pursuant to Section 2.4(f) of this Plan of Arrangement, in certificated form in the name of each such Second Lien Claimholder; and

(vii) No later than the third Business Day after the Effective Date, BNY Trust Company of Canada shall deliver by first class prepaid mail to each Second Lien Claimholder entitled to receive New Common Shares pursuant to Section 2.4(f) of this Plan of Arrangement, the share certificate issued in the name of such Second Lien Claimholder by Newco and delivered by Newco to the Second Lien Agent pursuant to Section 4.5(b)(vi) above.

(c) Newco shall issue a share certificate in the name of each participant in the New Investment pursuant to Section 2.4(a) and Section 4.2(e)(v) setting out the number of New Common Shares issued to each such participant at the time and in the sequence set out in Section 4.2(e)(v) of this Plan of Arrangement and shall deliver such share certificates to each such participant in the New Investment by first-class prepaid mail no later than the third Business Day after the Effective Date.

(d) Newco shall issue a share certificate in the name of each Backstop Party setting out the number of New Common Shares issued to each such Backstop Party at the time and in the sequence set out in Section 4.2(e)(vi) of this Plan of Arrangement and shall deliver such share certificates to each Backstop Party by first-class prepaid mail no later than the third Business Day after the Effective Date.

(e) No later than the third Business Day after the Effective Date, Newco shall deliver by first-class prepaid mail a share certificate in the names of each of MGOP Corco, Macquarie Corco and Crown Lux, setting out the number of New

Common Shares each is entitled to receive pursuant to Section 2.4(e) of this Plan of Arrangement.

Section 4.6 Calculations

All amounts of consideration to be received hereunder will be calculated to the nearest cent ($0.01) in the applicable currency, subject to Section 4.4 hereof. All calculations and determinations made by BNY Trust Company of Canada, Gateway, Holdco, Amalco or Newco for the purposes of the Recapitalization, including, without limitation, the allocation of the consideration, shall be conclusive, final and binding.

Section 4.7 Ordering

All amounts to be received under this Plan of Arrangement on account of Second Lien Debt by the Second Lien Claimholders pursuant to Section 4.2(e)(iii) shall be deemed to be paid and received first on account of the principal amount of such debt and then to the extent of the balance, if any, remaining on account of accrued but unpaid interest on such debt.

ARTICLE 5

CONDITIONS PRECEDENT TO PLAN IMPLEMENTATION

Section 5.1 Conditions Precedent

In addition to compliance with the provisions of Section 4.1, the implementation of this Plan of Arrangement shall be conditional upon the fulfillment, satisfaction or waiver of the following conditions precedent:

(a) No Material Adverse Change shall have occurred prior to the Effective Date;

(b) The Final Order shall have been made and the implementation of the Final Order or compliance therewith by Newco, Gateway, Holdco or Amalco shall not have been stayed or enjoined as a result of an appeal or otherwise;

(c) Gateway, Holdco, Amalco, the Debtor Affiliates, MGOP Corco, and Macquarie Corco shall have taken all necessary or desirable corporate actions and proceedings in connection with the Recapitalization and this Plan of Arrangement;

(d) No applicable law shall have been passed and become effective, which makes the consummation of this Plan of Arrangement illegal or otherwise prohibited;

(e) All necessary judicial consents, Regulatory Approvals and any other necessary or desirable third party consents to deliver and implement all matters related to the Recapitalization and this Plan of Arrangement shall have been obtained; and

(f) The Director shall have issued the Certificate of Arrangement.

provided that:

(I) In the case of Section 5.1(a), the determination as to whether or not there has been a Material Adverse Change shall be made by Catalyst, acting reasonably, provided that, if Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the First Lien Debt held by all Initial Parties (other than Catalyst) or Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the Second Lien Debt held by all Initial Parties (other than Catalyst) determine otherwise in writing, the determination of such Initial Parties (other than Catalyst) will be determinative as to whether or not a Material Adverse Change shall have occurred;

(II) In the case of Section 5.1(b), Catalyst shall have the ability to determine at first instance whether the Final Order is in form and substance satisfactory, provided that, if Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the First Lien Debt held by all Initial Parties (other than Catalyst) or Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the Second Lien Debt held by all Initial Parties (other than Catalyst) disagree in writing with such determination of Catalyst prior to the date which is one Business Day before the Effective Date, in which case the determination of such Initial Parties (other than Catalyst) shall prevail;

(III) In the case of Sections 5.1(c) to 5.1(e), the determination as to whether or not a condition precedent has been fulfilled or satisfied or whether or not a condition precedent shall be waived shall be made by Catalyst, acting reasonably, unless Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the First Lien Debt held by all Initial Parties (other than Catalyst) or Initial Parties (other than Catalyst) collectively holding at least 66 2/3% of the aggregate principal amount of the Second Lien Debt held by all Initial Parties (other than Catalyst) disagree in writing with such determination of Catalyst prior to the date which is one Business Day before the Effective Date, in which case the determination of such Initial Parties (other than Catalyst) shall prevail.

ARTICLE 6

AMENDMENT

Section 6.1 Amendment

The Initial Parties reserve (subject to the consent of the Backstop Parties and the Initial Parties' Consent) the right to amend, modify or supplement this Plan of Arrangement at any time and from time to time, provided that each such amendment, modification or supplement must be (i) set out in writing, (ii) agreed to in writing by Gateway and Holdco in the case of an amendment, modification or supplement to Section 2.4(e), Section 4.2(e)(vii), Section 4.2(e)(viii), Section 4.2(e)(ix) and Section 7.1 hereof only, and (iii) filed with the Court and, if made following the Meetings, communicated to holders of Existing Gateway Common Shares, Holdco Shareholders, First Lien Claimholders and Second Lien Claimholders in the manner required by the Court (if so required) and approved by the Court (unless such amendment, modification or supplement cannot reasonably be expected to have an affect adverse to the interests of any Person entitled to vote on this Plan of Arrangement). Any amendment, modification or supplement to this Plan of Arrangement will become part of this Plan of Arrangement for all purposes.

ARTICLE 7

GENERAL

Section 7.1 Release of Amalco Releasees

Immediately following the completion of the last step set forth in Section 4.2, Crown Limited, Crown Lux, MGOP New World Gaming Canada Ltd., MGOP New World Gaming Partnership, Macquarie New World Gaming Canada Ltd., Macquarie New World Gaming Partnership, Macquarie Investments Australia Pty Ltd., MGOP New World Gaming Holdings S.à.r.l., New World Gaming International S.à.r.l., New World Gaming Partners Holdings British Columbia Ltd., Macquarie Global Opportunities Partners, L.P., Macquarie Group Limited, Crown (Cyprus) Limited, Rowen Craigie, Benjamin Perham, Michael Smerdon, David Elmslie, John Roberts, Michael Cook, James Packer, Ray Fleming, Robert Turner, Dave Gadhia, Jason O'Connor, Jacqueline Hutchinson, Darren Harding, Moelis & Company, Blake, Cassels & Graydon LLP, KPMG LLP, their affiliates and their agents (collectively, the "**Amalco Releasees**") and, as applicable, the Amalco Releasees' officers, directors, partners, shareholders, employees, consultants, agents, successors, administrators, executors, heirs and assigns shall be remised, released and forever discharged of and from any and all claims, actions, causes of action, suits, debts, dues, accounts, costs, legal costs, judgments, sums of money, counterclaims, liabilities, contracts, covenants, damages, demands, executions and other recoveries of every nature or kind (a "**Demand**") which the First Lien Claimholders, the Second Lien Claimholders, Amalco and Newco (the "**Releasors**"), and, as applicable, the Releasors' officers, directors, partners, shareholders, employees, agents, successors, administrators, executors, heirs and assigns may assert or be entitled to assert, relating to, arising out of, or in connection with, the Credit Agreements and related debentures, the First Lien Forbearance Agreement, the Second

Lien Forbearance Agreement, Gateway and the business and affairs of Gateway (all of which are hereinafter referred to as the "**Gateway Matters**").

The Releasors further covenant and agree that no Amalco Releasee shall be deemed to have admitted any liability to any Releasor in respect of any Demand with respect to the Gateway Matters which it presently has or hereafter can, shall or may have.

If a Releasor takes any proceeding in relation to any Gateway Matters against any other Person ("**Third Party**") who claims contribution or indemnity from any Amalco Releasee in or in relation to such proceeding, such Amalco Releasee shall forthwith upon becoming aware of such claim for contribution or indemnity by the Third Party, provide written notice of that contribution or indemnity claim to the applicable Releasor, following which the Releasor may: (i) discontinue such proceeding against that Third Party, or (ii) pursue or continue such proceeding against the Third Party upon providing a reasonable indemnity to the Amalco Releasee to protect the Amalco Releasee from any costs, order or judgment requiring payment by such Amalco Releasee for any Demand released hereunder; provided, as a condition of such indemnity, that the applicable Releasor shall have the right in the place of the Amalco Releasee, but at the Releasor's cost, to defend, seek the dismissal of or seek summary judgment in respect of such contribution or indemnity claim on behalf of such Amalco Releasee, and shall have the right to the rights and defences available to the applicable Amalco Releasee in respect of the contribution or indemnity claim.

Nothing in this Section shall be construed to interfere with Newco's rights in respect of its property and assets which are not conveyed by Amalco to Newco pursuant to and in accordance with the Asset Purchase Agreement.

Nothing in this Section shall be construed to constitute a release of, or a covenant not to sue in respect of, any Demand that any Releasor (other than Amalco) has or may have in any other capacity other than as a party to the Credit Agreements and related debentures, the First Lien Forbearance Agreement and the Second Lien Forbearance Agreement.

Nothing in this Section shall be construed to constitute a release of, or a covenant not to sue in respect of any rights that a Releasor has or may have to enforce this Plan of Arrangement and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder or pursuant thereto.

Notwithstanding anything to the contrary contained in this Section, an Amalco Releasee shall not be released or discharged from or in respect of any Demand if the Amalco Releasee is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct relating to the subject matter of the Demand.

Notwithstanding anything to the contrary contained in this Plan of Arrangement, a Releasor shall incur no liability for any breach of this Section by another Releasor.

Section 7.2 Release of Claimholder Released Parties

Immediately following the completion of the last step set forth in Section 4.2, each of the First Lien Claimholders, First Lien Agents, Second Lien Claimholders, Second Lien Agents,

BNY Trust Company of Canada, Initial Parties, Bennett Jones LLP, Goodmans LLP and Jefferies & Company, Inc., together with their respective subsidiaries, affiliates and agents (collectively, the "**Claimholder Released Parties**") and, as applicable, the Claimholder Released Parties' officers, directors, partners, shareholders, employees, agents, successors, administrators, executors, heirs and assigns, shall be remised, released and forever discharged of and from any Demand that any Person may be entitled to assert, relating to, arising out of, or in connection with, the Gateway Matters.

No Claimholder Released Party shall be deemed to have admitted any liability to any Person in respect of any Demand relating to the Gateway Matters which such Person presently has or hereafter can, shall or may have.

If any Person takes any proceeding in relation to any Gateway Matters against any Third Party who claims contribution or indemnity from any Claimholder Released Party in or in relation to such proceeding, such Claimholder Released Party shall forthwith upon becoming aware of such claim for contribution or indemnity by the Third Party, provide written notice of that contribution or indemnity claim to such Person taking the proceeding (the "**Claimant**"), following which the Claimant may: (i) discontinue such proceeding against that Third Party, or (ii) pursue or continue such proceeding against the Third Party upon providing a reasonable indemnity to the Claimholder Released Party to protect the Claimholder Released Party from any order or judgment requiring payment by such Claimholder Released Party for any Demand released hereunder; provided, as a condition of such indemnity, that the Claimant shall have the right in the place of the Claimholder Released Party, but at the Claimant's cost, to defend, seek the dismissal of or seek summary judgment in respect of such contribution or indemnity claim on behalf of such Claimholder Released Party, and shall have the right to the rights and defences available to the applicable Claimholder Released Party in respect of the contribution or indemnity claim.

Nothing in this Section shall be construed to constitute a release of, or a covenant not to sue in respect of any rights that a Person has or may have to enforce this Plan of Arrangement and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder or pursuant thereto.

Notwithstanding anything to the contrary contained in this Section, a Claimholder Released Party shall not be released or discharged from or in respect of any Demand if the Claimholder Released Party is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed fraud or wilful misconduct relating to such Demand.

Newco shall be remised, released and forever discharged of any Demands which Holdco, Gateway, Amalco, the Debtor Affiliates, MGOP Corco and Macquarie Corco, and their officers, directors, partners, shareholders, employees, agents, successors, administrators, executors, heirs and assigns may assert or be entitled to assert, relating to, arising out of, or in connection with the Debt of Holdco.

Section 7.3 Binding Effect

This Plan of Arrangement and the transactions contemplated hereby will become effective at, and binding at and after the Effective Time in accordance with the terms hereof on all Persons affected by this Plan of Arrangement including (i) Gateway; (ii) Holdco; (iii) the Debtor Affiliates; (iv) MGOP Corco; (v) Macquarie Corco; (vi) Amalco; (vii) Newco; (viii) the beneficial and legal owners of the Existing Debt and the other creditors of Gateway, Holdco or Amalco; (ix) the beneficial and legal owners of the Existing Gateway Equity; (x) the beneficial and legal owners of the Holdco Equity; (xi) the beneficial and legal owners of the New First Lien Debt; (xii) the beneficial and legal owners of the New Common Shares; (xiii) the First Lien Agents; (xiv) the Second Lien Agents; (xv) the New First Lien Agent; (xvi) BNY Trust Company of Canada; (xvii) the New Revolving Lender and (xviii) in each case when applicable, their respective heirs, executors, administrators, legal representatives, successors and assigns.

Section 7.4 Different Capacities

If any Person holds more than one type or class of Existing Debt, such Person shall have all of the rights given to a holder of each particular type or class of Existing Debt so held. Nothing done by a Person acting in its capacity as a holder of a particular class or type of Existing Debt affects such Person's rights as a holder of another class or type of Existing Debt.

Section 7.5 Assignment of First Lien Debt and Second Lien Debt

For purposes of determining entitlement to receive any distribution pursuant to this Plan of Arrangement or effecting any distributions hereunder, Gateway, Newco, Amalco, BNY Trust Company of Canada, the First Lien Agents and the Second Lien Agents shall have no obligation to recognize any transfer or assignment of First Lien Debt or Second Lien Debt by any First Lien Claimholder or Second Lien Claimholder prior to the Election Deadline unless and until notice of the transfer or assignment from either the transferor, assignor, transferee or assignee, together with evidence showing ownership, in whole or in part, of such First Lien Debt and Second Lien Debt and that such transfer or assignment was valid at law, has been received by Gateway, with a copy to Bennett Jones LLP and to Blake Cassels & Graydon LLP, at least five Business Days prior to the Election Deadline.

Section 7.6 Further Assurances

Notwithstanding that the transactions and events set out herein will occur and be deemed to occur in the order set out in this Plan of Arrangement without any further act or formality, each of the Persons affected hereby shall make, do, execute and deliver, or cause to be made, done, executed and delivered, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them in order to document or evidence any of the transactions or events set out herein.

Section 7.7 Paramountcy

From and after the Effective Time, any conflict between this Plan of Arrangement and the covenants, warranties, representations, terms, conditions, provisions or obligations, expressed or implied, of any contract, mortgage, security agreement, indenture, trust indenture, loan

agreement, commitment letter, by-laws or other agreement, written or oral, and any and all amendments or supplements thereto existing between one or more of the holders of Existing Gateway Common Shares, Holdco Shareholders, First Lien Claimholders, Second Lien Claimholders, Gateway, Holdco, the Debtor Affiliates, MGOP Corco, Macquarie Corco and Amalco as at the Effective Date, will be deemed to be governed by the terms, conditions and provisions of this Plan of Arrangement and the Final Order, which shall take precedence and priority.

Section 7.8 Termination Date

In the event that the Effective Date shall not have occurred on or prior to the later of: (i) [30] days following the issuance of the Final Order, or (ii) [September 30], 2010, this Plan of Arrangement shall expire and be of no further force or effect, except if the Initial Parties, subject to the consent of the Backstop Parties and the Initial Parties' Consent, agree to extend such dates.

Section 7.9 Notices

Any notices or communication to be made or given hereunder shall be in writing and shall reference this Plan of Arrangement and may, subject as hereinafter provided, be made or given by the Person making or giving it or by any agent of such Person authorized for that purpose by personal delivery, by prepaid mail or by facsimile addressed to the respective parties as follows:

(a) if to Gateway:

300-4621 Canada Way
Burnaby, British Columbia
V5G 4X8

Attention: David Elmslie
Facsimile No.: 604-412-0169

(b) if to Holdco:

300-4621 Canada Way
Burnaby, British Columbia
V5G 4X8

Attention: David Elmslie
Facsimile No.: 604-412-0169

(c) if to Amalco:

300-4621 Canada Way
Burnaby, British Columbia
V5G 4X8

Attention: David Elmslie
Facsimile No.: 604-412-0169

(d) if to Crown Lux:

Crown Gateway Luxembourg S.à.r.l.
c/o Citco C&T (Luxembourg) S.A.
2-8 Avenue Charles De Gaulle
L-1653 Luxembourg
Grand-Duchy of Luxembourg

Attention: Sébastien Pauchot
Facsimile No.: + 352 27 00 12 210

with a copy to:

Crown Limited
Level 3, Crown Towers
8 Whiteman Street
Southbank
VIC 3006
Australia

Attention: Company Secretary
Facsimile No.: +616 9292 8815

(e) if to MGOP Corco:

c/o Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Attention: Steven McKoen
Facsimile No.: 604-631-3309

with a copy to:

Macquarie Capital Funds Inc.
125 West 55th Street
New York, NY 10019

Attention: Sunil Patel
Facsimile No.: 212-231-1838

(f) if to Macquarie Corco

c/o Blake, Cassels & Graydon LLP
595 Burrard Street, P.O. Box 49314
Suite 2600, Three Bentall Centre
Vancouver, BC V7X 1L3

Attention: Steven McKoen
Facsimile No.: 604-631-3309

with a copy to:

Macquarie Capital Funds Inc.
125 West 55th Street
New York, NY 10019

Attention: Sunil Patel
Facsimile No.: 212-231-1838

(g) if to Newco:

Suite 4320-77 King Street West
Royal Trust Tower, P.O. Box 212
Toronto, Ontario M5K 1J3

Attention: Gabriel De Alba
Facsimile No.: 416-945-3060

with a copy to:

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Attention: S. Richard Orzy
Facsimile No.: 416-863-1716

(h) if to BNY Trust Company of Canada:

Suite 1101
4 King Street West
Toronto, Ontario M5H 1B6

Attention: Marcia Redway
Facsimile No.: 416-360-1711

(i) if to a Claimholder:

to the address for such Claimholder as shown on the records of the applicable Agent with a copy to:

Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4

Attention: S. Richard Orzy
Facsimile No.: 416-863-1716

or to such other address or facsimile as any party may from time to time notify the others in accordance with this Section 7.9. In the event of any strike, lock-out or other event which interrupts postal service in any part of Canada or the United States, all notices and communications during such interruption may only be given or made by personal delivery or by facsimile and any notice or other communication given or made by prepaid mail within the five Business Day period immediately preceding the commencement of such interruption, unless actually received, shall be deemed not to have been given or made. All such notices and communications shall be deemed to have been received, in the case of notice by facsimile or by delivery prior to 5:00 p.m. (local time) on a Business Day, when received or if received after 5:00 p.m. (local time) on a Business Day or at any time on a non-Business Day, on the next following Business Day and, in the case of notice mailed as aforesaid, on the fifth Business Day following the date on which such notice or other communication is mailed. The unintentional failure by Gateway, Holdco, Amalco or Newco to give a notice contemplated hereunder to any particular First Lien Claimholder, Second Lien Claimholder, holder of Existing Gateway Common Shares, Holdco Shareholders or holders of New Common Shares shall not invalidate this Plan of Arrangement or any action taken by any Person pursuant to this Plan of Arrangement.

TAB Z

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

2008 ONCA 587 (CanLII)

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

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Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd

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Air Canada (Re), [2004] O.J. No. 1909, [2004] O.T.C. 1169, 2 C.B.R. (5th) 4, 130 A.C.W.S. (3d) 899 (S.C.J.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, 113 A.C.W.S. (3d) 52, REJB 2002-30904; [page515] Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Gen. Div.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, 23 A.C.W.S. (3d) 976 (C.A.); Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.); Country Style Food Services (Re), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte, [2003] J.Q. no 9223, [2003] R.J.Q. 2157, J.E. 2003-1566, 44 C.B.R. (4th) 302, [2003] G.S.T.C. 195 (C.S.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106, 54 A.C.W.S. (3d) 504 (Gen. Div.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101, 23 A.C.W.S. (3d) 1192 (C.A.); Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256 (S.C.); Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.); Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16 (S.C.J.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149 (Gen. Div.); Ravelston Corp. (Re), [2007] O.J. No. 1389, 2007 ONCA 268, 31 C.B.R. (5th)

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Civil Code of Qubec, C.c.Q.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5.1 [as am.], 6 [as am.]

Companies Act 1985 (U.K.), 985, c. 6, s. 425

Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92, (13), (21)

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2008 ONCA 587 (CanLII)

APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

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[6] For the reasons that follow, however, I would dismiss the appeal.
B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways.
[page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

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[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

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[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

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The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

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ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

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designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

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designed to make the notes more secure;
(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

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issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

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[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?
(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:
(a) on a proper interpretation, the CCAA does not permit such releases;
(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
(d) the releases are invalid under Quebec rules of public order; and because
(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

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(a) the open-ended, flexible character of the CCAA itself,
(b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

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Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

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be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

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reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

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ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

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the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

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(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

. . . . .

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 bankruptcy order has been made under the Bankruptcy and

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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.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

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[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

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would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

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> years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

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made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, 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. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

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released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

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principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

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certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

In my view, the appellant has not demonstrated that

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allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

(Footnote omitted)

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[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

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[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

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Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

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operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

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[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It 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 that 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.
>
> Exception

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(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.

Powers of court

(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. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

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even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

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661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

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[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

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[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

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Plan;

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;

(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

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acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

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among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

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Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

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(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

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Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

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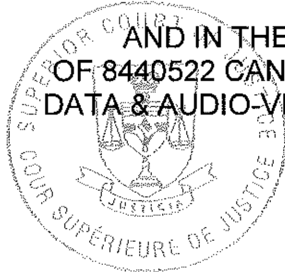
TAB AA

Court File No. CV-13-10274-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	MONDAY, THE 29TH
	)	
JUSTICE NEWBOULD	)	DAY OF JUNE, 2015

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 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC. AND 2451608 ONTARIO INC.

Applicants

ORDER
(Vesting)

THIS MOTION made by Data & Audio-Visual Enterprises Holdings Inc. ("**Holdings**"), Data & Audio-Visual Enterprises Wireless Inc. ("**Wireless**"), 8440522 Canada Inc. and 2451608 Ontario Inc. (collectively with Wireless and 8440522 Canada Inc,. the "**Wireless Entities**" and the Wireless Entities collectively with Holdings are the "**Applicants**") for an Order, further to the Order of this Court granted on June 24, 2015 (the "**Sale Order**") approving the sale transaction (the "**Transaction**") contemplated by a share purchase offer letter between Holdings, Wireless and Rogers Communications Inc. ("**Rogers**") dated June 23, 2015 (the "**Sale Agreement**") and attached as Confidential Exhibit "F" to the Affidavit of William E. Aziz, sworn June 23, 2015, *inter alia*:

(a) vesting in Rogers' designated affiliate, Rogers Cable and Data Centres Inc. (the "**Designee**", and collectively with Rogers, the "**Purchaser**") all of Holdings'

right, title and interest in and to the shares of Wireless (the "**Purchased Shares**") and all claims, if any, against Wireless by Holdings to be transferred pursuant to the Sale Agreement (together with the Purchased Shares, the "**Purchased Assets**");

(b) establishing the basis upon which the Cash Amount (as defined in the Sale Agreement) will be held by Ernst & Young Inc., in its capacity as Monitor, of the Applicants (in such capacity, the "**Monitor**");

(c) releasing certain Released Claims against the Released Parties (in each case as defined in Schedule "C"); and

(d) effective upon closing of the Transaction, terminating this proceeding under the CCAA solely in respect of the Wireless Entities and terminating and discharging the engagement of Blue Tree Advisors II Inc., and William E. Aziz on behalf of Blue Tree Advisors II Inc., as Chief Restructuring Officer of the Wireless Entities (in such capacity, the "**CRO**"),

was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of William E. Aziz sworn, June 29, 2015 (the "**Aziz Affidavit**"), the Fourteenth Report of the Monitor, dated June 27, 2015, and upon hearing the submissions of counsel for the Applicants, the Monitor, the Ad Hoc Committee of Noteholders, the Purchaser, and Catalyst and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Alexander Schmitt sworn June 27, 2015.

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion and the Motion Record in support of this Motion and the Fourteenth Report be

and is hereby abridged and validated, such that this Motion is properly returnable today, and that any further service of the Notice of Motion, the Motion Record or the Fourteenth Report is hereby dispensed with.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Sale Order, the Sale Agreement and the Aziz Affidavit.

3. **THIS COURT ORDERS** that Wireless is authorized and directed to, immediately prior to completion of the Transaction pay to Holdings (or to the Monitor on behalf of Holdings) all cash owned or held by Wireless (the "**Wireless Cash**") as at the date of completion of the Transaction as a dividend, or with the prior consent of the Purchaser, not to be unreasonably withheld, in any other manner as Wireless deems appropriate.

4. **THIS COURT AUTHORIZES AND DIRECTS** the Monitor to hold the Wireless Cash and the Cash Amount in trust for Holdings or Wireless, as the case may be, in accordance with the terms of this Order in an account opened at a Canadian chartered bank for this purpose.

5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "**Monitor's Certificate**"), all of Holdings' right, title and interest in and to the Purchased Assets shall vest absolutely in the Designee, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, "**Claims**") including, without limiting the generality of the foregoing, the

following (the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "B" hereto (the "**Permitted Liens**")): (i) any encumbrances or charges created by the Initial Order of this Court dated September 30, 2013 (as amended) or the Order of this Court dated January 28, 2015; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**") or any other personal property registry system; (iii) the shareholders agreements and shareholder declarations to which any of the Wireless Entities may be a party (including, without limitation, those listed on Schedule "D" hereto) and any other shareholders agreements and shareholder declarations that may apply to any of the Wireless Entities in any manner (collectively, the "**Shareholders Agreements**"); (iv) any equity securities, rights, claims, options, warrants, restricted stock units or other securities convertible or exchangeable into equity securities in the capital of any of the Wireless Entities (other than any common shares in the capital of any of the Wireless Entities that have been duly issued and are outstanding and are recorded in the share registers of the Wireless Entities, including the Purchased Shares) (the "**Options**"); and, for greater certainty, this Court orders that the Shareholders Agreements and the Options shall terminate and be of no force or effect with respect to the Purchased Shares or any of the Wireless Entities.

6. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate to the Purchaser, Equity Financial Trust Company in its capacity as trustee and collateral agent under the DIP Notes, the First Lien Notes and the Second Lien Notes is directed to release the share certificates of the Wireless Entities to the Purchaser.

7. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate to the Purchaser, all Claims and Encumbrances against the Purchased Assets, Wireless Entities and their assets (with the exception of Permitted Liens) shall be fully and finally released,

discharged, and expunged as against the Wireless Entities and their assets, provided that this paragraph does not affect unsecured recourse for Claims against the Wireless Entities and their assets other than Claims in respect of the DIP Notes, First Lien Notes (other than the Catalyst First Lien Notes), the Second Lien Notes, Shareholder Agreements or Options.

8. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate to the Purchaser all Claims and Encumbrances against Holdings in connection with obligations of Wireless, including in respect of the Catalyst First Lien Notes, shall be fully and finally released, discharged and expunged as against Holdings.

9. **THIS COURT ORDERS** that Catalyst has waived and released any claim against the Cash Amount (including any portion of the Cash Amount paid under Section 2(b) and 2(c) of the Sale Agreement following completion of the Transaction), provided that, for greater certainty, Catalyst retains its unsecured recourse against Wireless for full payment of all amounts owing in respect of the Catalyst First Lien Notes (which are in the principal amount of CAD$69,765,000), while the holders of any Claims in respect of the DIP Notes, the First Lien Notes (other than the Catalyst First Lien Notes) and the Second Lien Notes cease to have any recourse to the Wireless Entities whatsoever and instead have recourse against the Cash Amount as provided for in paragraph 12 below, and accordingly (a) nothing in this Order limits, lessens or extinguishes any unsecured Claims of Catalyst, following the Closing of the Transaction, against Wireless based upon the Catalyst First Lien Notes (or any related contractual obligations between Rogers and Catalyst in respect thereto), and (b) Wireless shall make any or all payments on account of the Catalyst First Lien Notes or the redemption thereof directly to Catalyst rather than to the Indenture Trustee under the First Lien Notes, and upon such payment

or payments the Catalyst First Lien Notes shall be deemed to be redeemed and extinguished to the extent of such payments.

10. **THIS COURT ORDERS** that upon the delivery of a Monitor's Certificate to the Purchaser, the Monitor (or its counsel or agents) shall forthwith complete all necessary filings and other steps required to discharge all registrations (with the exception of any registrations in respect of Permitted Liens) against the Purchased Assets, the Wireless Entities or their assets pursuant to the PPSA or any other personal property registry system and shall forthwith deliver to the Purchaser evidence that all such discharges have been completed.

11. **THIS COURT ORDERS** that Wireless and Holdings shall direct the Purchaser to pay the Cash Amount (including any portion of the Cash Amount paid under Section 2(b) and 2(c) of the Sale Agreement following completion of the Transaction), to the Monitor (on behalf of Wireless and Holdings) forthwith upon satisfaction of the conditions precedent to payment of the Cash Amount by the Purchaser under the Sale Agreement.

12. **THIS COURT ORDERS** that the Wireless Loan Amount, being the portion of that Cash Amount equal to the total amounts owing under the DIP Notes, the First Lien Notes (other than the Catalyst First Lien Notes), and the Second Lien Notes (such portion being, the "**Wireless Distribution Amount**") shall be held by the Monitor in escrow subject to further Order of the Court authorizing and directing the distribution of the Wireless Distribution Amount and that promptly following such distribution, the Monitor shall provide reasonably detailed particulars thereof to the Purchaser.

13. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims and Encumbrances against Holdings, other than those Claims and Encumbrances paid in full or waived pursuant to paragraphs 6 through 11 hereof, the

Cash Amount (including any portion of the Cash Amount paid under Section 2(b) and 2(c) of the Sale Agreement following completion of the Transaction) less the Wireless Distribution Amount (the "**Remaining Proceeds**") shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances shall attach to the Remaining Proceeds with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

14. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

15. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, Holdings and Wireless are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in Holdings' and Wireless' records pertaining to Wireless' past and current employees and all personal information in respect of Wireless' past and current customers. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by Holdings and Wireless.

16. **THIS COURT ORDERS** that, notwithstanding:

    (a) the pendency of these proceedings;

    (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") in respect of any of the

Applicants and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Applicants;

the vesting of the Purchased Assets in the Designee pursuant to this Order and the payment of the Wireless Cash from Wireless to Holdings, shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of any of the Applicants, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

17. **THIS COURT ORDERS AND DECLARES** that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

18. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate the Released Parties shall be released and discharged from any and all Released Claims and all Released Claims shall be fully, finally and irrevocably waived, discharged, released, cancelled and barred as against the Released Parties to the fullest extent permitted by applicable law, provided that, for greater certainty, the foregoing shall not prevent QCP CW S.A.R.L ("**QCP**") from advancing any claims or positions of QCP concerning entitlement to and distribution of the Wireless Distribution Amount.

19. **THIS COURT ORDERS** that all persons shall be permanently and forever barred, estopped, stayed and enjoined, from and after delivery of the Monitor's Certificate, with respect to any and all Released Claims, from: (i) commencing, conducting or continuing

in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties; (ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Released Parties or their respective property; (iii) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits or demands, including without limitation by way of contribution or indemnity or other relief, in common law, or in equity, or for breach of trust or breach of fiduciary duty or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any person who makes such a claim or might reasonably be expected to make such a claim, in any manner or forum, against one or more of the Released Parties; (iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their respective property; or (iv) taking any actions to interfere with the implementation or consummation of the Transaction; provided, however, that (i) the foregoing shall not apply to the enforcement of any obligations under the Sale Agreement, any other agreements delivered as part of the Closing under the Sale Agreement (in each case solely among the parties to the Sale Agreement or such other agreements delivered as part of the Closing under the Sale Agreement), or under any Order, including this Order, as the case may be, and (ii) for greater certainty, the foregoing shall not prevent QCP from advancing any claims or positions of QCP concerning entitlement to and distribution of the Wireless Distribution Amount.

20. **THIS COURT ORDERS** that, except as otherwise provided for in this Order, all obligations or agreements to which Wireless is party immediately prior to Closing will be

and remain in full force and effect as at Closing and no Person who is a party to any such obligations or agreements shall, following the Closing, accelerate, terminate, rescind, refuse to renew, refuse to perform or otherwise disclaim or repudiate its obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy (including any right of set-off, option, dilution or other remedy) or make any demand under or in respect of any such obligation or agreement, by reason of:

(a) any defaults or events of default arising as a result of the financial condition or insolvency of any of the Applicants on or prior to the Closing, other than a payment default in respect of an obligation falling due in the ordinary course that is not paid within 14 days of Closing;

(b) the fact that any Applicant has sought or obtained relief under the CCAA;

(c) any changes in share ownership of Wireless arising from implementation of the Transaction, provided, however, where a real property lease contains a provision prohibiting a change of control of the tenant by reason of the transfer of the shares of the tenant without landlord consent, then any landlord of such lease(s) (who has not consented to the transfer) may, within 30 days, serve a notice of motion objecting to the application of this provision to the applicable leases in which case the matter shall be dealt with on its merits, and failing timely service of such notice of motion, the landlord shall be permanently bound by this provision;

(d) the effect on Wireless of the completion of the Transaction.

21. **THIS COURT ORDERS** that effective upon delivery of the Monitor's Certificate to the Purchaser, this proceeding under the CCAA shall be and is hereby terminated solely in

respect of the Wireless Entities, provided however that the stay of proceedings contained in paragraphs 15 through 18 of the Initial Order shall remain in effect in respect of the Wireless Entities for 14 days following delivery of the Monitor's Certificate.

22. **THIS COURT ORDERS** that effective upon delivery of the Monitor's Certificate to the Purchaser, the appointment of the CRO in respect of the Wireless Entities shall be automatically terminated and the CRO discharged from any further obligations in respect of the Wireless Entities, both as CRO and as director.

23. **THIS COURT ORDERS** that effective upon delivery of the Monitor's Certificate to the Purchaser, the CRO is hereby released and discharged from any and all liability that the CRO now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of the CRO while acting in its capacity as CRO or director of the Wireless Entities.

24. **THIS COURT ORDERS** that notwithstanding any provision of this Order, the CRO may carry out such functions and duties as may be incidental to the termination of the proceedings under the CCAA in respect of the Wireless Entities and in carrying out such functions and duties, the CRO shall continue to have the benefit of any and all of the protections granted in the CCAA proceedings of the Wireless Entities.

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist Holdings, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to Holdings and the Monitor, as an officer of this Court, as may be necessary

or desirable to give effect to this Order or to assist Holdings, the Monitor and/or their respective agents in carrying out the terms of this Order.

26. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 2 9 2015

SCHEDULE "A"

FORM OF MONITORS CERTIFICATE

Court File No. CV-13-10274-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	●, THE ●
	)	
JUSTICE NEWBOULD	)	DAY OF JUNE, 2015

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 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC. AND 2451608 ONTARIO INC.

Applicants

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to Orders of the Honourable Justice Newbould of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated September 30, 2013 and January 28, 2015, Ernst & Young Inc., was appointed as monitor (in such capacity, the "**Monitor**") of the undertaking, property and assets of Data & Audio-Visual Enterprises Holdings Inc. ("**Holdings**") , Data & Audio-Visual Enterprises Wireless Inc. ("**Wireless**"), 8440522 Canada Inc. and 2451608 Ontario Inc. (collectively with Holdings and Wireless, the "**Applicants**").

B. Pursuant to an Order of the Court dated June 24, 2015, the Court approved the share purchase offer letter made as of June 23, 2015 (the "**Sale Agreement**") between Holdings,

Wireless and Rogers Communications Inc. (the "**Purchaser**") and an Order of the Court dated June ●, 2015 provided for the vesting in Rogers Cable and Data Centres Inc., (as a designated affiliate of the Purchaser) of Holdings' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Cash Amount; (ii) that the conditions to Closing set out in Sections 5 through 7 of the Sale Agreement have been satisfied or waived by Holdings and/or the Purchaser, as applicable; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and Holdings and Wireless (or the Monitor on behalf of Holdings and Wireless) have received the Cash Amount payable on Closing to each of Holdings and Wireless pursuant to the Sale Agreement;

2. The conditions to Closing as set out in sections 5 through 7 of the Sale Agreement have been satisfied or waived by Holdings and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at ________ [TIME] on _______ [DATE].

ERNST & YOUNG INC., in its capacity as Court-appointed Monitor of Data & Audio-Visual Enterprises Holdings Inc., Data & Audio-Visual Enterprises Wireless Inc., 8445022 Canada Inc. and 2451608 Ontario Inc., and not in its personal capacity

Per: ______________________________

Name:

Title:

Schedule "B"
Permitted Liens

"Permitted Liens" means:

1. Inchoate mechanic's, construction and carrier's liens and other similar liens arising by operation of law or statute in the ordinary course of the Business for obligations which are not delinquent and will be paid or discharged in the ordinary course of business.

2. Any right of expropriation conferred upon, reserved to or vested in Her Majesty The Queen in Right of Canada, Her Majesty The Queen in right of any province of Canada in which the Leased Properties are located, or by any Governmental Authority under any applicable Law which do not, individually or in the aggregate, materially impair the value or use of the Leased Properties for the Business.

3. Zoning restrictions, easements and rights of way or other similar Liens or privileges in respect of real property which do not, individually or in the aggregate, materially impair the value or use of the Leased Properties for the Business and provided the same have been complied with in all material respects.

4. Liens created by others upon other lands over which there are easements, rights-of-way, licenses or other rights of user in favour of the Leased Properties and which do not materially impede the use of the easements, rights-of-way, licenses or other rights of user for the purposes for which they are held.

5. Liens related to the following *Personal Property Security Act* (Ontario) registrations:

Secured Party	**Debtor**	**Reference File No. and Registration Number(s)**
ESI Techologies De L'Information Inc.	Data & Audio Visual Enterprises Wireless Inc.	683247294 20121130 1258 2562 2464
Collateral Classification	**General Collateral Description**	**Comments**
Equipment	F5-BIG-LTM-4200V BIG-IP-Appliance; local traffic manager 4200V (16G Qty 2 F5-SVC-BIG-STD-L1-3 Big-IP Service Std Level 1-3 HWR/Refer to Licensin Qty 2 F5-ADD-BIG DNS BIG-IP Add-on; DNS License Qty 2 F5-SVC-BIG-STD-L1-3 BIG-IP Service Std Level 1-3 HWR/Refer to licensin Qty 2 F5-UPG-AC-400W field upgrade; single 400W AC power (4000 series) QTY2 F5-INST-BIG-LTM BIG-IP installation; local traffic manager impleme Qty 1	Amount: $95,511 No Fixed Maturity Date

Schedule "C"

"**Mobilicity Released Parties**" means (i) Holdings; (ii) the present and former officers, directors, de facto officers or directors, employees, auditors, financial advisors, legal counsel and agents of Holdings, Wireless and their respective affiliates and subsidiaries; (iii) Ernst & Young Inc., in its capacity as court-appointed monitor of Holdings, Wireless and their respective affiliates and subsidiaries, and its legal counsel; and (iv) the chief restructuring officer of Holdings and Wireless and their respective affiliates and subsidiaries.

"**Rogers**" means (i) Rogers Communications Inc., its affiliates and subsidiaries; and (ii) the respective present and former officers, directors, de facto officers or directors, employees, auditors, financial advisors, legal counsel and agents of Rogers Communications Inc. and its affiliates and subsidiaries.

"**Released Claims**" means any and all demands, claims, liabilities, indebtedness, obligations, causes of action, debts, accounts, covenants, damages, executions and other recoveries of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, whether at law or in equity, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including, any legal, statutory, equitable or fiduciary duty) or by reason of any equity interest, right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and together with any security enforcement costs or legal costs associated with any such claim, and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, warranty, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, that any Released Party or Wireless may have against any other Released Party, or any right or ability of any Released Party or Wireless to advance against any other Released Party a claim for an accounting, reconciliation, contribution, indemnity, restitution or otherwise with respect to any matter, grievance, action (including any class action or proceeding before an administrative tribunal), cause or chose in action, whether existing at present or commenced in the future, including without limiting the generality of the foregoing, any security interest, charge, mortgage or other encumbrance in connection with any of the foregoing based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Closing and with respect to, relating to, arising out of, or in connection with Wireless or its subsidiaries, or the Released Parties' dealings with Wireless or its subsidiaries, including (without limitation) the transaction contemplated by the Sale Agreement, the proceedings of Holdings and Wireless and their affiliates and subsidiaries under the *Companies' Creditors Arrangement Act* (Canada), any person's financing to, or investment in securities of, Holdings or Wireless or their respective affiliates or subsidiaries, the Catalyst Oppression Application (as defined in the Aziz Affidavit) or events and occurrences directly or indirectly related to the Oppression Action or the facts, circumstances and allegations asserted or raised in the Oppression Action; provided, however, that Released Claims do not extend to (i) any Released Party's rights or obligations under the Sale Agreement, the Catalyst Letter or this Order, (ii) any claims any Mobilicity Released Parties have against any other Mobilicity Released Parties, or (iii) any Remaining Convertible Debenture Claims.

"**Released Parties**" means Securityholders' Released Parties, the Mobilicity Released Parties and Rogers.

"**Remaining Convertible Debenture Claims**" means any demands, claims, liabilities, indebtedness, obligations, causes of action, debts, accounts, covenants, damages, executions and other recoveries of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, against holders of Convertible Debentures in respect of their Claims, rights, obligations or entitlements under the Convertible Debentures.

"**Securityholders Released Parties**" means past and present (ii) indenture trustees and collateral agents under the First Lien Notes, (ii) legal and beneficial holders of First Lien Notes, (iii) legal and beneficial holders of Second Lien Notes, (iv) collateral agents under the Second Lien Notes, (v) legal and beneficial holders of DIP Notes, (vi) collateral agents under the DIP Notes, (vii) indenture trustees under the Unsecured Senior Notes, (viii) legal and beneficial holders of Unsecured Senior Notes, (ix) legal and beneficial holders of Convertible Debentures (except with respect to the Remaining Convertible Debenture Claims), (x) holders of equity securities of any Applicant, and their respective subsidiaries and affiliates, officers, directors, employees, auditors, financial advisors and legal counsel (including legal counsel to the Ad Hoc Committee of Noteholders and the holders of DIP Notes).

Schedule "D"
Shareholders Agreements and Shareholder Declarations

1. Unanimous Shareholder Agreement dated August 1, 2008 among Data & Audio-Visual Enterprises Inc., QCP CW S.A.R.L and Data & Audio-Visual Enterprises Wireless Inc., as amended, supplemented or restated from time to time.

2. Data & Audio-Visual Enterprises Wireless Inc. Unanimous Shareholder Declaration dated August 1, 2008 between Data & Audio-Visual Enterprises Wireless Inc. and Data & Audio-Visual Enterprises Holdings Inc., as amended, supplemented or restated from time to time.

3. Amended and Restated Shareholders Agreement made as of December 17, 2009 among Data & Audio-Visual Enterprises Investments Inc., QCP CW S.A.R.L., Data & Audio-Visual Enterprises Holdings Inc. and Data & Audio-Visual Enterprises Wireless Inc., as amended, supplemented or restated from time to time.

4. Data & Audio-Visual Enterprises Leasing Inc. Unanimous Shareholder Declaration dated February 19, 2010 among Data & Audio-Visual Enterprises Leasing Inc., Data & Audio-Visual Enterprises Holdings Inc. and Data & Audio-Visual Enterprises Wireless Inc., as amended, supplemented or restated from time to time.

5. Second Amended and Restated Shareholders Agreement dated May 14, 2010 among Data & Audio-Visual Enterprises Investments Inc., QCP CW S.A.R.L, Data & Audio-Visual Enterprises Holdings Inc. and Data & Audio-Visual Enterprises Wireless Inc., as amended, supplemented or restated from time to time.

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

Court File No: CV-13-10274-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC. AND 2451608 ONTARIO INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(VESTING ORDER)

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Lawyers for the Applicants

TAB BB

Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MADAM	)	MONDAY, THE 17th DAY
	)	
JUSTICE PEPALL	)	OF MAY, 2010

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

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

CONDITIONAL CREDIT ACQUISITION SANCTION, APPROVAL AND VESTING ORDER

THIS MOTION, made by Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the "**Applicants**") for an Order approving and conditionally sanctioning the plan of compromise and arrangement dated January 8, 2010 and attached as Schedule "A" to this Order (the "**Plan"**) and for ancillary relief associated with the implementation of the Plan, was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the seventh report of FTI Consulting Canada Inc. (the "**Monitor**") dated May 11, 2010 (the "**Seventh Report**"), and upon hearing submissions of counsel to the Applicants and Canwest Limited Partnership / Canwest Societe en Commandite ("**Canwest Limited Partnership**"), the Monitor, The Bank of Nova Scotia in its capacity as Administrative Agent for the Senior Lenders to Canwest Limited Partnership (the "**Administrative Agent**"), the ad hoc committee of holders of 9.25% senior subordinated notes issued by the Limited Partnership (the "**Ad Hoc Committee**"), 7535538 Canada Inc., the court-appointed representatives of certain employees and former employees of the LP Entities and others:

DEFINITIONS

1. **THIS COURT ORDERS** that any capitalized terms not otherwise defined in this Order shall have the meanings ascribed thereto in the Plan and/or the initial order (the "**Initial Order**") made by this Court under the *Companies' Creditors Arrangement Act* (the "**CCAA**") dated January 8, 2010.

SERVICE AND MEETING

2. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient service and notice of the Plan to all Senior Lenders.

3. **THIS COURT ORDERS** that there has been good and sufficient service of the Meeting Materials upon all Senior Lenders, and that the Senior Lenders Meeting was duly called, held and conducted in conformity with the CCAA and the Initial Order.

4. **THIS COURT ORDERS AND DECLARES** that there has been good and sufficient service and notice of this Sanction Hearing, and that this motion is properly returnable today and further service of the Notice of Motion and the Motion Record upon any interested party is unnecessary and is hereby dispensed with.

PLAN SANCTION

5. **THIS COURT ORDERS AND DECLARES** that:

   (a) the Plan has been approved by the requisite majority of Senior Lenders of the Applicants and Canwest Limited Partnership (collectively, the "**LP Entities**") entitled to vote on the Plan in conformity with the CCAA and the terms of the Initial Order;

(b) the LP Entities have acted in good faith and with due diligence and have complied and acted in accordance with the provisions of the CCAA and the Orders of this Honourable Court made in these proceedings in all respects;

(c) this Honourable Court is satisfied that the LP Entities have not done or purported to do anything that is not authorized by the CCAA; and

(d) the Plan and the transactions contemplated thereby are fair and reasonable and are in the best interests of the Senior Lenders and do not unfairly prejudice the interests of any Person.

6. **THIS COURT ORDERS** that the making of this Order in no way limits or lessens or otherwise affects the power of the Court to sanction other plans of arrangement between one or more of the LP Entities and any of their creditors other than the Senior Secured Lenders, including without limitation the CCAA Plan of Arrangement contemplated by the AHC Transaction.

7. **THIS COURT ORDERS** that notwithstanding the making of this Order, any other terms of this Order or of the Plan, and even if all conditions precedent to the effectiveness of the Plan are satisfied or waived, the Plan and the assignment of Contracts and the vesting of assets and claims provided for hereby shall not be effective until and unless the Monitor delivers to counsel for the Administrative Agent, the LP Entities, 7535538 Canada Inc. and the Ad Hoc Committee in accordance with this Order a certificate (the "**Monitor's Credit Bid Sanction Certificate**") in the form attached hereto as Schedule "B". The Monitor shall promptly thereafter file with this Court a copy of the Monitor's Credit Bid Sanction Certificate.

8. **THIS COURT ORDERS** that the Monitor will not deliver the Monitor's Credit Bid Sanction Certificate if the AHC Transaction closes on or before July 29, 2010 and the Administrative Agent receives, or escrow arrangements satisfactory to the Administrative Agent have been made to ensure that it receives on closing, from or on behalf of the LP Entities in immediately available funds an amount sufficient to distribute to the Senior Lenders in indefeasible repayment in full of all amounts owing under the Senior Credit Agreement, Hedging

Agreements and the Collateral Agency Agreement. Subject to paragraph 9 below, the Monitor's Credit Bid Sanction Certificate will not be delivered prior to July 29, 2010.

9. **THIS COURT ORDERS** that, notwithstanding paragraph 8 above, if prior to July 29, 2010, the Monitor determines in its reasonable business judgement that there is no reasonable chance that the AHC Transaction can close, the Monitor may apply to Court on four (4) business days notice for authority to deliver the Monitor's Credit Bid Sanction Certificate prior to July 29, 2010.

10. **THIS COURT ORDERS** that, subject to paragraph 9 above, if the AHC Transaction does not close on or before July 29, 2010, the Monitor is hereby authorized and directed to apply to the Court on July 30, 2010 for advice and direction as to whether it should deliver the Monitor's Credit Bid Sanction Certificate or withhold delivery of the Monitor's Credit Bid Sanction Certificate for such further period of time as directed by the Court.

11. **THIS COURT ORDERS** that, subject to paragraph 7 above, the Plan (including, without limitation, the Credit Acquisition, compromises, arrangements and releases set out therein) is hereby sanctioned and approved as of the date hereof pursuant to Section 6 of the CCAA and that upon delivery of the Monitor's Certificate pursuant to paragraph 14 below and the delivery of the Monitor's Credit Bid Sanction Certificate, the Plan shall be implemented, shall be effective and shall enure to the benefit of and be binding upon the LP Entities and the Senior Lenders, including their respective heirs administrators, executors, legal personal representatives, successors, and assigns but will not affect Unaffected Claims.

12. **THIS COURT ORDERS** that if the AHC Transaction has closed on or before July 29, 2010 (or such later date as is ordered by the Court) in accordance with the Order Approving the AHC Transaction and Amending the Claims Procedure Order and the SISP Procedures made on the date of this Order, then this Order shall be of no force or effect.

APPROVAL AND VESTING

13. **THIS COURT ORDERS AND DECLARES** that, subject to paragraph 7 above, the Acquisition and Assumption Agreement substantially in the form attached as Schedule "1.1(8)" to the Plan (the "**Acquisition Agreement**") and the transaction contemplated thereby (the "**Transactions**") are hereby approved. Upon the delivery of the Monitor's Credit Bid Sanction Certificate, the execution of the Acquisition Agreement by Doug Lamb or Kevin Bent on behalf the LP Entities will be authorized and approved without any requirement of further actions by shareholders, directors or officers of the LP Entities, and the LP Entities and the Monitor will be authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions and for the conveyance of the Acquired Assets to 7272049 Canada Inc. ("**Acquireco**") in accordance with the Plan and the Acquisition Agreement.

14. **THIS COURT ORDERS** that, subject to paragraph 7 hereof, upon being provided with evidence satisfactory to the Monitor of the satisfaction (or, where applicable, waiver) of the conditions set out in section 8.2 of the Plan, the Monitor shall deliver to the Administrative Agent and the LP Entities and promptly thereafter file with this Court a certificate stating that all conditions precedent set out in section 8.2 of the Plan have been satisfied (or, where applicable, waived by the LP Entities and/or the Administrative Agent in accordance with the terms of the Plan) (the "**Monitor's Certificate**"), and the date of the delivery of such certificate to the Administrative Agent and the LP Entities shall be the date upon which the Plan shall be and be deemed to have been implemented (the "**Credit Acquisition Plan Implementation Date**").

15. **THIS COURT ORDERS** that upon the filing of a Monitor's Certificate, the following shall take place, in the order in which they appear below and in accordance with the Plan:

(a) all right, title and interest in and to the Canwest Books Assets shall vest absolutely in CPI free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have

attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "**Canwest Books Encumbrances**") and, for greater certainty, this Court orders that Canwest Books Encumbrances affecting or relating to the Canwest Books Assets are hereby expunged and discharged as against the Canwest Books Assets;

(b) all right, title and interest in and to the Canwest GP Assets shall vest absolutely in CPI free and clear of any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "**Canwest GP Encumbrances**") and, for greater certainty, this Court orders that Canwest GP Encumbrances affecting or relating to the Canwest GP Assets are hereby expunged and discharged as against the Canwest GP Assets;

(c) all right, title and interest in and to the CLP Assets shall vest absolutely in CPI free and clear of any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or

monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement (collectively, the "**CLP Encumbrances**") and, for greater certainty, this Court orders that CLP Encumbrances affecting or relating to the CLP Assets are hereby expunged and discharged as against the CLP Assets;

(d) the right, title and interest in and to the Senior Secured Claims (for greater certainty, net of amounts paid to the Senior Lenders under the terms of the Acquisition Agreement (defined herein) and the Plan on or before the Credit Acquisition Plan Implementation Date that would reduce the outstanding Senior Secured Claims) shall vest absolutely in Acquireco free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including, without limiting the generality of the foregoing all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute (collectively, "**Senior Claim Encumbrances**") and, for greater certainty, this Court orders that Senior Claim Encumbrances affecting or relating to the Senior Secured Claims are hereby expunged and discharged as against the Senior Secured Claims; and

(e) all of the right, title and interest of any Person in and to the Acquired Assets described in the Acquisition Agreement shall vest absolutely in Acquireco, (including without limitation any amounts in the Cash Reserve Account that are

not used by the Monitor in accordance with the Cash Reserve Order to pay Cash Reserve Costs), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Initial Order of the Honourable Justice Pepall dated January 8, 2010; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other applicable federal or other provincial statute, but not including Prior Ranking Secured Claims expressly assumed by Acquireco pursuant to the terms of the Acquisition Agreement and real property permitted encumbrances as set out in Schedule D and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Acquired Assets are hereby expunged and discharged as against the Acquired Assets.

16. **THIS COURT ORDERS** that in accordance with the Plan, the Acquireco Equity and the Acquireco Debt to be distributed in respect of each Senior Lender's Senior Secured Claim (the "**Acquireco Debt/Equity**") shall stand in place and stead of such Senior Secured Claim and all Senior Claim Encumbrances on or against such Senior Secured Claim shall attach to and may be asserted against the Acquireco Debt/Equity with the same priority as they had immediately prior to the implementation of the Plan, as if such Senior Secured Claim had not been transferred to Acquireco and had remained the property of such Senior Lenders immediately prior to the implementation of the Plan.

17. **THIS COURT ORDERS** that, without limiting the other provisions in this Order, on the Credit Acquisition Implementation Date, the license of the LP Entities to use the "Canwest" name and trademarks under a Trademarks License Agreement dated October 13, 2005 (the "**License**") shall be assigned to Acquireco and, following that assignment, Canwest Global Communications Corp. shall not be entitled to exercise any right of termination of the License unless the termination is to take effect after February 28, 2011.

REAL PROPERTY

Ontario

18. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) (the "**Toronto Land Registry Office**") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Toronto Property (as defined in Schedule C), the Land Registrar for the Toronto Land Registry Office is hereby directed to enter Acquireco as the owner of the Toronto Property in fee simple, and is hereby directed to delete and expunge from title to the Toronto Property all of the real property encumbrances relating to the Toronto Property, including but not limited to, the real property encumbrances listed in Schedule D, subject only to the real property permitted encumbrances relating to the Toronto Property listed in Schedule E.

19. **THIS COURT ORDERS** that upon registration in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) (the "**Ottawa Land Registry Office**") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Ottawa Property (as defined in Schedule B), the Land Registrar for the Ottawa Land Registry Office is hereby directed to enter Acquireco as the owner of the Ottawa Property in fee simple, and is hereby directed to delete and expunge from title to the Ottawa Property all of the real property encumbrances relating to the Ottawa Property, including but not limited to, the real property encumbrances listed in Schedule D, subject only to the real property permitted encumbrances relating to the Ottawa Property listed in Schedule E.

20. **THIS COURT ORDERS** that upon registration in the Land Registry Office for the Land Titles Division of Essex (No. 12) (the "**Windsor Land Registry Office**") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Windsor Properties (as defined in Schedule C), the Land Registrar for the Windsor Land Registry Office is hereby directed to enter Acquireco as the owner of the Windsor Properties in fee simple, and is hereby directed to delete and expunge from

title to the Windsor Properties all of the real property encumbrances relating to the Windsor Properties, including but not limited to, the real property encumbrances listed in Schedule D, subject only to the real property permitted encumbrances relating to the Windsor Properties listed in Schedule E.

Alberta

21. **THIS COURT ORDERS** that, upon presentation for registration in either of the North Alberta Land Titles Office or the South Alberta Land Titles Office (collectively, the "**Alberta LTO**"), as the case may be, a certified copy of this Order and an Affidavit of Value as prescribed by the *Land Titles Act* (Alberta), the Alberta LTO be and is hereby authorized and directed to cancel the existing certificates of title to the Alberta Properties as defined in Schedule C and to issue new certificates of title for those Alberta Properties in the name of Acquireco. The Alberta LTO be and is hereby directed to delete and expunge from such new titles to the Alberta Properties all of the real property encumbrances relating to the Alberta Properties, including but not limited to the real property encumbrances listed on Schedule D, subject only to the real property permitted encumbrances relating to the Alberta Property listed in Schedule E being carried forward to the new Alberta Property titles.

22. **THIS COURT ORDERS** that the cancellation of titles and issuance of new titles and discharge of instruments as set out in paragraph 21 shall be registered notwithstanding the requirements of Section 191(1) of the *Land Titles Act* (Alberta).

British Columbia

23. **THIS COURT ORDERS** that, for greater certainty, those lands and premises defined in Schedule C hereto as the BC Properties (the "**BC Properties**") be sold to Acquireco, and that the BC Properties, together with all buildings, fixtures, systems, interests, licences, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, do vest in Acquireco in fee simple, free from all encumbrances, subject nevertheless to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown, and subject to

the real property permitted encumbrances relating to the BC Properties listed in Schedule E hereto, upon the filing of the Monitor's Certificate.

24. **THIS COURT ORDERS** that the BC Properties do vest in Acquireco as set out herein, and that all of the encumbrances registered against the titles to the BC Properties, including but not limited to the real property encumbrances relating to the BC Properties and listed in Schedule E hereto, but subject to the real property permitted encumbrances relating to the BC Properties listed in Schedule E hereto, be discharged immediately upon the registration in the appropriate Land Title Offices of a certified copy of the Order made upon this Motion, together with a letter from Bull, Housser & Tupper LLP, permitting registration of the Order made upon this Motion.

Saskatchewan

25. **THIS COURT ORDERS** that, pursuant to the Acquisition Agreement, upon payment of the required registration fee, the Registrar of Titles of the Saskatchewan Land Titles Registry is hereby authorized and directed pursuant to Section 109 of *The Land Titles Act, 2000* S.S. 2000, c. L-5.1 and Section 6.5 of *The Land Titles Conversion Facilitation Regulations*, c. L-5.1, Reg. 2 to cancel the existing titles to the Saskatchewan Properties identified in Schedule C and the new titles to such Saskatchewan Properties shall be issued in the name of Acquireco, free and clear of all real property encumbrances related to the Saskatchewan Properties listed in Schedule D, subject only to the real property permitted encumbrances related to the Saskatchewan Properties listed in Schedule E.

Quebec

26. **THIS COURT ORDERS** AND DIRECTS, in order to give effect to this Order prior to closing of the Transactions, CPI and Acquireco to enter into a deed of transfer with respect to the Quebec Property (as defined in Schedule C), upon the same terms and conditions substantially as those set forth in the draft deed of transfer attached hereto as Schedule F (the "**Deed of Transfer**"), which Deed of Transfer shall be effective upon the delivery of the Monitor's Certificate to Acquireco.

27. **THIS COURT ORDERS** AND DIRECTS, in order to give effect to this Order prior to closing of the Transaction, CIBC Mellon Trust Company to execute a deed of mainlevée with respect to the real property encumbrances listed in Schedule D relating to only the Quebec Property, subject only to the real property permitted encumbrances related to the Quebec Property listed in Schedule E (the "**Deed of Mainlevée**"), which Deed of Mainlevée shall be effective only upon the delivery of the Monitor's Certificate to Acquireco.

28. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the parties to the Acquisition Agreement are authorized and permitted to disclose and transfer to Acquireco all human resources and payroll information in the LP Entities' records pertaining to the LP Entities' past and current employees. The recipient of such information shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the applicable party to the Acquisition Agreement.

29. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the LP Entities or any of the Senior Lenders (herein collectively the "**Vesting Entities**") and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Vesting Entities;

(i) the entering into of the Acquisition Agreement; (ii) the vesting of rights, titles and interests as set out in paragraph 15 above and (iii) the assignment of the Contracts (as defined below) pursuant to this Order, shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Vesting Entities and shall not be void or voidable by creditors of any of the Vesting Entities, nor shall any of them constitute nor be deemed to be a settlement, fraudulent

preference, assignment, fraudulent conveyance or transfer at undervalue under the *Bankruptcy and Insolvency Act* (Canada), the CCAA or any other applicable federal or provincial legislation, nor shall any of them constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

30. **THIS COURT ORDERS AND DECLARES** that the Plan, the Credit Acquisition and the other transactions contemplated thereby are exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation under any other province or territory in Canada.

PLAN IMPLEMENTATION

31. **THIS COURT ORDERS** that upon delivery of the Monitor's Credit Bid Sanction Certificate, the LP Entities, Acquireco, the Administrative Agent, the Collateral Agent (as defined below) and the Monitor shall be authorized and directed to take all steps and actions and execute such additional documents (and with respect to the LP Entities Doug Lamb or Kevin Bent shall be authorized and directed to execute such additional documents on behalf of the LP Entities) as may be necessary or appropriate (as determined by each party in consultation with the other parties) to implement the Plan, the Credit Acquisition and the Transactions in accordance with and subject to their terms and such steps and actions are hereby approved.

SENIOR SECURED CLAIMS

32. **THIS COURT ORDERS** that, without limiting the Initial Order, for the purposes of the Plan the Principal amount of the Senior Secured Claims shall be determined in accordance with the claims process set out at paragraph 68 of the Initial Order. To the extent that any Senior Lender (the "**Claimant**") asserts a claim in respect of Other Amounts that arose after the Filing Date but prior to the date of this Order (a "**Post-Filing Other Amounts Claim**"):

(a) such Claimant shall within ten (10) Business Days from the making of this Order, send to the Monitor (with a copy to the LP Entities and the Administrative Agent) a notice (the "**Claim Notice**") setting out the amount of its Post-Filing Other

Amounts Claim in the form attached hereto as Schedule "G". If no such notice is received by the Monitor from the Claimant within ten (10) Business Days of the making of this Order, the Claimant's Post-Filing Other Amounts Claim shall be and is hereby for the purposes of the Plan extinguished and forever barred;

(b) if the Monitor, with the consent of the Administrative Agent acting in consultation with the Steering Committee, confirms the Post-Filing Other Amounts Claim set out in the Claim Notice or if the Monitor, with the consent of the Administrative Agent acting in consultation with the Steering Committee, does not deliver a Notice of Dispute, indicating that the Monitor disputes the Post-Filing Other Amounts Claim within five (5) Business Days of receipt of the Claim Notice, then the amount set out in the Claim Notice shall be deemed to be finally determined ("**Finally Determined**") and accepted for the purpose of calculating the Claimant's entitlement to distributions under the Senior Lenders CCAA Plan;

(c) if the Monitor delivers a Notice of Dispute in accordance with subparagraph (b) above, then the Monitor, the Administrative Agent and the particular Senior Lender shall have five (5) Business Days from the date of delivery of the Notice of Dispute to reach an agreement in writing as to the Post-Filing Other Amounts Claim that is subject to the Notice of Dispute, in which case such agreement shall govern and the Post-Filing Other Amounts Claim shall be deemed to be Finally Determined in accordance with the agreement;.

(d) if a Notice of Dispute is unable to be resolved in the manner and within the time period set out in subparagraph (c) above, then the Claim of such Claimant shall for the purposes of the Plan be determined by the Court on a motion for advice and directions brought by the Monitor (the "**Dispute Motion**") on notice to the Administrative Agent and all other interested parties. The Monitor and the Claimant shall each use reasonable efforts to have the Dispute Motion, and any appeals therefrom, disposed of on an expedited basis with a view to having the Post-Filing Other Amounts Claim of the Claimant Finally Determined on a timely basis.

If there are any Senior Secured Claims (including for greater certainty, for Principal or Other Amounts) or any portion thereof that have not been Finally Determined pursuant to the terms of the Initial Order or this Order (an "**Unresolved Senior Claim**"), as of the Credit Acquisition Plan Implementation Date, the Monitor shall establish a Unresolved Senior Claims Reserve. The Unresolved Senior Claims Reserve shall be comprised of Acquireco Debt, Acquireco Equity and cash reserved out of the LP Entity Cash and Cash Equivalents. The aggregate value of the Acquireco Debt and Acquireco Equity to be included in the Unresolved Senior Claims Reserve shall be equal to the value of Acquireco Debt and Acquireco Equity that would have been distributed in respect of the Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date. The aggregate amount of the cash to be included in the Unresolved Senior Claims Reserve shall be equal to the amount of all Unpaid Interest on Unresolved Senior Claims as of the Credit Acquisition Plan Implementation Date that would have been paid to the Senior Lenders holding such Unresolved Senior Claims if the full amounts of such Unresolved Senior Claims were Proven Senior Secured Claims on the Credit Acquisition Plan Implementation Date.

33. **THIS COURT ORDERS** that provided that the Monitor receives from the LP Entities and Acquireco, respectively, the cash and Acquireco Debt and Acquireco Equity required for the Monitor to establish the Unresolved Senior Claims Reserve in accordance with the Plan, not later than fifteen days (or such later date as may be specified by Order of the Court) following the Final Determination Date, the Monitor shall distribute from the Unresolved Senior Claims Reserve:

(a) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet, Acquireco Debt and Acquireco Equity in respect of any Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date and that subsequently became Proven Senior Secured Claims, together with any interest, dividends, distributions or other payments actually received by the Monitor on account or in respect thereof;

(b) following the distribution referred to in subparagraph (a) above, any balance of Acquireco Debt and Acquireco Equity that forms part of the Unresolved Senior

Claims Reserve shall be distributed to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet such that all Acquireco Debt and Acquireco Equity shall have been distributed in accordance with the Plan and the Acquireco Capitalization Term Sheet and any interest, distributions or other payments actually received by the Monitor on account or in respect of the Acquireco Debt and Acquireco Equity referred to in this subparagraph (b) shall be distributed to the Persons receiving the applicable Acquireco Debt or Acquireco Equity pursuant to this subparagraph (b),

(c) to the Persons entitled in accordance with the Plan and the Acquireco Capitalization Term Sheet, cash in an amount equal to the aggregate amount of all Unpaid Interest on Senior Secured Claims that were Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date that subsequently became Proven Senior Secured Claims, together with any interest actually received by the Monitor on account or in respect thereof, and following this distribution, any balance of cash that forms part of the Unresolved Senior Claims Reserve together with any interest actually received by the Monitor on account or in respect thereof shall be paid to Acquireco.

For the purposes of calculating the various distributions to be made pursuant to this paragraph 33, each Senior Lender's Pro Rata Share shall be calculated as if (i) the Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date were Proven Senior Secured Claims and not Unresolved Senior Claims on the Credit Acquisition Plan Implementation Date, (ii) the Unresolved Amount was zero as of the Credit Acquisition Plan Implementation Date, and (iii) Unpaid Interest on Senior Secured Claims that became Proven Senior Secured Claims after the Credit Acquisition Plan Implementation Date was paid on the Credit Acquisition Plan Implementation Date.

EFFECT OF PLAN IMPLEMENTATION

34. **THIS COURT ORDERS** that, effective on the Credit Acquisition Plan Implementation Date each Senior Secured Claim shall be dealt with in accordance with the Plan and the ability of

the holder of a Senior Secured Claim (other than Acquireco) to proceed against the LP Entities or the LP Property (including any amounts now or hereafter held by the Monitor in respect of the LP Entities) in respect of a Senior Secured Claim and all suits, actions, proceedings or other enforcement processes by the holder of a Senior Secured Claim (other than Acquireco) with respect to, in connection with or relating to such Senior Secured Claims are permanently stayed and restrained, subject only to the right of the holder of such a Senior Secured Claim to receive distributions in accordance with the Plan.

35. **THIS COURT ORDERS AND DECLARES** that, effective on the Credit Acquisition Plan Implementation Date, all Senior Secured Claims determined in accordance with the Plan, the Initial Order and this Order are final and binding on the LP Entities, the Monitor and all Senior Lenders and that, as of the Credit Acquisition Plan Implementation Date, the Plan shall enure to the benefit of and be binding upon the Senior Lenders and all other Persons affected thereby and their respective heirs, administrators, executors, legal personal representatives, successors and assigns.

36. **THIS COURT ORDERS** that, upon the delivery of the Monitor's Credit Bid Sanction Certificate and except as provided in the terms of the Plan and subject to the restrictions in Section 11.3 of the CCAA, the LP Entities will be authorized and directed to assign all contracts, leases, agreements and other arrangements of which Acquireco takes an assignment on closing pursuant to the terms of the Acquisition Agreement (the "**Contracts**") and that, subject to Section 11.3 of the CCAA and the giving of notice to the counterparties of such Contracts in accordance with paragraph 47 below, such assignments are hereby approved and are valid and binding upon the counterparties notwithstanding any restriction or prohibition on assignment contained in such Contract.

37. **THIS COURT ORDERS** that from and after the Credit Acquisition Plan Implementation Date, subject to the CCAA, all Persons shall be deemed to have waived all defaults then existing or previously committed by the LP Entities under, or caused by the LP Entities under, and the non-compliance by the LP Entities with, any of the Contracts arising solely by reason of the insolvency of the LP Entities or as a result of any actions taken pursuant to the Plan or in these proceedings, and all notices of default and demands given in connection

with any such defaults under, or non-compliance with, the Contracts shall be deemed to have been rescinded and shall be of no further force or effect.

ROLE OF THE MONITOR

38. **THIS COURT ORDERS** that, notwithstanding any other terms of this Order or of the Plan, the appointment of the Monitor pursuant to the terms of prior Orders made by this Honourable Court shall not expire or terminate on the Credit Acquisition Plan Implementation Date and shall continue for purposes of the following:

(a) the completion by the Monitor of all of its duties in connection with the Plan; and

(b) the completion by the Monitor of all other matters for which it is responsible in these proceedings and pursuant to the Plan, the Initial Order and the CCAA.

39. **THIS COURT ORDERS** that all claims of any Person, whether such claims are direct, indirect, derivative or otherwise, against the Monitor arising from or relating to the services provided by the Monitor in respect of the LP Entities prior to the date of this Order, save and except claims of gross negligence or wilful misconduct, shall be and are hereby forever barred from enforcement and are extinguished.

40. **THIS COURT ORDERS** that the Monitor shall be discharged of its duties and obligations with respect to the LP Entities pursuant to the Plan, this Order and all other Orders made in these proceedings with respect to the LP Entities from time to time upon the filing with this Honourable Court of a certificate of the Monitor certifying that the matters set out in paragraph 38 above are completed to the best of the Monitor's knowledge.

CHARGES

41. **THIS COURT ORDERS** that, on the Credit Acquisition Plan Implementation Date following the making of the Cash Reserve Order and the establishment of the Cash Reserve in

accordance with the Plan, all charges against the LP Entities or the LP Property created by the Initial Order or any subsequent Orders shall be terminated, discharged and released.

42. **THIS COURT ORDERS AND DECLARES** that, notwithstanding any of the terms of the Plan or this Order, the LP Entities shall not be released or discharged from its obligations to pay the fees and expenses of the Monitor, the Monitor's counsel or the LP Entities' counsel in respect of the Plan and the implementation thereof, which obligations shall be in addition to any such obligations under the Plan.

RELEASES, EXCULPATION AND LIMITATION OF LIABILITY

43. **THIS COURT ORDERS** that on the Credit Acquisition Plan Implementation Date, the LP Entities shall be deemed to have released each of the Senior Lenders, each individual, corporation or other entity that was at any time a Senior Lender, each member and former member of the Steering Committee or any other committee of holders of Senior Secured Claims, the Administrative Agent, the DIP Lenders, Acquireco and the Collateral Agent, and their respective agents, affiliates, directors, officers, employees, and representatives, including counsel and its financial advisor (collectively, the "**Indemnitees**") and the Monitor, from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether based on contract, negligence or other tort, fiduciary duty, common law, equity, statute or otherwise, whether known or unknown, whether foreseen or unforeseen, arising on or before the Credit Acquisition Implementation Date (other than any claims, obligations, rights, causes of action, and liabilities arising from fraud as determined by a final judgment of a court of competent jurisdiction) which such LP Entities may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims.

44. **THIS COURT ORDERS** that on the Credit Acquisition Plan Implementation Date the Senior Lenders shall be deemed to have released the Monitor and the present and former officers and directors of the LP Entities from any and all claims, obligations, rights, causes of action, and liabilities, of whatever kind or nature, whether known or unknown, whether foreseen or unforeseen, arising on or before the Credit Acquisition Plan Implementation Date, which such

Senior Lenders may have for, upon or by reason of any matter, cause or thing whatsoever, which are based upon, arise under or are related to the Senior Credit Agreement, Hedging Agreements, Collateral Agency Agreement or Senior Secured Claims, provided that nothing herein will release any of the present or former officers or directors of the LP Entities in respect of any claim, obligations right, cause of action, or liability referred to in section 5.1(2) of the CCAA.

45. **THIS COURT ORDERS** that none of the LP Entities, the Monitor, the Administrative Agent, the Senior Lenders, Acquireco, any individual, corporation or other entity that was at any time formerly a Senior Lender, the Steering Committee or any other committee of holders of Senior Secured Claims, the DIP Lenders, Collateral Agent, or any of their respective present or former members, officers, directors, employees, direct or indirect advisors, attorneys, or agents, shall have or incur any liability to any holder of a Senior Secured Claim, or any of their respective agents, employees, representatives, financial advisors, attorneys, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, the LP Entities' CCAA proceedings initiated by the Initial Order, formulating, negotiating or implementing the Plan or the Support Agreement, the solicitation of acceptances of the Plan or the Support Agreement, the pursuit of confirmation of the Plan, the confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their wilful misconduct, and in all respects shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under the Plan.

46. **THIS COURT ORDERS** that the LP Entities hereby jointly and severally fully indemnify each of the Indemnitees against any manner of actions, causes of action, suits, proceedings, liabilities and claims of any nature, costs and expenses (including reasonable legal fees) which may be incurred by such Indemnitee or asserted against such Indemnitee arising out of or during the course of, or otherwise in connection with or in any way related to, the negotiation, preparation, formulation, solicitation, dissemination, implementation, confirmation and consummation of the Plan, other than any liabilities to the extent arising from the gross negligence or willful or intentional misconduct of any Indemnitee or any breach by Acquireco of the terms of the Acquisition Agreement as determined by a final judgment of a court of

competent jurisdiction. If any claim, action or proceeding is brought or asserted against an Indemnitee in respect of which indemnity may be sought from any of the LP Entities, the Indemnitee shall promptly notify the LP Entities in writing, and the LP Entities may assume the defence thereof, including the employment of counsel reasonably satisfactory to the Indemnitee, and the payment of all costs and expenses. The Indemnitee shall have the right to employ separate counsel in any such claim, action or proceeding and to consult with the LP Entities in the defence thereof and the fees and expenses of such counsel shall be at the expense of the LP Entities unless and until the LP Entities shall have assumed the defence of such claim, action or proceeding. If the named parties to any such claim, action or proceeding (including any impleaded parties) include both the Indemnitee and any of the LP Entities, and the Indemnitee reasonably believes that the joint representation of such entity and the Indemnitee may result in a conflict of interest, the Indemnitee may notify the LP Entities in writing that it elects to employ separate counsel at the expense of the LP Entities, and the LP Entities shall not have the right to assume the defence of such action or proceeding on behalf of the Indemnitee. In addition, the LP Entities shall not affect any settlement or release from liability in connection with any matter for which the Indemnitee would have the right to indemnification from the LP Entities, unless such settlement contains a full and unconditional release of the Indemnitee, or a release of the Indemnitee satisfactory in form and substance to the Indemnitee.

COMPLETION OF SCHEDULES AND AMENDMENT OF ORDER

47. **THIS COURT ORDERS** that the LP Entities are authorized and directed to (i) use their commercially reasonable efforts to work cooperatively with the Administrative Agent to complete the Schedules to this Order by not later than June 15, 2010, and (ii) as soon as practicable following the completion of the Schedules to this Order, and in any event not later than June 29, 2010, serve a motion to this Court for an Order amending this Order on notice to the counterparties to the Contracts and any Person that has registered any Canwest Books Encumbrance, Canwest GP Encumbrance, CLP Encumbrance or Encumbrance.

OTHER PROVISIONS

48. **THIS COURT ORDERS** that the AHC Transaction will have priority to management time to close that transaction. However, the LP Entities will also use reasonable efforts to comply with information requests from the Agent in accordance with the email of Alvarez & Marsal Canada ULC to the Monitor dated May 16, 2010 and such other requests in accordance with the LP Support Agreement so long as in each case they do not materially hinder or prejudice the closing of the AHC Transaction within the intended timeline. If any issues arise in relation to access to management time or other closing requirements as between the AHC Transaction and the Credit Acquisition, the parties will consult with the Monitor who will seek to resolve them. If the Monitor is unable to resolve any such issues advice and direction will be sought from the Court.

49. **THIS COURT ORDERS** that, except to the extent that the Initial Order has been varied by or is inconsistent with this Order, the Plan or any other Order in these proceedings, the provisions of Initial Order shall remain in full force and effect until the Credit Acquisition Plan Implementation Date, when all but paragraphs 65-97 of the Initial Order shall terminate. Notwithstanding the termination of certain provisions of the Initial Order, the Monitor shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in its favour, except as varied herein.

50. **THIS COURT ORDERS** that paragraphs 65-97 of the Initial Order and all other Orders made in these CCAA proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by or inconsistent with this Order, subject to paragraph 12 hereof, or any further Order of this Honourable Court.

51. **THIS COURT ORDERS** that this Court shall retain jurisdiction in respect of any matter in dispute arising out of anything relating to the interpretation or implementation of the Plan.

52. **THIS COURT ORDERS** that the LP Entities, the Monitor, Acquireco or the Administrative Agent may apply to this Honourable Court for further advice, directions or assistance as may be necessary to give effect to the terms of the Plan.

53. **THIS COURT ORDERS** that, subject to paragraphs 7 and 12, this Order shall have full force and effect in all provinces and territories in Canada and abroad and as against all other Persons against whom it may otherwise be enforceable.

54. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the LP Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the LP Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the LP Entities and the Monitor and their respective agents in carrying out the terms of this Order.

55. **THIS COURT ORDERS** that each of the LP Entities, the Monitor, Acquireco and the Administrative Agent be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

56. **THIS COURT ORDERS** that this Order shall be posted on the website maintained by the Monitor and shall only be required to be served upon those parties who have either formally entered an appearance in these proceedings or those parties who appeared at the hearing of the motion for this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 17 2010

PER / PAR:

SCHEDULE "A"

Plan of Compromise and Arrangement

SCHEDULE "B"

Court File No. CV-10-8533-00CL

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 CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

MONITOR'S CREDIT BID SANCTION CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Madam Justice Pepall of the Ontario Superior Court of Justice (the "**Court**") dated January 8, 2010, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Canwest Publishing Inc. / Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc., and Canwest Limited Partnership / Canwest Societe en Commandite (collectively, the "**LP Entities**") in their proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended.

B. By Order dated May 17, 2010 (the "**Conditional Credit Acquisition Order**"), the Court approved and sanctioned, subject to paragraph 7 of the Conditional Credit Acquisition Order, the plan of compromise and arrangement dated January 8, 2010 attached as Schedule "A" to the Conditional Credit Acquisition Order (the "**Plan**") and ordered that upon, *inter alia*, delivery of the Monitor's Credit Bid Sanction Certificate the Plan shall be implemented, shall be effective and shall enure to the benefit of and be binding upon the LP Entities and the Senior Lenders (as defined in the Conditional Credit Acquisition Agreement).

C. Pursuant to the Conditional Credit Acquisition Order, the Monitor was authorized to apply to Court for authority or directions to deliver the Monitor's Credit Bid Sanction Certificate.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Conditional Credit Acquisition Order.

THE MONITOR CERTIFIES the following:

1. By Order dated ●, 2010, the Court directed the Monitor to deliver the Monitor's Credit Bid Sanction Certificate.

2. This Monitor's Credit Bid Sanction Certificate was delivered by the Monitor at _________ on _______ _____, 2010.

FTI Consulting Canada Inc., in its capacity as Court-appointed Monitor of the LP Entities, and not in its personal capacity

Per: ________________________________

Name:

Title:

SCHEDULE "C"

[NTD: List of legal descriptions to be completed in accordance with Paragraph ●]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

SCHEDULE "D"

[NTD: List of Real Properties Encumbrances to be added in accordance with Paragraph 43.]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

SCHEDULE "E"

[NTD: List of Real Properties Permitted Encumbrances to be added in accordance with Paragraph 43.]

Toronto Property

Ottawa Property

Windsor Property

Alberta Properties

BC Properties

Saskatchewan Properties

Quebec Properties

SCHEDULE "F"

[NTD: Insert form of draft deed of transfer for Quebec Property in accordance with Paragraph 43.]

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

Court File No: CV-10-8533-00CL

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

APPLICANTS

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

CONDITIONAL CREDIT ACQUISITION SANCTION, APPROVAL AND VESTING ORDER

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Lawyers for the Applicants

F. 1117119

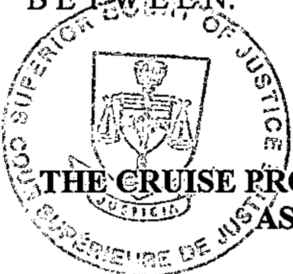
TAB CC

Court File No. CV-13-10320-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 4TH
	)	
MR. JUSTICE MORAWETZ	)	DAY OF DECEMBER, 2013

B E T W E E N:



ELLEWAY ACQUISITIONS LIMITED

Applicant

- and –

THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.com) AND 7500106 CANADA INC.

Respondents

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

ORDER (CHANGE IN TITLE OF PROCEEDINGS)

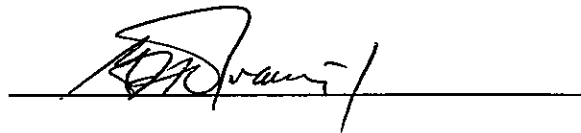
UPON THE REQUEST by Grant Thornton Limited in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertaking, property and assets of each of 1772174 Ontario Inc. (formerly known as The Cruise Professionals Limited), 4358376 Canada Inc. (formerly operating as itravel2000.com) and 7500106 Canada Inc., for an order changing the within title of proceedings, was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Receiver, no one else appearing;

1. **THIS COURT ORDERS** that for purposes of the within title of proceedings, the names of the Respondents in the within title of proceeds shall be deleted and replaced with "1772174 Ontario Inc. (formerly known as The Cruise Professionals Limited), 4358376 Canada Inc. (formerly operating as Itravel2000.com), and 7500106 Canada Inc.", and that any document required to hereafter be filed in these proceedings (other than this Order) shall be filed using such revised title of proceedings.

2. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations, governmental, municipal and regulatory authorities against whom it may be enforceable.

3. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province to act in aid of and to be complementary to this Court in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



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ELLEWAY ACQUISITIONS LIMITED	and	THE CRUISE PROFESSIONALS LIMITED, 4358376 CANADA INC. (OPERATING AS ITRAVEL2000.com) AND 7500106 CANADA INC.	Court File No. CV -13-10320-00C
APPLICANT		RESPONDENTS	

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

ORDER
(December 4, 2013)

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Lawyers for Grant Thornton Limited, in its capacity as receiver for 4358376 Canada Inc., 7500106 Canada Inc., and 1772174 Ontario Inc.

TAB DD

Court File No. CV12 – 9767 – 00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 19TH
	)	
JUSTICE MORAWETZ	)	DAY OF OCTOBER, 2012

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

ADMINISTRATIVE RESERVE / DISTRIBUTION / TRANSITION ORDER

THIS MOTION, made by C International Inc., formerly Cinram International Inc., C International Income Fund, formerly Cinram International Income Fund, CII Trust and the companies listed in Schedule "A" hereto (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Neill May sworn October 12, 2012, the Fourth Report of FTI Consulting Canada Inc. in its capacity as Court-appointed Monitor (the "**Monitor**") dated 12, 2012 (the "**Monitor's Fourth Report**"), the Affidavit of Paul Bishop sworn October 12, 2012 (the "**Bishop Affidavit**") and the Affidavit of Daphne MacKenzie sworn October 11, 2012 (the "**MacKenzie Affidavit**"), and on hearing the submissions of counsel for the Applicants and Cinram International Limited Partnership (together with the Applicants, the "**CCAA Parties**"), the Monitor, the Pre-Petition First Lien Agent (as defined in the Initial Order) and the Pre-Petition Second Lien Agent (as defined in the Initial Order, together with

the Pre-Petition First Lien Agent, the "**Agent**"), and with the consent of the Ad Hoc Committee of Former Canadian Cinram Employees, and no one appearing and making submissions for any other person served with the Motion Record, although properly served as appears from the affidavit of Jesse Mighton sworn October 15, 2012, filed,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion, the Monitor's Fourth Report and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that unless otherwise indicated or defined herein, capitalized terms have the meaning given to them in the Monitor's Fourth Report or in the Initial Order.

ADMINISTRATIVE RESERVE

3. THIS COURT ORDERS that the Monitor shall be and is hereby authorized and directed to deposit the amount of US$4.2 million (the "**Administrative Reserve Amount**") from the sale proceeds received and held by it arising from the closing of the Asset Sale Transaction (the "**August Asset Sale Proceeds**"), and any additional amount, from time to time, as agreed to by the Pre-Petition First Lien Agent or upon further Order of this Court, from Additional Proceeds (defined below) and/or available cash on hand at any of the CCAA Parties, into a segregated account established by the Monitor for the payment of Administrative Reserve Costs (the "**Administrative Reserve Account**"). "**Administrative Reserve Costs**" shall mean all professional costs and expenses associated with the completion of the administration of the estates of the CCAA Parties in these proceedings, the Chapter 15 proceedings and any other proceedings commenced in respect of the CCAA Parties or any of them, including, without limitation: (a) fees of the Monitor, the Receiver, their respective counsel, Canadian and U.S. counsel to the CCAA Parties, Canadian and U.S. counsel to the Agent and the financial advisor to the Agent, and such other Persons retained by the Monitor; and (b) directors' and trustees' fees.

4. THIS COURT ORDERS AND DECLARES that the Administrative Reserve Account shall constitute "Charged Property" within the meaning of and in accordance with the Initial Order and the applicable provisions of the Initial Order shall apply *mutatis mutandis* thereto.

5. THIS COURT ORDERS that the Monitor is hereby authorized and directed to make payments out of the Administrative Reserve Account, on behalf of the CCAA Parties, to the following Persons in the following amounts in respect of the payment of Administrative Reserve Costs and such other costs specifically provided for herein by way of cheque (sent by prepaid ordinary mail to the Monitor's last known address for such Persons) or by wire transfer (in accordance with the wire instructions provided by such Persons to the Monitor at least three (3) business days prior to the payment date set by the Monitor):

(a) the Monitor, its Canadian and U.S. counsel, the Receiver, its counsel, Canadian and U.S. counsel to the CCAA Parties, Canadian and U.S. counsel to the Agent and the financial advisor to the Agent in amounts sufficient to satisfy payment in full of their respective reasonable professional fees and disbursements incurred at their respective standard rates and charges in respect of their performance of their respective duties and obligations relating to completion of the administration of the estates of the CCAA Parties in these proceedings, the Chapter 15 proceedings and any other proceedings commenced in respect of the CCAA Parties or any of them;

(b) payments to directors and trustees of the CCAA Parties of fees owing to them for acting as directors or trustees of a CCAA Party in amounts sufficient to satisfy payment in full of amounts owing thereto; and

(c) such other fees and costs properly incurred by Persons retained by the Monitor in connection with completion of the administration of the estates of the CCAA Parties in these proceedings, the Chapter 15 proceedings and any other proceedings commenced in respect of the CCAA Parties or any of them as determined by the Monitor in its sole and unfettered discretion, after consultation with the Pre-Petition First Lien Agent or its advisors.

6. THIS COURT ORDERS that notwithstanding any other provision of this Order and without in any way limiting the protections for the Monitor set forth in the Initial Order or the CCAA, the Monitor shall have no obligation to make any payment, and nothing in this Order shall be construed as obligating the Monitor to make any such payment, unless and until the Monitor is in receipt of funds adequate to effect any such payment in full and that in the event the amount at any time in the Administrative Reserve Account is insufficient to satisfy any such amounts, the Monitor shall have no liability with respect to the payment thereof and the Monitor is authorized and empowered to determine in its sole and unfettered discretion which of the amounts shall be paid and when.

TRANSITIONAL COSTS RESERVE

7. THIS COURT ORDERS that the Monitor shall be and is hereby authorized and directed to deposit the amount of US$2.3 million (the "**Transitional Costs Amount**") from the August Asset Sale Proceeds, and any additional amount, from time to time, as agreed to by the Pre-Petition First Lien Agent or upon further Order of this Court, from Additional Proceeds and/or available cash on hand at any of the CCAA Parties, into a segregated account established by the Monitor for the payment of Transitional Costs (the "**Transitional Costs Account**"). "**Transitional Costs**" shall mean: (a) costs and expenses relating to the Excluded Assets, including, without limitation, property taxes, insurance, utilities, maintenance costs, security costs, property management fees (collectively the "**Excluded Assets Costs**"); and (b) costs incurred for transitional services relating to the Share Sale Transaction, the Excluded Assets and administration of these proceedings.

8. THIS COURT ORDERS AND DECLARES that the Transitional Costs Account shall constitute "Charged Property" within the meaning of and in accordance with the Initial Order and the applicable provisions of the Initial Order shall apply *mutatis mutandis* thereto.

9. THIS COURT ORDERS that the Monitor is hereby authorized and directed to make payments out of the Transitional Costs Account, on behalf of the CCAA Parties, to the following Persons in the following amounts in respect of the payment of Transitional Costs and such other costs specifically provided for herein by way of cheque (sent by prepaid ordinary mail to the Monitor's last known address for such Persons) or by wire transfer (in accordance

with the wire instructions provided by such Persons to the Monitor at least three (3) business days prior to the payment date set by the Monitor):

(a) payments to applicable Persons relating to Excluded Assets Costs in amounts sufficient to satisfy payment in full of Excluded Assets Costs;

(b) payments to the Purchaser for amounts owing by the CCAA Parties pursuant to the Transition Services Agreement in connection with any costs incurred for the provision of transitional services relating to the Share Sale Transaction, the Excluded Assets and administration of these proceedings; and

(c) payments to applicable counterparties under contracts and agreements with the CCAA Parties that are not Excluded Assets and which are incurred following the Closing of the Asset Sale Transaction and prior to their assumption or disclaimer pursuant to the provisions of the CCAA;

10. THIS COURT ORDERS that notwithstanding any other provision of this Order and without in any way limiting the protections for the Monitor set forth in the Initial Order or the CCAA, the Monitor shall have no obligation to make any payment, and nothing in this Order shall be construed as obligating the Monitor to make any such payment, unless and until the Monitor is in receipt of funds adequate to effect any such payment in full and that in the event the amount at any time in the Transitional Costs Account is insufficient to satisfy any such amounts, the Monitor shall have no liability with respect to the payment thereof and the Monitor is authorized and empowered to determine in its sole and unfettered discretion which of the amounts shall be paid and when.

DISTRIBUTION TO THE PRE-PETITION FIRST LIEN AGENT

11. THIS COURT ORDERS that the Monitor is hereby authorized and directed to: (a) distribute on behalf of the CCAA Parties US$24,890,000 from the August Asset Sale Proceeds to the Pre-Petition First Lien Agent on behalf of the Pre-Petition First Lien Lenders; and (b) take all necessary steps and actions to effect the foregoing distribution.

12. THIS COURT ORDERS that the Monitor is hereby authorized to make one or more further distributions, at such time(s) as the Monitor may deem appropriate, without further order of this Honourable Court, to the Pre-Petition First Lien Agent on behalf of the Pre-Petition First Lien Lenders from: (a) additional sale proceeds received by the Monitor from the Asset Sale Transaction subsequent to the Closing; (b) sale proceeds received by the Monitor from the Share Sale Transaction; (c) any additional funds that come into the Monitor's possession in respect of the assets or property of the CCAA Parties (clauses (a), (b), and (c) collectively, the "**Additional Proceeds**"); (d) any available cash on hand at any of the CCAA Parties in such amount(s) as the Monitor deems appropriate; (e) any net balance remaining in the Administrative Reserve Account following payment therefrom of the Administrative Reserve Costs enumerated in paragraphs 3 and 5 of this Order and (f) any net balance remaining in the Transitional Costs Account following payment therefrom of the Transitional Costs enumerated in paragraphs 7 and 9 of this Order (the amounts in clauses (a) to (f) above, collectively, the "**Excess Funds**"); provided that in no circumstance shall the aggregate amount of the distributions to the Pre-Petition First Lien Agent contemplated in paragraphs 11 and 12 of this Order exceed the total amount of the secured indebtedness plus interest accrued thereon owing by the CCAA Parties to the Pre-Petition First Lien Lenders under the Pre-Petition First Lien Credit Agreement. The Monitor is hereby authorized to take all necessary steps and actions to effect the distributions described in this paragraph.

13. THIS COURT ORDERS AND DECLARES that, notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any one or more of the CCAA Parties and any bankruptcy order issued pursuant to any such application; or

(c) any assignment in bankruptcy made in respect of any of the CCAA Parties,

the distributions and payments made pursuant to paragraphs 5, 9, 11 and 12 of this Order are final and irreversible and shall be binding upon any trustee in bankruptcy that may be

appointed in respect of any of the CCAA Parties and shall not be void or voidable by creditors of any of the CCAA Parties, nor shall the payments constitute or be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances, or other reviewable transactions under the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, nor do they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person.

TRANSITION POWERS OF THE MONITOR

14. THIS COURT ORDERS that in addition to its prescribed rights in the CCAA and the powers granted by the Initial Order, the Monitor is empowered and authorized, *nunc pro tunc*, but not obligated, to take such actions and execute such documents, in the name of and on behalf of the CCAA Parties, as the Monitor considers necessary or desirable in order to:

(a) perform its functions and fulfill its obligations under this Order or the Initial Order;

(b) facilitate the completion of the Share Sale Transaction;

(c) in consultation with the Pre-Petition First Lien Agent or its advisors, market, collect, monetize, liquidate, realize upon, sell or otherwise dispose of any of the Excluded Assets, pay any commissions and marketing expenses incurred in connection therewith and apply the net proceeds thereof in accordance with this Order or further Order of the Court;

(d) facilitate the completion of the administration of the estates of the CCAA Parties in these proceedings, the Chapter 15 proceedings and any other proceedings commenced in respect of the CCAA Parties or any of them;

(e) supervise the management of the business and affairs of Cinram Wireless LLC;

(f) issue notices of disclaimer of contracts pursuant to section 32 of the CCAA;

(g) effect liquidation, bankruptcy, winding-up or dissolution of the CCAA Parties;

(h) act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of such entities; and

(i) perform such other functions as the Court may order from time to time on a motion brought on at least three (3) days' notice to the Pre-Petition First Lien Agent or such other notice as deemed appropriate by the Court,

and in each case where the Monitor takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons including the CCAA Parties, and without interference from any other Person, including any trustee in bankruptcy of any of the CCAA Parties; provided that in the event of a disagreement between the Monitor and the Pre-Petition First Lien Agent with respect to the exercise of powers by the Monitor under this paragraph 14 (except subsection (e)), the Monitor or the Pre-Petition First Lien Agent may apply to this Court for advice and directions in connection with the exercise of such powers.

15. THIS COURT ORDER that from and after the date of this Order, the Monitor is authorized, empowered and directed, to the exclusion of all other Persons including the CCAA Parties, to:

(a) take control of the existing bank account(s) of the CCAA Parties outlined in Schedule "B" (the "**Bank Accounts**"), and the funds credited thereto or deposited therein;

(b) give instructions from time to time to transfer the funds credited to or deposited in such existing Bank Accounts (net of any fees to which the financial institutions maintaining such Bank Accounts are entitled) to such other account as the Monitor may direct and give instructions to close the existing Bank Accounts; and

(c) execute and deliver such documentation and take such other steps as are necessary to give effect to the powers set out in this paragraph 15(a) and 15(b) above; and

(d) the financial institutions maintaining such Bank Accounts shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken in accordance with the instructions of the Monitor or as to the use or application of funds transferred, paid, collected or otherwise dealt with in accordance with such instructions and such financial institutions shall be authorized to act in accordance with and in reliance upon such instructions without any liability in respect thereof to any Person. For greater certainty and except to the extent that any of the terms of the documentation applicable to the Banking and Cash Management System (as defined in the Initial Order) are inconsistent with the authorities granted to the Monitor pursuant to paragraphs 15(a) and 15(b) above, nothing in this Order shall or shall be deemed to derogate from, limit, restrict or otherwise affect the protections granted pursuant to paragraph 5 of the Initial Order in favour of any bank providing cash management services to the CCAA Parties.

16. THIS COURT ORDERS that notwithstanding any other provisions of this Order, the Monitor shall consult with the Pre-Petition First Lien Agent or its advisors with respect to the Administrative Reserve Account, the Transitional Costs Account, the Bank Accounts and any payments therefrom, and with respect to the Excess Funds and any distributions therefrom, and in the event of a disagreement between the Monitor and the Pre-Petition First Lien Agent with respect to any of the foregoing, the Monitor or the Pre-Petition First Lien Agent may apply to this Court for advice and directions in connection with any of the foregoing, including the making of proposed payment from any of the Administrative Reserve Account, the Transitional Costs Account and the Bank Accounts, and any failure to make, or in respect of the amount of, one or more additional distributions from the Excess Funds pursuant to paragraph 12 of this Order.

17. THIS COURT ORDERS that from and after the date of this Order, the Monitor is authorized, but not required, to prepare and file the CCAA Parties' employee-related remittances, T4 statements and records of employment for the CCAA Parties' former employees on behalf of the CCAA Parties based solely upon information provided by the

CCAA Parties and on the basis that the Monitor shall incur no liability or obligation to any Person with respect to such returns, remittances, statements, records or other documentation.

18. THIS COURT ORDERS that the Monitor shall be at liberty, after consultation with the Pre-Petition First Lien Agent, to engage such Persons (including any Persons currently representing or retained by the CCAA Parties), in its capacity as Monitor, as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under the Initial Order and this Order and to facilitate the completion of these proceedings, and in the event of a disagreement between the Monitor and the Pre-Petition First Lien Agent with respect to the engagement of any such Persons, the Monitor or the Pre-Petition First Lien Agent may apply to this Court for advice and directions.

19. THIS COURT ORDERS that, without limiting the provisions of the Initial Order, the CCAA Parties shall remain in possession and control of the Property (as defined in the Initial Order) which remains following completion of the Sale Transaction (other than the Limited Receivership Property as defined and described in the Appointment Order granted by this Court on October 19, 2012) and the Monitor shall not be deemed to be in possession and/or control of any such remaining Property.

20. THIS COURT ORDERS that all employees of the CCAA Parties shall remain the employees of the CCAA Parties until such time as the Monitor, on the CCAA Parties' behalf, may terminate the employment of such employees. The Monitor shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, other than such amounts as the Monitor may specifically agree in writing to pay.

21. THIS COURT ORDERS that all Persons in possession or control of the Property which remains following completion of the Sale Transaction, other than the Limited Receivership Property, shall forthwith advise the Monitor of such and shall grant immediate and continued access to such property to the Monitor and shall forthwith deliver all such property as directed by the Monitor upon the Monitor's request, other than documents or information which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

22. THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representatives of any of the CCAA Parties within the meaning of any relevant legislation.

23. THIS COURT ORDERS that from and after the date of this Order, the stay of proceedings provided for in the Initial Order may be lifted by Court Order or with the written consent of the Monitor and no further consent of any other Person shall be required to commence or continue a proceeding or enforcement process in any court or tribunal against or in respect of any of the CCAA Parties.

MONITOR PROTECTIONS

24. THIS COURT ORDERS AND DECLARES that the Monitor is not a legal representative within the meaning of Section 159(3) of the *Income Tax Act* (Canad a), as amended (the "**ITA**") or a person subject to Section 150(3) of the ITA and that the Monitor shall have no obligation to prepare or file any tax returns of the CCAA Parties with any taxing authority.

25. THIS COURT ORDERS AND DECLARES that any distributions under this Order shall not constitute a "distribution" for the purposes of section 159 of the ITA, section 270 of the *Excise Tax Act* (Canada), section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax* (Ontario), section 117 of the *Taxation Act, 2007* (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively, the "**Tax Statutes**"), and the Monitor in making any such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of its making any payments ordered or permitted under this Order, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under this Order and any claims of this nature are hereby forever barred.

26. THIS COURT ORDERS that in addition to the rights and protections afforded to the Monitor under the Initial Order, the Monitor shall not be liable for any act or omission on the part of the Monitor, or any reliance thereon, including without limitation, with respect to any information disclosed, any act or omission pertaining to the discharge of duties under this Order or as requested by the CCAA Parties or with respect to any other duties or obligations set out in this Order or the Initial Order, save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Monitor. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA, any other applicable legislation or the Initial Order.

27. THIS COURT ORDERS that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court and on prior written notice to the Monitor.

28. THIS COURT ORDERS that upon fulfilment of its obligations under this Order, the Monitor is hereby authorized and directed to apply to Court for its discharge.

RELEASE

29. THIS COURT ORDERS that the former and current trustees, directors and officers of the CCAA Parties (collectively, the "**Directors and Officers**", and each a "**Director**" or "**Officer**") are hereby fully, finally, irrevocably and forever released and discharged from any and all claims, obligations and liabilities that they may have incurred or may have become subject to as Directors or Officers of the CCAA Parties after the commencement of the within proceedings, provided that nothing herein shall release or discharge any of the Directors or Officers if such Director or Officer is adjudged by the express terms of a judgment rendered on a final determination on the merits to have committed gross negligence, fraud or wilful misconduct in its capacity as a Director or Officer.

EXTENSION OF THE STAY PERIOD

30. THIS COURT ORDERS that the Stay Period (as defined in the Initial Order) be and is hereby extended to 11:59 p.m. on February 1, 2013.

TITLE OF PROCEEDINGS

31. THIS COURT ORDERS that the title of these proceedings is amended to reflect the new names of the Applicants as follows:

> 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 C INTERNATIONAL INC., C INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

APPROVAL OF MONITOR'S REPORTS, ACTIVITIES AND FEES

32. THIS COURT ORDERS that the First Report of the Monitor dated July 9, 2012, the Second Report of the Monitor dated August 17, 2012, the Third Report of the Monitor dated September 9, 2012 and the Monitor's Fourth Report and the activities described therein are hereby approved.

33. THIS COURT ORDERS that the fees and disbursements of the Monitor for the period June 25, 2012 to September 30, 2012 and its counsel, Stikeman Elliott LLP, for the period June 25, 2012 to August 31, 2012, all as particularized in the Bishop Affidavit and the MacKenzie Affidavit are hereby approved.

SEALING

34. THIS COURT ORDERS that pursuant to Section 10(3) of the CCAA the cash flow forecast attached as Appendix "A" to the Confidential Supplement to the Monitor's Fourth Report be sealed and not form part of the public record, but rather shall be placed separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

ADDITIONAL PROVISIONS

35. THIS COURT ORDERS that the CCAA Parties or the Monitor may apply to this Court for advice and directions, or to seek relief in respect of, any matters arising from or under this Order.

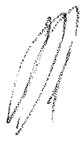
36. THIS COURT ORDERS that any interested party (including the CCAA Parties and the Monitor) may apply to this Court to vary or amend this Order, provided that no order shall be made varying, rescinding or otherwise affecting the provisions of this Order unless notice of a motion is served on the Service List in these proceedings on not less than five (5) days' notice, or upon such other notice, if any, as this Court may order, returnable November 2, 2012.

37. THIS COURT ORDERS that the amount of the Directors' Charge may be decreased upon the consent of the Pre-Petition First Lien Agent, counsel to the CCAA Parties and the Monitor or upon further Order of this Court.

38. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, in the United States or in any other foreign jurisdiction, to give effect to this Order and to assist the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the CCAA Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to CRW International ULC, formerly Cinram International ULC in any foreign proceeding, or to assist the CCAA Parties and the Monitor and their respective agents in carrying out the terms of this Order.

39. THIS COURT ORDERS that each of the CCAA Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and any other Order issued in these proceedings.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:



OCT 19 2012

SCHEDULE A

Additional Applicants

C International General Partner Inc., formerly Cinram International General Partner Inc.
CRW International ULC, formerly Cinram International ULC
1362806 Ontario Limited
CUSH Inc., formerly Cinram (U.S.) Holding's Inc.
CIHV Inc., formerly Cinram, Inc.
IHC Corporation
CMFG LLC, formerly Cinram Manufacturing LLC
CDIST LLC, formerly Cinram Distribution LLC
Cinram Wireless LLC
CRSMI LLC, formerly Cinram Retail Services, LLC
One K Studios, LLC

SCHEDULE B

Bank Accounts

CUSH Inc.'s USD Concentration/Funding account at JPMorgan Chase

CUSH Inc.'s USD Benefits payments account at JPMorgan Chase

CUSH Inc.'s USD Money Market Account at Community Bank

CUSH Inc.'s USD account at JPMorgan Chase, N.A., Toronto Branch

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

Court File No: CV12 – 9767 – 00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Melaney J. Wagner LSUC#: 44063B
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Lawyers for the Applicants

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TAB EE

1999 CarswellOnt 4661
Ontario Superior Court of Justice [Commercial List]

T. Eaton Co., Re

1999 CarswellOnt 4661, [1999] O.J. No. 5322, 15 C.B.R. (4th) 311, 95 A.C.W.S. (3d) 219

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

In the Matter of a Plan of Compromise or Arrangement of the T. Eaton Company Limited, Applicant

Farley J.

Judgment: November 23, 1999
Docket: 99-CL-3516

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Arrangements and compromises — Under general corporate legislation

Company brought application for court's approval for plan under Business Corporations Act — Application granted — To be approved, plan must strictly comply with all statutory requirements, determination must be made that nothing has been done or purported to be done that is not authorized by Act, and plan must be fair and reasonable — Perfection is not required for plan to be fair and reasonable, as plan is compromise — Both classes of creditors as well as shareholders voted overwhelmingly in favour of plan — Alternative plan was not presented — Concern was raised regarding amount going to shareholders under plan, and plan could be "closer to perfection", but plan was fair and reasonable — Business Corporations Act, R.S.O. 1990, c. B.16.

Table of Authorities

Cases considered by *Farley J.*:

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — considered

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — considered

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — 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.) — applied

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — applied

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.) — applied

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Olympia & York Developments Ltd., Re (1993), (sub nom. *Olympia & York Developments Ltd. v. Royal Trust Co.)* 18 C.B.R. (3d) 176, 102 D.L.R. (4th) 149 (Ont. Gen. Div.) — applied

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

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]) — applied

Sorsbie v. Tea Corp, [1904] 1 Ch. 12 (Eng. C.A.) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by company for court approval of plan under *Business Corporations Act*.

Subject:

***Farley J.*:**

1 The criteria that a debtor company must satisfy in seeking the court's approval for a plan under the *Companies' Creditors Arrangement Act* ("*CCAA*") are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedure 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: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at pp.182-3, affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) and *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) at p. 172.

2 In exercising its discretion to approve an arrangement under the *Ontario Business Corporations Act* ("*OBCA*"), the court must be satisfied that the arrangement meets the same criteria as set out above for approving a plan under the *CCAA*. See *Re Olympia & York Developments Ltd.* (1993), 18 C.B.R. (3d) 176 (Ont. Gen. Div.) at p. 186.

3 It would appear to be undisputed by anyone (including myself) that items (a) and (b) have been met and complied with. That leaves the question of whether what is advanced is fair and reasonable. The majority can bind the minority in a plan provided that the purchase does not bind the minority to terms that are unfair or unconscionable. See *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.) at pp.247-8, 258.

4 In reviewing the fairness and reasonableness of a plan the court does not require perfection; nor will the court second guess the business decisions reached by the stakeholders as a body.

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5 In *Sammi Atlas Inc.*, *supra*, I cited *Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.), *Northland Properties Ltd.*, *supra*, and *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at pp.173-4 where I observed:

> ... 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. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights ...
>
> Those voting on the Plan (and I noted there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of *Olympia & York Developments Ltd.*:
>
> > As the other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and 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.
>
> The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests ...

6 As well there is a heavy onus on parties seeking to upset a plan that the required majority have supported. See *Sammi Atlas Inc.*, *supra*, at p.274 citing *Re Central Guaranty Trustco Ltd.* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) at p.141.

7 It is also appropriate to take into consideration the fact that both classes of creditors as well as the shareholders voted overwhelmingly in favour of the Eaton's Plan. In the case of the unsecured creditors this was 99% plus in number and 94% plus in value; the landlords unanimously; and the shareholders 99.5%. This was not a scrape by the minimum requirement situation.

8 The alternative to a favourable vote would be that Eaton's would be in bankruptcy today as per the provisions of last week. Thus there would be some uncertainty as to recoveries - and whether or not a plan could arise from the ashes so as to utilize the tax loss potential. *I note specifically that no one presented an alternative plan for the interested parties to vote on.*

9 What is of concern is the question of the size of the pot going to the shareholders. That was a bone of contention amongst the various creditors - but as I have observed, no one advanced a competing plan. I would also like to make it clear that I have no doubt that many of the shareholders have suffered significant losses as a result of the demise of Eaton's and I know that it is painful for them. It is not my intention to increase that pain but I do think that it is important for at least future situations that in devising and considering plans persons recognize that there is a natural and legal "hierarchy of interest to receive value in a liquidation or liquidation related transaction" and that in that hierarchy the shareholders are at the bottom. See my endorsement of November 22, 1999 in *Re Royal Oak Mines Inc.* [(1999), 14 C.B.R. (4th) 279 (Ont. S.C.J. [Commercial List])]:

> Further in these particular circumstances [here I was talking of Royal Oak, but the same would appear to hold true for Eaton's], there are, in relation to the available tax losses (which is in itself a "conditional" asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation without restructuring, would have to wait a long while before their interests saw the light of day.

10 I think it appropriate to note that in *Sammi Atlas Inc.*, the shareholder got $1.25 million U.S.; in *Re Cadillac Fairview Inc.*; nothing; and in *Royal Oak Mines Inc.* it is proposed the shareholders be diluted down to 1% equity interest underneath a heavy blanket of other obligations. When viewed in contrast, the Eaton's deal would appear to be on the rich side.

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11 I also think it helpful to note my observations in *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), at pp.11-16 and especially the analysis *Sorsbie v. Tea Corp*, [1904] 1 Ch. 12 (Eng. C.A.) as well as the other cases referred to therein.

12 I trust that a forward thinking analysis of these views will be of assistance to those involved in future cases.

13 However, in the subject Eaton's case, in the circumstances here prevailing, I find the plan to be fair and reasonable, notwithstanding my concerns that it might well have been appropriately modified to get it closer to perfection. While "perfection" is an impossible goal, "closer to perfection" should always be strived for. The Eaton's plan is approved for both *CCAA* and *OBCA* purposes.

Application granted.

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TAB FF

Re Hunters Trailer & Marine Ltd., 2001 ABQB 1094

Date: 20011214
Action No. 0003 19315

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

2001 ABQB 1094 (CanLII)

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

\- and -

IN THE MATTER OF HUNTERS TRAILER & MARINE LTD.

REASONS FOR DECISION
of the
HONOURABLE CHIEF JUSTICE ALLAN H. WACHOWICH

APPEARANCES:

Kentigern A. Rowan
Ogilvie LLP
for Canadian Western Bank

Terrence M. Warner
Miller Thomson LLP
for CIT Financial Ltd.

Douglas H. Shell
Lucas Bowker & White
for Deutsche Financial Services

R. Craig Steele
Bordner Ladner Gervais LLP
for Bank of America Canada Specialty Group Ltd.

Juliana E. Topolniski, Q.C.
Bishop & McKenzie
for Mr. Blair Bondar

Darcy G. Readman and Darren R. Bieganek
Duncan & Craig LLP
for UMC Financial Management Inc.

Jeremy H. Hockin & Deborah J. Polyn
Parlee McLaws
for Deloitte Touche Inc.

2001 ABQB 1094 (CanLII)

THE APPLICATION TO DETERMINE COST ALLOCATION

[1] The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the ***Companies' Creditors Arrangement Act*** proceedings (***CCAA*** costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

[2] Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the ***CCAA*** proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc.

(UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the ***CCAA*** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of ***CCAA*** costs.

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THE ARGUMENTS OF THE PARTIES

[3] DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all ***CCAA*** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the ***CCAA*** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the ***CCAA*** proceedings to one class of creditors.

[4] CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the ***CCAA*** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

[5] UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the ***CCAA*** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

[6] The Interim Receiver recommends something of a middle ground. While acknowledging that the ***Bankruptcy and Insolvency Act*** does not apply to ***CCAA*** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

[7] The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the

remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

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[8] UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE *CCAA* COSTS

[9] The ***CCAA*** does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

> 38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

[10] The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in ***Canadian Asbestos Services Ltd. v. Bank of Montreal*** (1993), 11 O.R. (3d) 353 at 359 (Gen. Div.):

> The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

[11] Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the

CCAA proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

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[12] Like the argument raised by UMC in the present case, the secured creditors in ***United Used Auto & Truck Parts Ltd.*** (2000), 16 C.B.R. (4th) 141 (B.C.C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

> The object of the ***CCAA*** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In ***Chef Ready*** [***Hongkong Bank v. Chef Ready Foods*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)]..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants ***CCAA*** relief.

[13] The Monitor acts on behalf of the Court for the benefit of all parties (***Re Starcom International Optics Corp.*** (1988), 3 C.B.R. (4th) 177 (B.C.S.C.); ***Canadian Asbestos Services Ltd. v. Bank of Montreal***, *supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

[14] All creditors may be affected by a stay imposed in the ***CCAA*** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the ***CCAA***. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

[15] Equity informs the decisions made by courts in the exercise of their jurisdiction under the ***CCAA.*** While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the ***CCAA*** costs. That is not to say that equity calls for an equal allocation of costs.

[16] The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The

Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of ***CCAA*** costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

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[17] Six classes of creditors voted on a reorganization plan in ***Re Keddy Motor Inns Ltd.*** (1992), 90 D.L.R. (4th) 175 (N.S.S.C.A.D.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also ***Re Wellington Building Corp***. (1934), 16 C.B.R. 48 (Ont. H.C.J.). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

> It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment – as opposed to equitable treatment – is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

[18] Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in ***CCAA*** proceedings.

[19] In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

> It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in ***Kowal*** [***Robert F. Kowal Investments Limited v. Deeder Electric Limited*** (1975), 9 O.R. (2d) 84 (C.A.)] that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

[20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from ***CCAA*** proceedings. The ***CCAA*** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

[21] Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

[22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

[23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

[24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

[25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered ***CCAA*** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the ***CCAA*** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the ***CCAA*** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of ***CCAA*** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

[26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting

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on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

[27] UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of ***CCAA*** costs and the principles that should be applied in such a determination. There is no need, as there was in ***Canadian Imperial Bank of Commerce (CIBC) v. Wm. C. Rieger Co.*** (1991), 126 A.R. 69 (Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

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CONCLUSION

[28] UMC is allocated 15 percent of the Monitor's fees, $500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the ***CCAA*** costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

HEARD on the 26th day of November, 2001.
DATED at Edmonton, Alberta this 14th day of December, 2001.

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J.C.Q.B.A.

TAB GG

1992 CarswellNS 46
Nova Scotia Supreme Court, Appeal Division

Keddy Motor Inns Ltd., Re

1992 CarswellNS 46, [1992] N.S.J. No. 98, 110 N.S.R. (2d) 246, 13 C.B.R. (3d) 245, 299 A.P.R. 246, 32 A.C.W.S. (3d) 1085, 6 B.L.R. (2d) 116, 90 D.L.R. (4th) 175

ROYNAT INC. and ROYAL TRUST CORPORATION OF CANADA v. KEDDY MOTOR INNS LIMITED

Clarke C.J.N.S., Matthews and Freeman JJ.A.

Heard: February 7, 1992
Judgment: March 2, 1992
Docket: Docs. S.C.A. 02595, 02598

Counsel: *Daniel M. Campbell, Q.C.*, for appellant RoyNat Inc.
Peter J. MacKeigan and *Gregory Cooper*, for Royal Trust Corporation of Canada.
John D. Stringer and *Richard Freeman*, for Keddy Motor Inns Limited.
Gerald R.P. Moir, for Central Guaranty Trust Company.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable"

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Secured creditors appealing sanctioning order on grounds of voting irregularity and unfair practices — Appeal dismissed — Mere irregularity not being sufficient to invalidate ballot — No substantial unfairness found — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The plan of arrangement of a debtor company received the approval and sanction of the court. Two secured creditors appealed seeking to overturn the order on the grounds of voting irregularity and unfair practices. They alleged that a proxy vote that arrived late was improperly included and that this had resulted in the approval of the plan by a class of creditors. They also alleged that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote and that the creditors had been unfairly classified.

Held:

The appeal was dismissed.

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The proxy vote received after the voting was complete, but before the votes were counted, had been properly admitted. The vote was carefully conducted, with due attention to fairness and security. It is important that creditors not be disenfranchised for technical reasons. Clear evidence of illegality within the spirit and purpose of the *Companies' Creditors Arrangement Act*, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

A creditor which withholds its support from a plan because it fails to address legitimate concerns is perfectly within its right to insist on improvements. There was no evidence that any advantages negotiated by one creditor were offset by substantial disadvantages to another, nor were the advantages so great as to constitute substantial unfairness. The process of negotiation took place in the open, and the other creditors were reasonably well advised of all amendments that were made. There was no evidence of a deliberate intention to conceal or mislead. The appellants were under no duty to negotiate for better terms. However, their failure to do so did not entitle them to destroy the plan strongly supported by the other creditors.

The classification of creditors, while not ideal, did not give rise to any substantial injustice and was carried out under a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and was distinct from the sanctioning order. The classification order was not appealed and, therefore, the creditors and debtor company were entitled to rely upon it as a foundation for the plan. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order.

Table of Authorities

Cases considered:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., Re, [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221, 2 Meg. 377 (C.A.) — *considered*

Exco Corp. v. Nova Scotia Savings & Loan Co. (1983), 35 C.P.C. 245 at 255, 59 N.S.R. (2d) 331, 124 A.P.R. 331 (C.A.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*

McCarthy v. Acadia University (1977), 3 C.P.C. 42, 18 N.S.R. (2d) 364, 75 D.L.R. (3d) 304 (C.A.) — *referred to*

Minkoff v. Poole (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143 (C.A.) — *referred to*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566 (Q.B.) — *referred to*

Northland Properties Ltd., Re, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.) — *considered*

NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *referred to*

Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *considered*

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Shaw v. Tati Concessions Ltd., [1913] 1 Ch. 292, [1911-13] All E.R. Rep. 694, 82 L.J. Ch. 159, 20 Mans. 104 (Ch.) — *referred to*

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-94] All E.R. Rep. 246, 62 L.J. O.B. 19 (C.A.) — *considered*

Washington State Labour Council v. Federated America Insurance Co., 78 Wash.2d 263, 474 P.2d 98, 41 A.L.R. 3d 22 (Wash. 1970) — *referred to*

Westminer Canada Holdings Ltd. v. Coughlan (1989), 91 N.S.R. (2d) 214, 233 A.P.R. 214 (C.A.) — *referred to*

Statutes considered:

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

s. 6

Appeal from order reported at (1991), 107 N.S.R. (2d) 424, 290 A.P.R. 424 (T.D.) sanctioning plan of arrangement.

The judgment of the court was delivered by *Freeman J.A.*:

1 Two secured creditors are seeking to overturn the Supreme Court order sanctioning a hotel chain's plan of arrange ment under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, on grounds of voting irregularity and unfair practices.

2 Faced with debts totalling $42,000,000 that threatened to overwhelm it, the respondent, Keddy's Motor Inns Limited ["Keddy"], brought proceedings under the Act. Under a series of court orders creditors' actions were stayed, creditors divided into classes according to interest, and a schedule established requiring a plan to be voted on by November 2, 1991.

3 Following the vote approving the plan as amended at the meetings, it was sanctioned on application to Mr. Justice Nathanson of the Trial Division [reported 107 N.S.R. (2d) 424, 290 A.P.R. 424].

4 The issues on the appeal from his decision are that he should not have allowed the inclusion of a proxy vote that arrived late, resulting in approval of the plan by the class of capital lease creditors; that creditors were permitted to negotiate preferential treatment within their classes as an inducement to vote for a plan confiscatory of secured creditors' rights; and that the creditors had been unfairly classified.

5 The appellants must overcome obstacles including strong creditor approval of the plan, a well-reasoned decision by Mr. Justice Nathanson and able submissions on behalf of both respondents.

6 The scheme of the Act is contained in s.6:

> 6. Where a majority in number representing three-fourths 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; ...

7 Important features are that the majority as defined in the Act can bind the minority, that the final plan is defined by the vote of the creditors at the meetings, and that modifications can be negotiated up to the time of voting.

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8 The right of majority creditors of a class to bind the minority is an extraordinary one, reflecting a willingness on the part of Parliament to deprive some creditors of their contractual rights in the interest of the survival of the economic unit composed of the ailing corporation and its creditors. Fairness is preserved by the requirement for court sanction. But fairness must be understood within the spirit of the statute.

9 The Act itself, apart from the jurisprudence which has developed around it, is little encumbered by detail or nicety and provides minimal direct guidance as to procedures to be followed. It is intended to provide distressed businessmen and their creditors with a means of reaching an accommodation of benefit to both, and to the public generally. Writing for the British Columbia Court of Appeal, Mr. Justice Gibbs described the Act in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 [p. 318 C.B.R.]:

> The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed — the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-up Act*, R.S.C. 1927, c. 213. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

10 The Act was considered by the Supreme Court of Canada soon after its enactment in *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 in which Cannon J. described it as follows [p. 664 S.C.R.]:

> Therefore, if the proceedings under this new Act of 1933 are not, strictly speaking, 'bankruptcy' proceedings, because they had not for object the sale and division of the assets of the debtor, they may, however, be considered as 'insolvency proceedings' with the object of preventing a declaration of bankruptcy and the sale of these assets, if the creditors directly interested for the time being reach the conclusion that an opportune arrangement to avoid such sale would better protect their interest, as a whole or in part. Provisions for the settlement of the liabilities of the insolvent are an essential element of any insolvency legislation. ...

11 The Act fell into disuse until recent years but now appears to be enjoying a resurgency. McEachern C.J.B.C. discussed its purpose in the influential case of *Re Northland Properties Ltd.*, *(*sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 [p. 201 C.B.R.] (C.A.):

> ... there can be no doubt about the purpose of the C.C.A.A. It is to enable compromises to be made for the common benefit of the creditors and of the company, particularly to keep a company in financial difficulties alive and out of the hands of liquidators. To make the Act workable, it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, but the plan must be fair and reasonable.

12 Nathanson J. recognized that court sanction for the plan required that the court be satisfied as to three criteria which have evolved through the case law and which were stated in the *Northland Properties* case [p. 426 N.S.R.].

> 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 or purported to be done which is not authorized by the *Companies' Creditors Arrangement Act*.
>
> 3. The plan must be fair and reasonable.

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13 Each of the six classes of creditors voted in favour of the plan by the majority required under the Act. The creditors did not vote as a whole. The votes cast at the class meetings — including the proxy vote at issue in this appeal — showed 92 per cent of the creditors representing 86.6 per cent of the value of the claims favoured the plan.

14 After three days of hearings in November 1991, Mr. Justice Nathanson sanctioned the plan. It provides for three unprofitable hotel or motel properties to be sold or transferred to mortgagees, and the eight profitable "core" properties to be retained. Interest rates on the core properties were standardized at 11 per cent and amortization periods at 25 years. Numerous variations were arrived at through negotiations, as contemplated by the Act, to make the plan acceptable to the majority of creditors. Many creditors received concessions of particular interest or benefit to themselves, that were not made to their class of creditors as a whole.

15 Central Guaranty, the largest creditor, was added as respondent in this appeal. It was owed $16,600,000 secured by mortgages on hotels in Halifax, Moncton and Fredericton. Relying on provisions of its security contracts, it negotiated for monthly payments of $66,000 to cover municipal taxes and for payment of its legal fees of $25,000 as a protective disbursement out of a trust fund held for renovation expenses. The appellants did not receive equivalent benefits. It does not appear that they engaged in negotiations with the respondents to improve their positions, although they would have been free to do so. They did not expect the plan to be approved.

16 The appellants, in voting against the plan, were in the minority in the secured creditor class. They were among the few secured creditors who were fully secure. Royal Trust held a first mortgage for $985,000 on a hotel at Shediac Road, Moncton, and RoyNat Inc. held a first mortgage for $3,750,000 on Keddy's Saint John hotel. Both properties are valued in excess of the first mortgages. The appellants claim their position has worsened because their interest rates were reduced from 13 per cent, the amortization periods were increased, and they are precluded from realizing on their security during the 5-year currency of the plan. They also object that some creditors negotiated benefits for themselves which the appellants did not receive. They say that they should not be bound by a majority of creditors voting out of self-interest in hope of realizing the benefits they had negotiated for themselves.

17 Moreover, they say the class of secured creditors is too broad, and that they are unfairly grouped with creditors secured by non-core properties, and by mechanics' lienholders. They should not, they say, be bound by the votes of secured creditors with whom they have no community of interest.

18 I will dispose of the classification of creditors issue first. Similar arguments were considered by Forsyth J. of the Alberta Queen's Bench in *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566. He discussed the "commonality of interests test" described in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-94] All E.R. Rep. 246, 62 L.J.Q.B. 19 (C.A.) in which Lord Esher stated [p. 580 Q.B.]:

> ... if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

19 Bowen L.J. stated [p. 583] that a class

> ... must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

20 Forsyth J. also referred to the "*bona fide* lack of oppression test" considered in the widely cited case of *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213, [1886-90] All E.R. Rep. Ext. 1143, 60 L.J. Ch. 221, 2 Meg. 377 (C.A.). Lindley L.J. stated at p. 239 [Ch.]:

> The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting *bona fide*, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent. ...

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21 Forsyth J. considered an article by Ronald N. Robertson, Q.C., in a publication entitled "Legal Problems on Reorganizing of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, April 5, 1983, at p. 15 and summarized it as follows [p. 28 C.B.R.]:

> These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan. To accept the 'identity of interest' proposition as a starting point in the classification of creditors necessarily results in a 'multiplicity of discrete classes' which would make any reorganization difficult, if not impossible, to achieve.
>
> In the result, given that this planned reorganization arises under the C.C.A.A., I must reject the arguments put forth by the Hongkong Bank and the Bank of America, that since they hold separate security over different assets, they must therefore be classified as a separate class of creditors.

22 There is undoubtedly merit in the arguments of the appellants in the present case. Better classifications could no doubt be arranged with the benefit of hindsight. It might have been beneficial if secured creditors of core properties were in a separate class from secured creditors of non-core properties and holders of mechanics' liens. However, the Act does not require more than a single class of secured creditors, and I am satisfied the present classification of creditors does not give rise to any substantial injustice. Classification was by a court order following a hearing at which the creditors were entitled to be heard. That order was made earlier than and distinct from the order sanctioning the plan. The classification order was never appealed, and the 21-day appeal period expired before the class meetings. The creditors and the debtor company were entitled to rely upon it as a foundation for the plan. It is not specifically included in the present appeal because it was not subject to collateral attack in the proceedings before Nathanson J. who was bound by it. The proper procedure for attacking the classification order was by way of appeal from that order, not the sanctioning order. Nevertheless, because of the overall supervisory duty of the court to ensure fairness of the plan, it is my view that we could intervene with respect to the classification order if necessary to avert substantial injustice. I am not satisfied the present circumstances warrant this court's intervention. I would reject the grounds of appeal based on classification.

23 The ground of appeal first stated by the appellants is their assertion that a late-arriving proxy vote should not have been counted in the voting for the plan for the class of capital lease creditors. Without that vote that plan would have been defeated. The assumption of the appellants appears to be that rejection of a class plan would defeat the entire plan, or at least render it unfeasible, but that is contrary to the intention of the Act and to s. 7.03 of the plan as sanctioned. They assert a right to appeal from the result of voting for a plan approved by another class of creditors because approval of that plan was essential to the overall plan which is binding on them. Without endorsing that reasoning, the duty of this court, once again, is to consider whether the trial judge erred in assessing the fairness of the plan. This includes jurisdiction over the votes of all classes of creditors; if the impugned vote is a nullity it must be rejected.

24 Meetings of the six classes of creditors took place November 1 and 2, 1991. The meeting of the capital leasing creditors was held the first day. The original draft of the entire plan, including the plan for that class, and written statements of amendments were before the creditors. Disclosures of results of the most recent negotiations were made orally at the meeting, having the effect of amending the plan to include them.

25 Marcus Wide of Coopers & Lybrand, the court-appointed monitor, acted as chairman of all the meetings. He called for a motion of "closure" of the meeting following the vote. That is, he sought a motion prior to the vote to take effect after the vote. The minutes disclose that such a motion was made and seconded but do not show that it was voted on. After this motion, the creditors and their proxies cast their votes and dispersed. There was no motion for adjournment. The ballot box was sealed. The votes were not to be counted until after the last class meeting the next day. The Bruncor proxy in favour of Martin MacKinnon, Keddy's representative, was received by Mr. Wide at 5:08 p.m. on November 1. Mr. Justice Nathanson said [at p. 427 N.S.R.] that Mr. Wide

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declined to include and count the vote in the final tabulation of votes. However, reluctant to deny a legitimate creditor an opportunity to express its view concerning the plan, he brought the matter to the attention of the Court in the monitor's final report.

26 The monitor's report on the result of the vote by the capital lease creditors, and the controversial proxy, is as follows:

2. Capital Lease Creditors — failed to approve the plan

	For	Against
Value of creditors voting	$679,148	$261,509
Percentage	72	28
Number of creditors voting	8	1
Percentage	89	11

The Monitor wishes to advise the Court that a proxy, instructing Mr. Martin MacKinnon to vote in favour of the plan, was received from Bruncor Leasing Inc., a capital lease creditor in the amount of $212,959, on the afternoon of November 1, 1991, subsequent to the meeting for that class, but not before the final meeting of creditors and while the ballots were still in sealed boxes. The instruction regarding proxies circulated with the notice of Meeting provides as follows:

A proxy may be deposited with, faxed or mailed to and received by the monitor at any time up to the respective creditor meeting, or any adjournment thereof, or may be deposited with the chairman of the meeting immediately prior to the creditors meeting, or any adjournment thereof.

This vote has therefore not been tabulated.

Had the vote been tabulated the Capital Lease Class of Creditors would have approved the plan with 77.3 of the value of the votes cast in that class and 90 per cent of the number.

27 Mr. Justice Nathanson cited *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, supra, at p. 245 as authority for the statement that the vote required for approval of a plan is "a condition precedent to the jurisdiction of the Court." He stated [at p. 427] that "[i]f the vote is not in accord with the statutory requirement, the Court cannot exercise its jurisdiction under the statute to sanction the plan. Strict compliance with the statutory requirement is mandatory."

28 The Act provides statutory requirements as to the majorities necessary to approve a plan by a class of creditors, but no guidance as to the manner of voting. The words "present and voting, either in person or by proxy, at the meeting or meetings" of the creditors or a class of creditors have been referred to by counsel as a voting directive. In context, however, they merely define the creditors to be considered in determining whether the requisite majorities for approval of the plan have been met.

29 The somewhat unusual procedure of "closing" the meeting by motion prior to the vote presumably fixed the plan in the form it had attained up to the moment of closure and cut off further discussion while the creditors turned their attentions to the actual process of voting. Voting is as much a function of the meeting as discussion of the plan; while the voting was in progress the meeting necessarily continued in existence. Counting the ballots is as much a function of the vote as casting them. Apart from the security measure of sealing the ballot box, no step was taken, no motion moved nor voted on, to end the meeting or to close the voting, between the casting of the votes and the counting of them.

30 The meeting must still have been an existing, though fictitious, entity at the time the votes were counted; the count necessarily occurred within the context of the meeting. The continuation of the meeting and the acceptance of the late proxy vote finds support in the case law. See *Shaw v. Tati Concessions Ltd.*, [1913] 1 Ch. 292, [1911-13] All E.R. Rep. 694, 82 L.J.

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Ch. 159, 20 Mans. 104; *Washington State Labour Council v. Federated American Insurance Co.*, 78 Wash. 2d 263, 474 P.2d 98, 41 A.L.R. 3d 22 (Wash. 1970).

31 Counsel for the appellants complain that the proxy was obviously solicited from Bruncor by representatives of Keddy. However, they specifically acknowledged that they do not allege it was induced by improper side deals or secret benefits.

32 While it was obviously intended that proxies should be produced prior to the meetings, there appears to be nothing in the Act, nor in the orders, nor in the voting instructions of the monitor, to preclude the tabulation of a proxy vote submitted prior to the counting of ballots. The common law applies. That is stated in *Company Meetings* by J.M. Wainberg, Q.C., 2d ed. (Toronto: Canada Law Book, 1969) at p. 73 in his discussion of Rules of Order:

> When a poll is demanded, it shall be taken forthwith. If the poll is on the election of a chairman or on a motion to adjourn, the votes shall be counted forthwith, and the result declared before any further business is conducted. On any other question the count may be made at such time as the chairman directs, and other business may be proceeded with pending the results of the poll. Up to the time the poll is declared closed and the chairman (or the scrutineers) begin examining ballots, any qualified voter may vote.

33 The vote was carefully conducted, with due attention to fairness and security. I am not satisfied that prejudice was suffered by creditors of any other class as a result of the counting of the vote of a creditor qualified to vote in every respect save for tardiness. It is important that creditors not be disenfranchised for technical reasons; approval of a plan is an expression of the collective will of the creditors, and it is important that be as broadly based as possible. It must be borne in mind that this was a vote by creditors under the *Companies' Creditors Arrangement Act*, not a meeting of municipal councillors or a company board of directors. Clear evidence of illegality within the spirit and purpose of the Act, not mere irregularity, is necessary to invalidate the ballot. If the ballot was not invalid, it must be counted.

34 As McEachern C.J.B.C. said [at p. 205 C.B.R.] in *Northland*,

> As the authorities say, we should not be astute in finding technical arguments to overcome the decision of such a majority.

35 Nevertheless, late proxies are not desirable. They create uncertainty, and there exists a perceived possibility for abuse. The reason for holding the counting of the votes until all creditors had voted was to ensure that classes with the latest meetings would not have the negotiating advantage of knowing how other classes had voted. Chairmen of creditors' meetings would be well advised to have the ballots counted promptly after they are cast and then to have the meeting properly adjourned. There would be no need to announce the results until after the last meeting.

36 I am not satisfied the appellants have demonstrated that Mr. Justice Nathanson erred at law in approving the Bruncor ballot. I would dismiss this ground of appeal.

37 The remaining grounds of appeal include the allegation that the plan for secured creditors was actually a number of plans tailored to individual creditors. This ground is closely related to the classification issue. The commonality of interests test is no longer strictly applied because of its unwieldiness. It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment — as opposed to equitable treatment — is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

38 The other grounds to be considered within the general heading of unfairness include allegations that votes of secured creditors obtained by inducements should have been excluded, that the plan was not fair and reasonable among secured creditors and that the process employed by the respondent was inherently unfair.

39 The instances complained of are set forth in Mr. Justice Nathanson's decision and need not be repeated here. In dealing with them generally, he remarked that what the appellants overlooked was "that their objections must be examined in the light of what is in the best interests of the class of secured creditors to which they belong and of the creditors as a whole."

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40 He summarized his conclusions about the complaints as follows [p. 431]:

> ... some of the complaints are relatively inconsequential, others have another ... context which is not stated. What appears on the surface to be the whole truth is, in reality, of less moment

41 He stated that he applied the following principles, which he derived from the case law [pp. 431-432]:

> 1. Negotiations between the debtor company and creditors are salutary and ought to be encouraged.
>
> 2. Secret or side deals or arrangements are improper. Their impropriety can be ameliorated by making full disclosure in a timely manner.
>
> 3. There is no authoritative definition of what constitutes full disclosure or timely manner; therefore, these may be questions of fact to be determined in each individual case.
>
> 4. Members of a class of creditors must be treated fairly and equitably. Where different members are treated differently, all members of the class must have knowledge of the plan overall and for the particular class.

42 Mr. Justice Nathanson made the following findings [p. 432]:

> I find that the debtor company made full disclosure in a timely manner by setting out the essential characteristics of the proposed plan, that is, all material information needed by a creditor in order to make a fair and informed judgment, in the draft plan as filed, in the two addenda circulated to the members of the class, and in the oral communications made during the meeting which could not have been made in writing at an earlier time because of the continuance of negotiations with various creditors. I also find that the members of the secured creditors class had full knowledge of the plan in its application to all members of that class and generally in its application to all creditors of all classes.
>
> I find that the members of the secured creditors class are treated fairly and equitably in the plan as amended. Some sacrifices will be made, but the evidence discloses that at least some of those sacrifices are of windfalls which might accrue if the plan is not approved and the sacrificing creditors are able to realize on the security which they hold.
>
> I hold that the proposed plan is fair and reasonable. It is a bona fide and creditable attempt to achieve a result which is generally fair to the creditors.

43 The burden on the appellants to show otherwise is a very heavy one. In considering fairness Mr. Justice Nathanson was in the last analysis exercising his discretion in addition to identifying and applying rules of law and making findings of fact. This court has ruled repeatedly, on sound authority, that it should only interfere with discretionary findings by a trial judge if serious or substantial injustice, material injury or very great prejudice would otherwise result. See, for example, *McCarthy v. Acadia University* (1977), 3 C.P.C. 42, 18 N.S.R. (2d) 364, 75 D.L.R. (3d) 304 (C.A.); *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1983), 35 C.P.C. 245 at 255, 59 N.S.R. (2d) 331, 124 A.P.R. 331 (C.A.); *Westminer Canada Holdings Ltd. v. Coughlan* (1989), 91 N.S.R. (2d) 214, 233 A.P.R. 214 (C.A.); *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143, 275 A.P.R. 143 (C.A.); and the authorities cited therein.

44 When the judicial discretion is exercised in favour of sanctioning a plan proposed by a debtor company, but in a very real way created by a resounding majority vote of its creditors, the burden on the appellants becomes even heavier.

45 Nevertheless, there remain some matters of serious concern which the appellants have raised, including the fact that the respondent Central Guaranty Trust did not support the plan until arrangements had been made for paying its legal costs and for monthly instalments of municipal taxes. If these could be characterized as inducements to procure its vote, unfairness would be apparent.

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46 A creditor which withholds its support from a plan because it has failed to address legitimate concerns arising from its contractual relationship with the debtor company is perfectly within its right to insist on improvements. The Act encourages just this kind of negotiation. It is not material whether agreement occurs soon after the first draft of the plan is circulated, so the resulting amendments can also be circulated to creditors, or whether a last-minute compromise is reached moments before the vote. The disclosure to be made in the latter instance will be necessarily sketchier than the one made in the former.

47 On the other hand a creditor whose legitimate concerns have been met on a basis similar to that of other creditors in its class, but which continues to insist on a benefit to which it is not entitled as the price of its vote, is attempting to commit the debtor to an unfair practice which could invalidate the whole plan. The distinction between the two situations must be drawn by the trial judge, and there will be occasions when it is a very difficult and murky one.

48 The benefit derived by the Relax Company in the *Northlands* case is an example of the first instance. So are the benefits negotiated by the Central Guaranty Trust in the present case. It seems clear that when other complaints of instances of unfairness were found by Mr. Justice Nathanson to involve matters of substance, he was able to consign them to the first category. I am not satisfied that he was wrong in doing so.

49 The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority. Lack of disclosure, however, can transform an intrinsically fair alteration in the terms of a plan into an unfair secret deal which invalidates a plan. As a general rule the plan must include all of the arrangements made between the debtor company and the creditors; in principle, undisclosed arrangements cannot be part of the plan because they are not what the creditors voted for. Nathanson J. found there is no authoritative definition of full or timely disclosure — these were questions of fact. Consequences of inadvertent and innocent non-disclosure and imperfect or inadequate disclosure must be assessed. This involves a fine sifting of all factors to tax the skill of a trial judge; I am not satisfied Nathanson J. committed reversible error in his analysis nor in his conclusion that all material information had been disclosed.

50 Another concern of the appellants, and of this court, is that regardless of any benefits they did not receive but which were negotiated by other secured creditors in their own interests, they are left worse off under the plan than they were under the provisions of their own security contracts. The appellants had taken pains to protect their own interests when they made the loans, and they would be repaid if they were left the freedom to realize on their security.

51 In his decision on a classification order in *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), Mr. Justice Davison cites with approval an article by Stanley E. Edwards in (1947) 25 Can. Bar Rev., at p. 587. He quotes Mr. Edwards at p. 595 as follows:

> There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization. Since the company is insolvent this is the amount he would have received upon liquidation.

52 At p. 594 Mr. Edwards said:

> A further element of feasibility is that the plan should embrace all parties if possible, but particularly secured creditors, so that they will not be left in a position to foreclose and dismember the assets after the arrangement is sanctioned as they did in one case.

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53 The one major disadvantage the appellants suffer is the loss of the present right to realize on their security. They may well consider that that right has been confiscated from them. It is essential to the purpose of the Act to bring about such a result, but it must be done fairly.

54 With an exception involving a government agency which had not been receiving a commercial rate of interest, all the secured creditors have their interest rates reduced to the current market level of 11 per cent, amortization periods increased, and in one case, principal and interest blended. However, the appellants' security is unimpaired, and apart from the reduced interest, they stand to recover as much as they would have if the reorganization had not taken place. Their worst disadvantage is that they are delayed in recovering under their security, which appears to be a necessity if the plan is to succeed. There is nothing to suggest that Keddy, or the other creditors, sought to take advantage of them. Rather, they were asked to accept what appears to be the minimum disadvantage consistent with a plan which might permit the company's survival. And, had they chosen to negotiate, they might have improved the terms.

55 In the long term creditors in the position of the appellants should be required to suffer no loss, and when such appears likely courts must be vigilant to protect them in keeping with the spirit of the Act.

56 At first blush the reduction of their interest rates from approximately 13 per cent to 11 per cent appears to represent a greater loss than can fairly be imposed upon them. However, what they are entitled to is not what they would recover if the contract were to be continued to its fulfilment as originally contemplated. What they are entitled to, as Mr. Edwards points out, is what they would recover from an insolvent company upon liquidation.

57 That is, they would be entitled to recover the outstanding balance they are owed plus interest to date. The reduced interest rate relates to future interest. On liquidation they may be presumed to reinvest their recovered capital at present market rates. The 11 per cent rate fairly represents the present market rate they would likely obtain on reinvestment of the funds. The other disadvantages of which they complain are merely delays in recovery for which they will be compensated by interest. They have suffered inconvenience but no injustice. They have not been treated unfairly within the spirit of the Act.

58 The plan originally proposed by Keddy was unacceptable to many of the creditors, although it would appear to have been offered in good faith. Keddy had to try to offer an acceptable plan, without any certain knowledge of the matters of chief concern to the individual creditors. If there had been no room for movement the plan would predictably have failed. What appears to be controversial is that a process of negotiations took place within a compressed time frame between Keddy and the creditors, in which the concerns of the creditors were considered. It does not appear that advantages negotiated by any creditor were offset by substantial disadvantages to another, nor does it appear that the advantages were so great as to constitute substantial unfairness even viewed in their worst light. In keeping with the purposes of the Act, substance must prevail over merely theoretical or technical considerations. The process took place in the open, and the other creditors were reasonably well advised of all amendments that were agreed to, with the possible exception of some last-minute changes of a relatively minor nature that escaped detailed disclosure. There appears to have been no deliberate intention to conceal or mislead.

59 The appellants were aware of the process but, in the belief that the plan would fail, did not fully participate. They were under no duty to negotiate for better terms. However, their choice not to do so does not entitle them on these facts to destroy a plan so strongly supported by the other creditors. The plan does not treat the creditors equally, but it treats them equitably. In my view, both the plan and the process by which it was achieved were not perfect, nor beyond criticism, but they were roughly fair and within the objectives of the Act, as Nathanson J. determined.

60 Considered as a whole, the concerns of the appellants are understandable. But when they are examined within the framework of the purposes and objectives of the *Companies' Creditors Arrangement Act* they lack sufficient substance to justify interference by this court with the plan sanctioned by Mr. Justice Nathanson.

61 I would dismiss the appeal. As the issues involved in this appeal were not previously considered by this court, the parties should bear their own costs.

Appeal dismissed.

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End of Document

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TAB HH

COURT OF APPEAL OF NEW BRUNSWICK

186/04/CA

2005 NBCA 55 (CanLII)

IN THE COURT OF APPEAL OF NEW BRUNSWICK	LA COUR D'APPEL DU NOUVEAU-BRUNSWICK
IN BANKRUPTCY AND INSOLVENCY	SIÉGEANT EN MATIÈRE DE FAILLITE ET D'INSOLVABILITÉ
IN THE MATTER OF the Bankruptcy of St. Anne Nackawic Pulp Company Ltd.	DANS L'AFFAIRE DE la faillite de St. Anne Nackawic Pulp Company Ltd.
BETWEEN:	ENTRE :
LOGISTEC STEVEDORING (ATLANTIC) INC.	LOGISTEC STEVEDORING (ATLANTIC) INC./ LOGISTEC ARRIMAGE (ATLANTIQUE) INC.
(Respondent) APPELLANT	(Intimée) APPELANTE
-and-	- et -
A.C. POIRIER & ASSOCIATES INC., Trustee in Bankruptcy of St. Anne Nackawic Pulp Company Ltd.	A.C. POIRIER & ASSOCIATES INC., syndique de faillite de St. Anne Nackawic Pulp Company Ltd.
(Applicant) RESPONDENT	(Requérante) INTIMÉE
Logistec Stevedoring (Atlantic) Inc. v. A.C. Poirier & Associates Inc., 2005 NBCA 55	Logistec Stevedoring (Atlantic) Inc./ Logistec Arrimage (Atlantique) Inc. c. A.C. Poirier & Associates Inc., 2005 NBCA 55
CORAM: The Honourable Justice Turnbull The Honourable Justice Deschênes The Honourable Justice Robertson	CORAM : L'honorable juge Turnbull L'honorable juge Deschênes L'honorable juge Robertson
Appeal from a decision of the Court of Queen's Bench: December 21, 2004	Appel d'une décision de la Cour du Banc de la Reine : le 21 décembre 2004
Appeal heard: March 22, 2005	Appel entendu : le 22 mars 2005
Judgment rendered: June 2, 2005	Jugement rendu : le 2 juin 2005
Reasons for judgment by:	Motifs de jugement :

The Honourable Justice Robertson

Concurred in by:
The Honourable Justice Turnbull
The Honourable Justice Deschênes

Counsel at hearing:

For the appellant:
D. Leslie Smith, Q.C.

For the respondent:
G. Patrick Gorman, Q.C.

THE COURT

The appeal is allowed and the order dated January 7, 2005 set aside. The application for declaratory and ancillary relief is dismissed. The appellant is entitled to costs of $3,000 throughout.

L'honorable juge Robertson

Souscrivent aux motifs :
L'honorable juge Turnbull
L'honorable juge Deschênes

Avocats à l'audience :

Pour l'appelante :
D. Leslie Smith, c.r.

Pour l'intimée :
G. Patrick Gorman, c.r.

LA COUR

Accueille l'appel et annule l'ordonnance datée du 7 janvier 2005. La demande en vue d'obtenir un jugement déclaratoire et des mesures de redressement accessoires est rejetée. L'appelante a droit à des dépens afférents à la première instance et à l'appel, lesquels sont fixés à 3 000 $.

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The following is the judgment rendered by

ROBERTSON, J.A.

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[1] We are asked to decide whether the application judge erred in holding that a $500,000 payment made by an insolvent debtor to one of its creditors qualifies as a fraudulent preference within the meaning of s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA). In my respectful view, the application judge erred. Specifically, he failed to ask whether the impugned payment was made with the "dominant intent" of preferring one creditor over the others. When that test is applied to the facts of the present case, it is evident that the debtor harboured no such intent. Admittedly, the creditor in receipt of the payment received a "preference in fact", but that is not a sufficient basis for declaring the payment a fraudulent preference. As will be explained, s. 95 has no application in circumstances where the insolvent debtor is effecting a payment with a view to generating income to be applied against the debts of both secured and unsecured creditors. This remains true even if it were unrealistic to expect that the unsecured creditors would share in the income generated.

[2] The essential facts are as follows. Until September 15, 2004, St. Anne Nackawic Pulp Company Ltd. had been operating a pulp mill in Nackawic, New Brunswick. That corporation is a wholly owned subsidiary of St. Anne Industries Ltd. St. Anne Industries is also the primary secured creditor of St. Anne Pulp under a registered general security agreement, the validity of which is being challenged in other proceedings. Finally, St. Anne Industries is a wholly owned subsidiary of Parsons & Whittemore Inc. of New York. On September 15, 2004, St. Anne Pulp made a voluntary assignment in bankruptcy. A trustee was appointed on that date, but later replaced by the respondent, A.C. Poirier & Associates Inc. Prior to the bankruptcy, it was customary for St. Anne Pulp to transport its pulp to Saint John where it was stored in a dockside warehouse belonging to the appellant, Logistec Stevedoring (Atlantic) Inc. Logistec was also responsible for loading of pulp onto ships and trucks. On September 14, 2004, one day prior to the filing for bankruptcy, Logistec was informed by St. Anne

Pulp that it would be ceasing operations but that it wanted to ensure that the 10,800 tonnes of pulp, being presently stored in Logistec's warehouse, would be released and loaded onto two ships that were to arrive in Saint John on or about September 18, 2004. As well, one shipment was to be effected by truck. In response, Logistec asserted that it possessed a warehouseman's lien on the goods and refused to release and load any pulp unless it received prior payment, in full, with respect to past due accounts. Logistec informed St. Anne Pulp that it was owed $562,574.72 plus amounts not yet posted to the account. Initially, Logistec demanded payment from anyone other than St. Anne Pulp in order to avoid the possibility of someone alleging the payment was a fraudulent preference. Eventually, Parsons & Whittemore agreed to indemnify Logistec in the event the payment from St. Anne Pulp to Logistec was successfully challenged. The impugned payment was made on September 14, 2004. The next day St. Anne Pulp made a voluntary assignment in bankruptcy. On the same date, St. Anne Industries appointed a receiver under the terms of its security agreement. On September 16, 2004, Logistec determined that a further $232,945.91 would be needed to settle the account. The receiver paid this amount with funds drawn on St. Anne Pulp's bank account, over which St. Anne Industries had taken security. As of September 27, 2004, all the pulp in the warehouse had been shipped.

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[3] On December 10, 2004, the respondent trustee filed an application for a declaration that the $562,574.72 payment was fraudulent and void under s. 95 of the BIA. Correlatively, the trustee sought judgment for that amount. On December 21, 2004, the application was heard. On the same date the application judge granted the relief requested. His decision is now reported at [2004] N.B.J. No. 477 (Q.B.) (QL). The reasons for judgment address two issues. The first was whether the application proceedings should be converted into an action. On this issue, the application judge ruled in favour of the trustee. Although Logistec pursued this issue on appeal, there is no need to convert this matter into an action. The only factual matter which the parties failed to resolve concerns the extent to which the $500,000 payment related to work already performed, as opposed to work to be performed. However, that factual determination is only relevant if the payment in question were declared a fraudulent preference, in which

case part of the payment may have been valid. As I find that the payment in question does not constitute a fraudulent preference, there is no need to dwell on the first issue. As to the second issue, I turn to s. 95. At the relevant time, ss. 95(1) and (2) read as follows:

> **95.** (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

> **95.** (1) Sont tenus pour frauduleux et inopposables au syndic dans la faillite tout transport ou transfert de biens ou charge les grevant, tout paiement fait, toute obligation contractée et toute instance judiciaire intentée ou subie par une personne insolvable en faveur d'un créancier ou d'une personne en fiducie pour un créancier, en vue de procurer à celui-ci une préférence sur les autres créanciers, s'ils surviennent au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement.
>
> (2) Lorsqu'un tel transport, transfert, charge, paiement, obligation ou instance judiciaire a pour effet de procurer à un créancier une préférence sur d'autres créanciers, ou sur un ou plusieurs d'entre eux, il est réputé, sauf preuve contraire, avoir été fait, contracté, intenté, payé ou subi en vue de procurer à ce créancier une préférence sur d'autres créanciers, qu'il ait été fait ou non volontairement ou par contrainte, et la preuve de la contrainte ne sera pas recevable pour justifier pareille transaction.

[Note that the wording of ss. 95(1) and 95(2) was amended, effective December 15, 2004, but those changes have no effect on the disposition of this case.]

[4] The law is settled with respect to the interpretation and application of s. 95 of the BIA. In order for a payment to a creditor to qualify as a fraudulent preference three conditions precedent must be met: (1) the payment must have been made within three

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months of bankruptcy; (2) the debtor must have been insolvent at the date of the payment; and (3) as a result of the payment the creditor must have in fact received a preference over other creditors (see *Re Van der Liek* (1970), 14 C.B.R.(N.S.) 229 (Ont. H.C.J.).

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[5] Once the three conditions precedent have been met, a presumption arises that the payment was made "with a view to giving that creditor a preference over the other creditors." However, it is a rebuttable presumption. In that regard, the courts have interpreted the above-quoted phrase as placing an onus on the creditor to establish that the debtor's dominant intent was not to prefer that creditor. The genesis of the dominant intent test is invariably traced to the following passage in *Re Van der Liek,* at pages 231-32:

> When the trustee has proved these three essentials, he need proceed no further and the onus is then on the creditor to satisfy the court, if he can, that there was no intent on the part of the debtor to give a preference. If the creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, then the application will be dismissed, but if the creditor fails to meet the onus, then the trustee succeeds.

[6] Certain factors may or not be relevant to the task of ascertaining the debtor's dominant intent. Based on the Supreme Court's decision in *Hudson v. Benallack*, [1976] 2 S.C.R. 168, it is settled law that the creditor's knowledge of the debtor's insolvency at the time of the payment is an irrelevant consideration. On the other hand, it is relevant that the corporate debtor knew of its insolvency at the date of the payment. If the debtor is related to the creditor the payment will be scrutinized with greater care and suspicion. However, it is no defence to an allegation of fraudulent preference that the creditor exerted pressure on the insolvent debtor to secure the payment. According to s. 95(2), pressure is no longer a ground for upholding a transaction which is otherwise preferential within the meaning of s. 95(1). Finally, as the dominant intent test is an objective one, we need not be concerned with the subjective intent of the insolvent debtor

at the time of the payment. The requisite intent will be drawn from all of the relevant circumstances, as opposed to the debtor's personal ruminations. See generally Lloyd W. Houlden & Geoffrey B. Morawetz, *Bankruptcy & Insolvency Law of Canada*, looseleaf (Toronto: Carswell, 1992) at 4-66 to 4-67, 4-79.

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[7] Returning to the facts of the present case, the parties agree that conditions precedent (1) and (2) have been met. However, Logistec argues that it was not the beneficiary of a preference in fact and, therefore, s. 95 has no application. A concise and accurate statement of the law as to the relationship between the concept of preference in fact and dominant intent is found in *Re Norris* (1996), 193 A.R. 15 at para. 16 (C.A.):

> In considering this section, it is well to keep in mind the distinction between preference in fact and fraudulent preference as that latter is defined in the **Act**. There can be no doubt in this case that Revenue Canada received a preference in fact from the payment of tax made by this debtor on November 25, 1992. Its debt was paid where the debt owing to other ordinary creditors were not. What would render that preference in fact a fraudulent one under s. 95 is the accompanying intent of the insolvent debtor who in the face of imminent bankruptcy is moved to prefer or favour, before losing control over his assets, a particular creditor over others who will have to wait for and accept as full payment their rateable share on distribution by the Trustee in the ensuing bankruptcy. It is called fraudulent because it prejudices other creditors who will receive proportionately less, or nothing at all, and upsets the fundamental scheme of the **Act** for equal sharing among creditors. That accompanying intent to favour one creditor over another is what makes a preference in fact a fraudulent preference and is referred to in the cases as the "dominant intent". …

[8] In my view, Logistec's argument would have been persuasive had the impugned payment related solely to work or services to be performed in regard to the pulp that was being stored in Logistec's warehouse at the time of the payment. In other words, had the entire $500,000 payment related to the storage and shipping of the 10,800 tonnes of pulp in Logistec's warehouse, Logistec's argument would have been well

founded. The situation would be no different had Logistec sold St. Anne Pulp a piece of machinery within the three months preceding the bankruptcy and St. Anne Pulp paid in cash. Such a payment would not qualify as a preference, but rather as a purchase and sale made in the ordinary course of business. However, counsel for Logistec conceded that part of the $500,000 was to be applied against amounts already owing for work undertaken in the past. In these circumstances, Logistec did receive a preference in fact when contrasted with St. Anne Pulp's other creditors who were also awaiting payment of their outstanding accounts. That said, the mere establishment of a preference in fact does not lead to the conclusion that the payment qualifies as a fraudulent preference within the meaning of s. 95 of the BIA. What we are left with is a rebuttable presumption that the payment in question so qualifies.

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[9] Logistec bore the onus of establishing that St. Anne Pulp's dominant intent was not to prefer Logistec over the other creditors. Alternatively stated, the onus was on Logistec to establish that St. Anne Pulp's dominant intent was to achieve a purpose other than to prefer Logistec. Regrettably, the application judge did not address that issue. For this reason, this court must draw the necessary inference from the primary findings of fact, as found by the application judge. Those facts are not in dispute.

[10] St. Anne Pulp's dominant intent may be formulated in at least one of four ways. First, it can be argued that it intended to bestow a preference on Logistec over the other creditors. This is the position of the trustee in bankruptcy. Second, it can be argued that St. Anne Pulp made the payment in order to honour its contractual obligations to its customers who had purchased the pulp and, hence, to ensure that the goods were duly shipped. This is the position of Logistec. The third and fourth characterizations flow from the second. Third, it can be argued that St. Anne Pulp's dominant intent was to generate income in the form of accounts receivable. Moneys collected would be applied against amounts owing to creditors and in the order of priority established at law. Fourth, it can be argued that St. Anne Pulp's dominant intent was to maximize St. Anne Industries' recovery on its secured debt. This characterization is a logical extension of the reality that, as the primary secured creditor, St. Anne Industries is entitled to the proceeds arising from the sale of inventory in priority to the unsecured creditors. If it can be fairly

said that St. Anne Pulp's dominant intent falls within either the second, third or fourth formulations, it is my view that the payment in question does not qualify as a fraudulent preference under s. 95 of the BIA. I so find. My formal reasoning is as follows.

[11] At common law and even after passage of the *Statute of Elizabeth* in 1570 (fraudulent conveyances) there was no impediment against an insolvent debtor preferring one creditor over another. The question of why a debtor would prefer one creditor over another goes to the question of the debtor's underlying motive, which text writers point out is irrelevant to the issue of dominant intent. Admittedly, it is easy to blur the legal distinctions often drawn between motive, intent, purpose or object. Be that as it may, one cannot help but ask why a debtor would prefer one creditor over another. In some cases the answer is self-evident. The common law allowed an insolvent debtor to engage in selective generosity by paying first those he liked most. Thus, payment to a creditor who is a family member or friend is more apt than not to qualify as a fraudulent preference within the meaning of s. 95 of the BIA: see *Craig (Trustee of) v. Devlin Estate* (1989), 63 Man.R. (2d) 122 (C.A.). Ironically, there is also a reported case in which the debtor allegedly made the payment to a non-related creditor (Revenue Canada) in order to prefer a creditor who was a close but distant relative: see *Norris (Re)*. But even if there is no close relationship between the debtor and the preferred creditor, the payment may be caught by s. 95. For example, where the payment is made to a creditor with respect to an indebtedness that had been guaranteed by the debtor's spouse, the payment has been held to be a fraudulent preference: see *Royal Bank of Canada v. Roofmart Ontario Ltd.* (1990), 74 O.R. (2d) 633 (C.A.) and also *Re Royal City Chrysler Plymouth Limited* (1998), 38 O.R. (3d) 380 (C.A.).

[12] As a general observation, it is evident that the cases in which the creditor has been unable to rebut the presumption arising under s. 95 of the BIA generally involve two factual patterns. First, the insolvent debtor and the creditor in receipt of the payment are somehow related (e.g., family members). Second, the payment to an arm's length creditor has the subsidiary effect of conferring an unjustified benefit or advantage on the insolvent debtor or a family member. While these factual patterns are not exhaustive, it is clear that the facts of the present case do not support a finding that St. Anne Pulp's

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dominant intent was to prefer Logistec over the other creditors. But that is not the end of the matter. It is still necessary to isolate, by inference, St. Anne Pulp's dominant intent. In my view, its ultimate goal was to generate income from its accounts receivable, the proceeds of which would be applied first against the debt owing to St. Anne Industries, the primary secured creditor. In brief, St. Anne Pulp's dominant intent was to maximize the amount that the receiver would recover on behalf of St. Anne Industries from the sale of the existing inventory. Does this inference support the allegation of fraudulent preference under s. 95 of the BIA? In my view, it does not for two reasons. First, s. 95 speaks of fraudulent preference in terms of the creditor who received the payment. In this case, it was Logistec who received the payment, not St. Anne Industries. Second, and more importantly, St. Anne Industries cannot be accused of obtaining a fraudulent preference when as a matter of law it is entitled to a preference as a secured creditor of St. Anne Pulp. It is St. Anne Industries that has priority over the unsecured creditors by virtue of its security agreement. St. Anne Industries is to be paid first. If the income generated resulted in a surplus that surplus would be shared pro-rata amongst the unsecured creditors. The fact that St. Anne Pulp made the impugned payment to Logistec with a view to generating income which would be applied first against the debt owing to the secured creditor, St. Anne Industries, and then against amounts owing to the unsecured creditors, cannot be regarded as a valid basis on which to declare the payment to Logistec a fraudulent preference.

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[13] My understanding of the law is that in circumstances where an insolvent debtor pays one creditor at the expense of another for purposes of carrying on business, the payment will more likely than not be deemed not to constitute a fraudulent preference within the meaning of s. 95 of the BIA. I need only refer to two cases in support of this proposition. In *Davis v. Ducan Industries Ltd.* (1983), 45 C.B.R. (N.S.) 290 (Alta. Q.B.) the bankrupt was a manufacturer of recreational vehicles. The creditor who received the questionable payment was a supplier of parts that the debtor used in its business. The supplier refused to continue to do business with the debtor unless payments were made towards its large outstanding account. Less than three months before the bankruptcy, the debtor made payments to the supplier. Once the debtor became bankrupt,

another creditor challenged this transaction as a fraudulent preference. The court found that the dominant intent of the bankrupt in making the payments to the supplier was to secure supplies to continue to run its business and not to give the creditor a preference. Similarly, in *Econ Consulting Ltd. (Trustee of) v. Deloitte, Haskins & Sells* (1985), 31 Man.R. (2d) 313 (C.A.) the bankrupt made a payment of $10,000 to accountants in respect of an outstanding account sixteen days prior to making an assignment in bankruptcy. The debtor's income tax returns were due and the accountants required the payment before they would prepare income tax returns for the debtor. The Court of Appeal cited this finding of the application judge with approval:

> I am satisfied that Econ made this payment not to give a preference to Deloitte but to get what it needed and required, i.e. its income tax returns prepared. I think that Deloitte would not have received payment if it had not been necessary for Econ to do so in order to persuade Deloitte to do the work that had to be done.

[14] Under Canadian law, if a creditor refuses to perform an act for an insolvent debtor, such as delivering goods or preparing income tax returns, unless its existing account is paid in full or in part, and the account is so paid in order to have the act performed, the transaction will not be deemed a fraudulent preference. This is because the debtor made the payment, not for purposes of preferring the creditor, but rather to obtain the performance of an act which is consistent with what is expected of someone who is acting in the ordinary course of business: see Houlden & Morawetz at 4-79 to 4-80.

[15] I admit that in the present case St. Anne Pulp did not make the payment for purposes of carrying on its pulp business in the long term. The impugned payment was made one day prior to St. Anne Pulp's voluntary assignment in bankruptcy. In the interim, however, it was entitled to carry on business albeit for a day. The truth of the matter is that St. Anne Pulp was acting in the best interests of all concerned when it made the payment to Logistec. Let me explain.

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[16] It would have been irresponsible for either St. Anne Pulp, the trustee or the privately appointed receiver to allow the inventory of pulp to sit in Logistec's warehouse. St. Anne Pulp had entered into binding contracts for the sale of this product. The goods had to be shipped, otherwise St. Anne Pulp would have been in breach of its contractual obligations and liable for any consequential damages. When completed, those contracts generated income for St. Anne Pulp. The net amount invoiced on the three contracts in question was $1.3 million (U.S.), $2.3 million (U.S.) and $300,000 (Cdn.). Together, the shipment of the pulp generated more than $4.6 million (Cdn.) in accounts receivable. That amount is net of the $800,000 paid to Logistec to ensure the shipment of the pulp ($562,574.72 + $232,945.91 = $795,520.63). In effect, for every $1 paid to Logistec, St. Anne Pulp generated at least $5 in accounts receivable. In addition, by fulfilling the pulp contracts, future pulp sales might not otherwise be jeopardized if the trustee or the receiver decided to operate St. Anne Pulp pending a disposition of the mill.

[17] What the trustee fails to appreciate is that although a debtor is insolvent, it is entitled to carry on in the ordinary course of business even if only for a day, so long as it is acting in a commercially reasonable manner and, therefore, in the best interests of all concerned. As well, the trustee appears to be proceeding on the mistaken assumption that prior to the voluntary assignment in bankruptcy any moneys held in St. Anne Pulp's bank account could be used only for purposes of effecting a settlement of all debts on a pro-rata basis. The reality is that if anyone possessed a priority with respect to moneys in St. Anne Pulp's bank account, it was St. Anne Industries under its general security agreement. That security extended not only to St. Anne Pulp's accounts receivable and inventory, but also to all moneys held on St. Anne Pulp's account. It is out of that bank account that the receiver paid Logistec $232,000 in order to secure shipment of the pulp. Had St. Anne Pulp not made the payment to Logistec on September 14, 2004, here is what would have happened. On the following day, the newly appointed receiver would have seized the moneys held in St Anne Pulp's bank account. From that account the receiver would have paid the full amount owing to Logistec, for both past and present work. As it happens, the fact that a substantial payment was made one day prior to the bankruptcy is of no moment. Finally, I should point out that the payment to Logistec will

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work to the benefit of the unsecured creditors in the event St. Anne Industries' security agreement is successfully challenged and declared invalid. The income generated by that payment ($5 for every $1 paid to Logistec) would become available to all unsecured creditors.

[18] At first blush the "optics" of this case cast a long shadow over the actions of St. Anne Pulp, St. Anne Industries and, ultimately, Parsons & Whittemore. It is understandable that Logistec was adamant that it receive an indemnity from Parsons & Whittemore with respect to the possibility the payment in question would be successfully challenged as a fraudulent preference under s. 95 of the BIA. The fact that the payment was made one day prior to the voluntary assignment in bankruptcy, and that both Logistec and St. Anne Pulp were aware of the latter's insolvency, threw suspicion over the transaction. However, when properly viewed, the transaction made good commercial sense. There is no doubt that St. Anne Industries was the true beneficiary of St Anne Pulp's payment to Logistec. But no one can complain of the preferential treatment being accorded that secured creditor. The preference arises as a matter of the security contract and is sanctioned by both the common law and the BIA.

[19] For these reasons, I would allow the appeal, set aside the order dated January 7, 2005 and dismiss the application for declaratory and ancillary relief. The appellant is entitled to costs of $3,000 throughout.

J.T. ROBERTSON, J.A.

WE CONCUR:

WALLACE S. TURNBULL, J.A.

ALEXANDRE DESCHÊNES, J.A.

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TAB II

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***In the Matter of the Bankruptcy of Inex Pharmaceuticals Corp.,***
2005 BCSC 1514

Date: 20051027
Docket: B051719
Registry: Vancouver

2005 BCSC 1514 (CanLII)

In Bankruptcy

In the Matter of the Bankruptcy of

Inex Pharmaceuticals Corporation

Before: The Honourable Mr. Justice Bauman

Reasons for Judgment

Counsel for the Petitioners, Stark Trading and Shepherd Investments International, Ltd.	J. F. Dixon and J. J. D. Bateman
Counsel for the Respondent	P. J. Reardon and L. Raffin
Date and Place of Trial/Hearing:	11 and 12 October 2005 Vancouver, B.C.

[1] The petitioners, Stark Trading and Shepherd Investments International, Ltd. apply for a Receiving Order pursuant to which Inex Pharmaceuticals Corporation ("Inex") be adjudged bankrupt.

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[2] Inex is a publicly traded company which operates from Burnaby, British Columbia. It is in the business of developing and commercializing proprietary drugs and drug delivery systems.

[3] I emphasize the aspect of proprietary drug development. This is a capital intensive business which spends millions of dollars in the development of a drug before it receives regulatory approval therefor and its large investment can hopefully be recouped.

[4] Inex has yet to enjoy substantial revenues other than from research and development collaborations, license fees and milestone payments.

[5] Pursuant to a series of promissory notes dated 27 April 2001, Inex International Holdings Ltd., a subsidiary of Inex, borrowed a total of US $27 million from Elan Corporation (the "Notes").

[6] The petitioners acquired a beneficial interest in a portion of the Notes in April 2004 and by direct assignment dated 30 August 2005 ("Assigned Notes").

[7] As of 15 April 2004, the amount outstanding under the Assigned Notes was approximately US $22.3 million.

[8] It is a term of the Assigned Notes that Inex unconditionally guarantees the full and punctual payment thereof.

[9] As of 15 September 2005, the amount due the petitioners under the Assigned Notes had risen to almost US $25 million.

[10] Inex has been in the course of developing a drug for the treatment of a specific cancer. The drug is called "Marqibo".

[11] In this regard, Inex had entered into a strategic partnership with Enzon Pharmaceuticals Inc. to develop and commercialize Marqibo.

[12] A critical milestone in the development of the drug was to be a ruling by the Oncology Drugs Advisory Committee of the FDA recommending accelerated approval for Marqibo.

[13] On 1 December 2004, Inex announced that the committee had voted unanimously against recommending accelerated approval for Marqibo.

[14] This was shortly confirmed by the FDA itself.

[15] On or about 14 December 2004, Inex issued a supplemental Material Change Report pursuant to which it confirmed that as a result of the negative recommendation of the Oncology Drugs Advisory Committee it would reduce its workforce from 162 to 62 and that it intended to restructure its affairs at a cost of approximately $5 million.

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[16] On 17 March 2005, Inex announced that Enzon had terminated its partnership agreement with respect to Marqibo.

[17] In a press release dated 17 March 2005, Inex confirmed that as of 31 December 2004 it had a cash position of $30 million. It further confirmed that at the "current burn rate" of approximately $1 million per month it anticipated it would have sufficient cash to fund the company for approximately 24 months. In his affidavit sworn 6 October 2005, Ian Mortimer (the company's CFO) confirmed that "[a]t the anticipated burn rate, the present working capital will last until the end of 2006. In order to have sufficient funds to operate to the maturity date of the Notes, April 27, 2007, Inex will require additional funds of approximately $3,000,000."

[18] On 21 June 2005, Inex announced its intention to further reduce its workforce from 57 to 22 incurring in the result severance costs of approximately $4.4 million.

[19] It also announced that its CEO and two senior vice presidents had resigned. A new CEO has since been appointed.

[20] As I understand the facts, Inex paid a total of approximately $8.1 million in severance costs to its departing employees and executives.

[21] On 21 June 2005, Inex wrote an important letter to the petitioners, one upon which the petitioners place much reliance in their submission that Inex has effectively admitted its inability to carry on business and meet its obligations as they become due. I reproduce here a large portion of this correspondence:

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Subsequent to the FDA's decision in December 2004 not to provide accelerated approval of our product Marqibo, and the subsequent restructuring within Inex, we have attempted to work within our financial capacity and move forward with the development of our commercial programs. Our primary task as a company has been to seek ways to re-establish the value of Marqibo, which is our most advanced program.

Throughout 2005, members of both the Inex Management Team and Board of Directors have been involved in informal discussions with you and your team as the principal holder of our outstanding promissory notes to determine a rationale manner for the retirement of these obligations. To date, these discussion have been focused primarily on finding common ground for agreement. We feel it is now time to expand the preliminary discussions we have had with you and your team to include all noteholders so that we can arrive at a definitive plan to eliminate this debt.

We have been working over the last few months to advance, develop and add value to our products while conserving our limited cash resources. We believe that Marqibo is a product that is commercially viable, and that a clear clinical strategy could be implemented that, if successful, would satisfy the requirements for FDA approval. As such, we believe we have a responsibility to our shareholders to find a way to realize the most value for our investment in Marqibo. Our most viable alternative to realize such value is likely to find a partner to take over the development of Marqibo. As such, we have already commenced a search for such a partner and if need be may expand our efforts by retaining outside advisors to assist in this process.

Even assuming successful partnering activities for Marqibo, it is unlikely Inex will have sufficient cash to repay the notes and provide value to our shareholders by advancing the development of our other product candidates. As you may know, our ability to raise additional cash to retire your notes is blocked by the very existence of this debt, which is providing a significant overhang in the capital markets. Accordingly, based on our current circumstances it is our expectation that when the notes mature in April 2007, Inex would likely exercise its right to repay the notes solely in shares of Inex. Based on our current share price, such a share issuance would be highly dilutive.

…

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[22] The petitioners took the position that there had been an event of default under the Notes and on 16 September 2005, they made a demand for payment. Inex has not paid and these proceedings have resulted.

[23] Section 43(1) of the ***Bankruptcy and Insolvency Act***, R.S. 1985, c. B-3 provides:

> **43.**(1) Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,
>
> > (*a*) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and
> >
> > (*b*) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

[24] It is the petitioners' position that they have clearly satisfied s-s. (1)(a) - the Notes are in default and currently due.

[25] In the alternative, the petitioners say that even if the Notes are not currently due, they still meet the requirement of s-s. (1)(a), as it is sufficient to show the debt is simply owing in light of authority binding upon me:

> ***Re Columbia Properties Ltd.*** (1963), 5 C.B.R. 258 (B.C.S.C.), affirmed on appeal
>
> CF ***Re Brown v. St. John Garage and Supply Company*** (1925), 7 C.B.R. 62 (N.B.K.B.)

[26] I proceed on the premise that the petitioners have standing to bring the petition under s-s. 43(1)(a).

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[27] The question remains: Has Inex committed one of the four acts of bankruptcy alleged in the petition? These rest on s-s. 42(1)(c), (g), (h) and (j) of the ***Bankruptcy and Insolvency Act***.

[28] These subsections provide:

> **42.**(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> …
>
> > (*c*) if in Canada or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, that would under this Act be void as a fraudulent preference;
> >
> > …
> >
> > (*g*) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;
> >
> > (*h*) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;
> >
> > …
> >
> > (*j*) if he ceases to meet his liabilities generally as they become due.

[29] I turn to deal with the submissions under each subsection. It is convenient to deal with s-s. (1)(h) and (j) together.

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Subsection (1)(h) and (j)

[30] It is clear that the petitioners enjoy the burden of proving fully and strictly the acts of bankruptcy alleged to support the Receiving Order: ***Re Selkirk*** (1961), 2 C.B.R. (N.S.) 113 (Ont. C.A.).

[31] The Chief Financial Officer of Inex deposes that Inex is current in its payments to trade creditors. Where the evidence does disclose that some terminated employees have not been fully paid, the Chief Financial Officer, Mr. Mortimer, has offered an acceptable explanation.

[32] In the result, Inex relies on ***T.D. Bank v. Langille*** (1983), 45 C.B.R. (N.S.) 49 (N.S.C.A.), which states (per headnote):

> An act of bankruptcy to support a petition must relate to the situation as it was on the date of the filing of the petition. Where the evidence indicated that, at the time of the filing of the petition, all of the ordinary creditors of the debtor were being paid with the exception of the petitioning creditor, and the debt to the petitioning creditor was not yet due pursuant to an agreement reached between the parties. It was held that the act of bankruptcy, that the debtor has ceased to meet his liabilities generally as they become due, was not proven and the petition should be dismissed. …

[33] The petitioners' most forceful argument under these heads is the submission that the Notes are currently in default and therefore immediately due and payable.

[34] Section 2 of the Notes provides that they are repayable on the Maturity Date, 27 April 2007, or at the option of Inex:

…

(ii) if Inex Canada so requires by written notice (the "Assignment Notice") given to the Holder and the Company not less than 40 days and not more than 50 days before the Maturity Date, the Holder will assign this Note, or such portion thereof as requested by Inex Canada pursuant to such Assignment Notice, to Inex Canada and in consideration therefor Inex Canada will, on a date that is before the first anniversary of the Maturity Date and as is specified by it in such Assignment Notice, issue to the Holder as fully paid and non-assessable shares, that number of common shares without par value in the capital of Inex Canada (the "Inex Canada Common Shares"), having an aggregate fair market value equal to the entire outstanding principal amount of this Note (including capitalized interest), together with any accrued and unpaid interest thereon (the amount equal to such aggregate fair market value, the "Assignment Price"), or

…

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[35] It will be seen that Inex has retained the right to effectively avoid the need to repay the Notes in cash by instead, pursuant to the option, requiring the petitioners to take common shares in Inex. It is common ground that this option only remains extant so long as the Notes do not go into default before the opening of the option window.

[36] But the petitioners say that an event of default has indeed occurred under section 6 of the Notes such that the debt is accelerated and now due and payable. The petitioners allege these events of default under section 6:

(e) Inex is unable to pay its debts in the normal course of business;

(f) Inex has ceased wholly or substantially to carry on its business; and

(g) Inex has admitted in writing its inability to pay its debts as they mature or become due.

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[37] I have already dealt with the alleged inability of Inex to pay its debts in the normal course of business. The evidence is to the contrary.

[38] As to the allegation that Inex has ceased substantially to carry on its business, it is true that Inex has drastically pared down its workforce in an effort to reduce the burn rate on its working capital, but the company continues to pursue opportunities under Mr. Ruane, its experienced new Chief Executive Officer.

[39] The company has credible products including Marqibo and it is actively pursuing new partnering opportunities or purchasers for Inex products.

[40] Mr. Ruane deposes in his affidavit of 6 October 2005:

> 4. For the last several months, I have been actively involved in attempting to find partners or purchasers. There have been a number of expressions of interest which are being followed up. Companies have entered confidential disclosure agreements with Inex, confidential due diligence materials have been given to interested parties, and I am following up with those potential partners or purchasers. I have received a Term Sheet on one of the products, and I am continuing negotiations with that party. The successful partnering or sale of any one of the products, including Marqibo, could yield substantial near-term cash for Inex. Given our current level of discussions with potential partners and purchasers, I am confident we will receive further offers to partner and/or purchase Inex products in the near future.

[41] Inex faces significant challenges in the months ahead, but I cannot find that it has ceased to substantially carry on business.

[42] I turn to the submission that Inex has admitted in writing its inability to pay its debts as they mature or become due.

[43] Here the petitioners rely on a variety of statements. First, they point to Inex's press release of 21 June 2005 (McNally #1, Exhibit U).

[44] Emphasis is placed on this statement:

> …
>
> INEX is now in a position to finalize protocols for the phase 3 trials. INEX will not file Special Protocol Assessments with the FDA until after a partner is secured for Marqibo. A Special Protocol Assessment (SPA) is an FDA process that allows for formal FDA agreement on trial design and endpoints. INEX is continuing discussions with pharmaceutical companies with the intention of securing a commercial partnership, out-licensing agreement or other arrangement that would maximize the value of Marqibo for INEX.
>
> …

[45] Nothing here amounts to the required admission, indeed, the contrary is shown - efforts continue to restructure.

[46] The petitioners then point to Inex's Report to Shareholders of August 2005.

[47] The report sets out the financial position of the company and the challenges which it faces. I find no evidence of Inex "admitting in writing its inability to pay … its debts as they mature or become due …".

[48] The petitioners add to their submission here the press release which accompanied the report dated 11 August 2005. The same observations pertain to it.

[49] Next, the petitioners place heavy reliance on the letter from Inex of 21 June 2005 and, in particular, this portion:

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> …
>
> Even assuming successful partnering activities for Marqibo, it is unlikely Inex will have sufficient cash to repay the notes and provide value to our shareholders by advancing the development of our other product candidates. As you may know, our ability to raise additional cash to retire your notes is blocked by the very existence of this debt, which is providing a significant overhang in the capital markets. Accordingly, based on our current circumstances it is our expectation that when the notes mature in April 2007, Inex would likely exercise its right to repay the notes solely in shares of Inex. Based on our current share price, such a share issuance would be highly dilutive.
>
> …

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[50] I note firstly that, as Inex submits, the first sentence is conjunctive, that is, "… it is unlikely Inex will have sufficient cash to repay the notes and provide value to our shareholders."

[51] This is not an admission that Inex will categorically not repay the Notes.

[52] In any event, the paragraph goes on to say that Inex expects to honour its commitment under the Notes by taking an assignment of the Notes for shares in Inex.

[53] Finally, the petitioners rely on an alleged admission of insolvency by one of Inex's directors - Jim Miller - in a telephone conference with the petitioners' representatives on 6 June 2005.

[54] David Main, another director of Inex, was a party to the telephone conference and he recalls that a representative of the petitioners commented that Inex was insolvent. Mr. Main deposes "Darrell Elliott [chairman of Inex] immediately contradicted that statement and advised the group that Inex was not insolvent. I

also denied that Inex was insolvent and stated that Inex could voluntarily take steps to manage its cash to ensure continued operations until the Notes matured."

[55] I do not find that anything said at this telephone conference could amount to a binding admission by Inex that it was insolvent and not intending to meet its obligations as they became due.

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[56] In light of these findings it follows that I have concluded that an event of default as alleged by the petitioners under these provisions of section 6 of the Notes, has not occurred.

[57] It further follows that I have concluded that the petitioners have not met the burden in proving an act of bankruptcy by Inex under s-s. 42(1)(h) or (j) of the ***Bankruptcy and Insolvency Act***.

Subsections 42(1)(c) and (g)

[58] Here the petitioners allege a transfer of property by Inex that is void as a fraudulent preference and/or the disposal of property to defraud, defeat or delay creditors.

[59] The petitioners complain that the payment by Inex of a portion of its long term debt in August 2005 in part founds a breach of these sections.

[60] The facts disclose that this payment was to a secured creditor, G.E. Capital, which then freed up collateral over which G.E. Capital held its security. This cannot

be attacked as a fraudulent preference: ***Re Imperial Lumber Limited v. Coast Mill Works Limited*** (1956), 36 C.B.R. 36 (B.C.S.C.).

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[61] Then the petitioners say that the severance payments to departing employees are either a transfer of property, void as a fraudulent, or the disposal of property with the intent to defraud, defeat or delay creditors.

[62] As to the latter, I agree with Inex that the petitioners have simply not met their evidentiary burden in proving such intent. Indeed, the evidence supports the conclusion that the payments were made to allow Inex to carry on in business and not face the disruption of the inevitable costly litigation arising out of the workforce reduction.

[63] As to the issue of fraudulent preference, at the time of making the payments Inex was not insolvent or at least that has not been proven on the record before me.

[64] In any event, in the words of s. 95(1) of the ***Bankruptcy and Insolvency Act***, it has not been shown that these payments were made with a view to giving these employees preference over other creditors. Indeed, the evidence is that the payments were prudently made to rationalize Inex's affairs going forward so that it could continue in business.

[65] Even if the presumption raised by s. 95(2) of the ***Bankruptcy and Insolvency Act*** is operative, in my view Inex has led sufficient evidence to the contrary - it intended to continue in business and avoid insolvency: ***Re Grimsby***

Machine Manufacturing Company Limited (1971), 15 C.B.R. (N.S.) 1 (Ont. C.A.) at 2.

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[66] I have concluded that the petitioners have not proven one or more acts of bankruptcy by Inex. Accordingly, it is not necessary to consider Inex's alternative submission under s-s. 43(7) of the ***Act***.

[67] But I do note paragraphs 71 and 72 of Inex's argument:

> 71. The Petitioners investment in Inex was, in reality, an equity investment. The Petitioners expected to exercise their option to convert the debt to equity and make a profit. There was, of course, no guarantee that the share price would be maintained or go up. That was a risk the Petitioners took. They also took the risk that the obligations owing to them would be satisfied in whole or in part in shares at maturity. The share price at that time would clearly be lower than the conversion price and probably lower than the share price at the time they acquired the Notes (see Mr. McNally's Affidavit #2, para. 3).
>
> 72. What is absolutely clear is that the Petitioners are trying to avoid the bargain that they made, getting to the Maturity Date when they will likely, not certainly, get paid in shares at a lower price than they would have liked even though that is a risk they freely took.

[68] I agree with the thrust of this submission and this would obviously be an important consideration in the exercise of my residual discretion under s-s. 43(7).

[69] In the result the petition is dismissed with costs.

“R.J. Bauman, J.”
The Honourable Mr. Justice R.J. Bauman

TAB JJ

5 D.L.R. (2d) 334
British Columbia Supreme Court, In Bankruptcy

Imperial Lumber Ltd. v. Coast Mill Works Ltd.

1956 CarswellBC 7, 19 W.W.R. 379, 36 C.B.R. 36, 5 D.L.R. (2d) 334

Re Imperial Lumber Limited v. Coast Mill Works Limited

McInnes J.

Judgment: June 22, 1956

Counsel: *Thomas Campbell*, for trustee, petitioner.
R. Edwards, for respondent, Imperial Lumber Ltd.

Subject: Corporate and Commercial; Insolvency

Bankruptcy IV D

Garnishment I A — Garnishee proceedings in action against debtor — Consent of debtor to payment out of money paid in by garnishees — Subsequent bankruptcy of debtor — Whether creditor secured — Equitable assignment — Bankruptcy Act (Can.), ss. 40, 64.

A person holding a valid equitable assignment of a specific fund is a secured creditor within s. 2(r) of the Bankruptcy Act, R.S.C. 1952, c. 14, and his right to realize on the security is not affected by s. 64. Thus, where a creditor sued a debtor and took garnishee proceedings in respect of money owing to the debtor and the latter, before bankruptcy, consented to payment out to the creditor of all money paid into Court by the garnishees, held, the creditor by virtue of the consent held an equitable assignment of the funds in Court and was hence a secured creditor.

Cases Judicially Noted: Re Matthews Sheet Metal & Roofing Co., [1924] 1 D.L.R. 761, 55 O.L.R. 262, 4 C.B.R. 471; McLean Co. v. Newton, 36 Man. R. 187, [1926] 3 W.W.R. 593, 8 C.B.R. 61, apld.

Annotation

Ordinarily a judgment creditor who has attached a debt prior to bankruptcy but who has not received payment out of the moneys from the sheriff before bankruptcy occurs, receives nothing. The sheriff must because of ss. 40 and 41, turn the money over to the trustee in bankruptcy. At first glance it would seem in this case that the creditor by taking a judgment, had elected to give up his rights under his assignment. However, as the learned judge points out, once he had received the assignment of accounts, he was to that extent a secured creditor and had a valid equitable assignment of the moneys due and owing. The taking of a judgment could in no way affect the collateral security which had been obtained by the creditor (see *Utterson Lumber Co. v. H. W. Petrie Ltd.* (1908), 17 O.L.R. 570, 24 Can. Abr. 845).

The Consulting Editor

Table of Authorities

Statutes Considered:

Bankruptcy Act, R.S.C. 1952, c. 14,
ss. 40, 64.PETITION for repayment of certain money to a Trustee in Bankruptcy.

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***McInnes J.*:**

1 This matter comes before me by notice of motion on behalf of the trustee in bankruptcy for an order that the $2,426.09 paid out of court in an action numbered I 389/54 in this court, wherein Imperial Lumber Ltd. was plaintiff and Coast Mill Works Ltd. (now in bankruptcy) was as defendant, be repaid by Imperial Lumber Ltd. to the trustee in bankruptcy of Coast Mill Works Ltd.

2 The facts briefly are that: The respondent, Imperial Lumber Ltd. had been supplying material to Coast Mill Works Ltd. for some years. Their account became delinquent and the defendant voluntarily assigned to the plaintiff Imperial Lumber Ltd. certain accounts owing by International Construction Co. Ltd. and Greenall Brothers Ltd. as security for its indebtedness. To safeguard the claim and also the assignments they commenced action against Coast Mill Works Ltd. on June 11, 1954, and took garnishee proceedings against the two debtors of the above-named defendant. As a result they attached the sum of $2,505.45. On July 5, 1954, a petition in bankruptcy was presented by Coast Mill Works Ltd. and the receiving order was made on Aungust 9, 1954. By s. 41(4) of *The Bankruptcy Act, R.S.C.*, 1952, c. 14, the bankruptcy shall be deemed to have relation back to and to commence at the time of the filing of the petition on which a receiving order is made. The effective date of the bankruptcy therefore is July 5, 1954.

3 Moneys were paid into court under the garnishing order as follows: On June 17, 1954, $1,382.20; on July 5, 1954, $592.15; on July 27, 1954, $106.98; on August 9, 1954, $344.76.

4 Consent to payments out of all moneys paid into court under the garnishing order by the garnishees was signed by Coast Mill Works Ltd. on June 30, 1954, and on July 2, 1954, default judgment was entered against Coast Mill Works Ltd. and the bill of costs taxed. Pursuant to the consent given by Coast Mill Works Ltd. the above moneys paid in by the garnishees were paid out in separate amounts to Imperial Lumber Ltd., namely: On July 9, July 23, August 13 and August 25, all in 1954.

5 Reliance is placed by the trustee-petitioner on ss. 40 and 41 and s. 64. Section 40 reads as follows:

> 40. Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovering of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

6 Subsec. (2) reads as follows:

> (2) Subject to the provisions of section 48 and sections 86 to 93, a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows:
>
> (*a*) in the case of a security for a debt due at the date of the bankruptcy or of the approval of the proposal or which becomes due not later than six months thereafter such right shall not be postponed for more than six months from such date;
>
> (b) in the case of a security for a debt that does not become due until more than six months after the date of the bankruptcy or of the approval of the proposal such right shall not be postponed for more than six months from such date, unless all instalments of interest which are more than six months in arrears are paid and all other defaults of more than six months' standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by such security becomes payable under the instrument or law creating the security, except under paragraph (*a*).

7 A "secured creditor" is defined by s. 2(*r*) as follows:

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> 'Secured creditor' means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

8 On p. 21 of the third edition by C. H. Morawetz of Bradford & Greenberg's Canadian Bankruptcy Act, 1951, the following appears:

> A person holding a valid equitable assignment of a specific fund is a secured creditor: *In re Matthews Sheet Metal & Roofing Co.*, 4 C.B.R. 471 (Ont.) [55 O.L.R. 262, [1924] 1 D.L.R. 761, 3 Can. Abr. 1052].

9 And again:

> A person who prior to the authorized assignment obtained a charging order against a fund in court is a secured creditor: *J. J. H. McLean Co. v. Newton*, 8 C.B.R. 61 (Man.), [[1926] 3 W.W.R. 593, 36 Man. R. 187, [1927] 1 D.L.R. 183, 3 Can. Abr. 742].

10 It would appear therefore that the Imperial Lumber Ltd. was a secured creditor and that it held an equitable assignment of the funds in court under the consent to payment out. By s. 41(1) the rights of a secured creditor are specifically exempted from the provisions of that section.

11 As to s. 64 I have nothing before me to show that the Coast Mill Works Ltd. was insolvent or that the consent to payment was given with a view to giving Imperial Lumber Ltd. a preference over other creditors. In any event I do not think that s. 64 applies to a secured creditor so as to affect security which he holds. In the result the petition will be dismissed.

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TAB KK

1995 CarswellOnt 48
Ontario Court of Justice (General Division), In Bankruptcy

Royal City Chrysler Plymouth Ltd., Re

1995 CarswellOnt 48, [1995] O.J. No. 476, 30 C.B.R. (3d) 178, 53 A.C.W.S. (3d) 704

Re bankruptcy of ROYAL CITY CHRYSLER PLYMOUTH LIMITED

Leitch J.

Heard: August 15-17, 1994
Judgment: January 17, 1995
Docket: Doc. 35-040042

Counsel: *D.E. Snider*, for Royal Bank of Canada.
I. Duncan, for Robert Mahon and Gillian Kathleen Mahon.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act

Fraudulent preferences — Reviewable transactions — Creditor obtaining general security agreement and promissory note in return for loan made to bankrupt more than year before bankruptcy — Loan repaid within three months of bankruptcy — Creditor claiming that payment to secured creditor exempt from attack by trustee under s. 95 of Bankruptcy and Insolvency Act — As payment exceeding value of security trustee entitled to attack — Payment declared fraudulent — Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, s.95.

More than a year before the bankruptcy, RM loaned $180,000 to the bankrupt company. He received a promissory note and a general security agreement as security for the loan. The loan was repaid within three months of the bankruptcy when the company was insolvent.

The bank, as assignee of the trustee's right of action, applied for a determination of whether the payments made by the bankrupt were fraudulent and void against the creditors pursuant to s. 95 of the *Bankruptcy and Insolvency Act*. RM argued that payment by a debtor to a secured creditor could not be a fraudulent preference because the preference given to certain classes of creditors by s. 136 meant that a payment to such a creditor of the amount referred to in the section cannot be attacked by the trustee.

Held:

The payments were fraudulent and void against the creditors.

Section 136 outlines a scheme of distribution of the property of a debtor in the hands of a trustee in bankruptcy and sets out the order of priority of claims of the persons named in the section. It does not provide a scheme of distribution to secured

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creditors. Therefore, the section does not exempt a payment to a secured creditor from scrutiny by the trustee pursuant to s. 95. In this case, the security held by RM had no value on the date RM received payment. Therefore, the trustee, and the bank as its assignee, was entitled to attack the payment under s. 95 even though RM was a secured creditor.

Table of Authorities

Cases considered:

Alaska Construction Ltd., Re (1973), 18 C.B.R. (N.S.) 221 (Ont. S.C.) — *referred to*

Canadian Imperial Bank of Commerce v. Sitarenios (1976), 23 C.B.R. (N.S.) 6, 14 O.R. (2d) 345, 73 D.L.R. (3d) 663 (C.A.) — *considered*

Gonvill (Trustee of) v. Patent Caramel Co., [1912] 1 K.B. 599 — *considered*

Hudson v. Benallack, [1976] 2 S.C.R. 168, 21 C.B.R. (N.S.) 111, [1975] 6 W.W.R. 109, 7 N.R. 119, 59 D.L.R. (3d) 1 — *followed*

Imperial Lumber Ltd. v. Coast Mill Works Ltd. (1956), 36 C.B.R. 36, 19 W.W.R. 379, 5 D.L.R. (2d) 334 (B.C. S.C.)*considered*

Kisluk v. B.L. Armstrong Co. (1982), (sub nom. *Re Pontiac Forest Products Ltd.)* 44 C.B.R. (N.S.) 251, 40 O.R. (2d) 167, 143 D.L.R. (3d) 66 (S.C.) — *applied*

Newton v. White, 11 C.B.R. 348, [1930] 2 W.W.R. 1, [1930] 3 D.L.R. 930 (Man. K.B.) [affirmed 12 C.B.R. 332, [1931] 1 W.W.R. 836, 39 Man. R. 455, [1931] 2 D.L.R. 733 (C.A.)] — *considered*

Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33.

Bankruptcy Act, R.S.C. 1970, c. B-3 [R.S.C. 1985, c. B-3] —

s. 73 [R.S.C. 1985, c. B-3, s. 95]

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

s. 2 "creditor"

s. 2 "insolvent person"

s. 2 "person"

s. 38

s. 38(2)

s. 95

s. 95(2)

s. 136

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s. 158

Business Corporations Act, R.S.O. 1990, c.B.16 —

s. 32

s. 247

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

Application for declaration that certain payment was fraudulent preference under s. 95 of *Bankruptcy and Insolvency Act* and void against creditors.

***Leitch J.*:**

1 Pursuant to s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act"), the Royal Bank of Canada (the "Royal Bank"), as assignee of the trustee in bankruptcy's right of action, has brought these proceedings against Robert Mahon and Gillian Kathleen Mahon.

2 Pursuant to the order of Browne J. dated March 1, 1994, the questions to be tried in this proceeding are whether a payment made by the bankrupt, Royal City Chrysler Plymouth Limited ("Royal City Chrysler"), to Robert Mahon and Gillian Kathleen Mahon on August 6, 1991 in the sum of $182,243 is either:

a) fraudulent and void as against the creditors of Royal City Chrysler Plymouth Limited as a preference within the meaning of s. 95 of the Act; or

b) null and void as against the said creditors pursuant to the provisions of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29; or

c) null and void as against the said creditors pursuant to the provisions of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33; or

d) contrary to s. 32 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 as against the creditors and should, therefore, be set aside pursuant to s. 247 of the said Act.

3 At trial, the fourth issue, dealing with whether there had been a breach of s. 32 of the *Business Corporations Act*, was withdrawn by counsel for the Royal Bank. In written argument, counsel for the Royal Bank made submissions only with respect to whether the contentious payment was a fraudulent conveyance within the meaning of s. 95 of the Act. There were no submissions made with respect to whether there was a fraudulent preference under the *Assignments and Preferences Act* or a fraudulent conveyance under the *Fraudulent Conveyances Act*. Therefore, these reasons for judgment will relate only to the first issue defined in the order of Browne J. — that is whether the contentious payment constituted a fraudulent preference within the meaning of s. 95 of the Act.

4 In written argument submitted by counsel for Robert and Gillian Mahon, there were two issues raised with respect to whether the Royal Bank had the right to bring this proceeding pursuant to s. 38 of the Act. These issues can form no part of this proceeding. The Royal Bank was clearly authorized by the order of Browne J. to proceed with this action dealing with the issues set out in his order.

5 These reasons for judgment will therefore deal only with the issue of whether the payment in issue was a fraudulent preference within the meaning of s. 95 of the Act.

Relevant Provisions of the Act

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6 Section 95 of the Act provides as follows:

(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering it becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering it, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

7 Section 2 of the Act defines an "insolvent person" as:

a person who is not bankrupt and who resides or carries on business in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars,

(*a*) who is for any reason unable to meet his obligations as they generally become due,

(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;

8 Section 2 of the Act defines a "person" to include a corporation.

9 Section 2 of the Act defines a "creditor" as a person having a claim, preferred, secured or unsecured, provable as a claim under the Act.

Background Facts

10 In March 1990 Robert Mahon returned to Royal City Chrysler as its general manager after having worked at the dealership from April 1981 to February 1988. In March 1990, Robert and Gillian Mahon borrowed $180,000 from Scotia Mortgage Corporation and directed those funds to Royal City Chrysler. This loan was a condition of Robert Mahon's employment with the dealership. Royal City Chrysler evidenced the $180,000 loan from Robert and Gillian Mahon by signing a demand promissory note dated March 26, 1990 in their favour. Royal City Chrysler also executed a general security agreement in favour of the Mahons as security for the loan. Interest on the loan was paid by Royal City Chrysler each month from April 1990 without default. The loan was personally guaranteed by Mr. John Woytkiw, the president and a director of Royal City Chrysler, and Loren Robin. The personal guarantees of John Woytkiw and Loren Robin were secured by a collateral mortgage on property which they owned as tenants in common.

11 Royal City Chrysler was primarily financed by the Royal Bank and Chrysler Credit. Marlene Walden, who was the assistant secretary/treasurer of Royal City Chrysler throughout the relevant time, prepared monthly financial statements for presentation to the Royal Bank and Chrysler Credit which were copied to Mr. Mahon and to Mr. Woytkiw before they were delivered to the bank and Chrysler Credit. Marlene Walden utilized for her financial statement preparation the format provided by Chrysler Credit. In this format, "other notes and contracts" were identified at line 41, and "capital stock: preferred" was identified at line 46.

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12 The financial statement for the period ending October 1990 indicated in line 41 that there were other notes and contracts outstanding totalling $878,266 and in line 46 that there was outstanding preferred capital stock of $360,000. Marlene Walden prepared a schedule to the financial statement which detailed the other notes and contracts and the capital stock.

13 The financial statement for the period ending November 1990 indicated in line 41 that the other notes and contracts outstanding had been reduced by $180,000 to $758,063, and in line 46 that the preferred capital stock was increased by $180,000 to $540,000. In the supplementary schedule detailing the other notes and contracts, the note in favour of Robert Mahon was no longer listed. Marlene Walden testified that she was directed to change the financial statements in this matter by Mr. Woytkiw.

14 The monthly financial statements continued to reflect this change. Mr. Campion, the account manager with the Royal Bank in charge of the Royal City Chrysler account, noted in an internal memorandum he prepared to his manager that Mr. Mahon's $180,000 shareholder loan was converted to share capital in November 1990. As Mr. Campion testified, he had received correspondence from Mr. Woytkiw dated June 26, 1990 in which Mr. Woytkiw advised Mr. Campion that Royal City Chrysler was raising $180,000 in equity from the issuance of special shares. Mr. Campion testified that this increase in preferred shares was represented on the November 1990 financial statement he received from Royal City Chrysler. With this conversion, the debt to equity ratio which Royal City Chrysler was required to maintain was satisfied. Without the conversion, the dealership would have been in breach of its covenant with the Royal Bank to maintain a specific debt to equity ratio.

15 Mr. Campion did not recall specifically speaking with Mr. Mahon about the conversion of his loan to equity. He believed, however, that Mr. Mahon was aware of the need to comply with the debt to equity ratio. Although Mr. Campion testified that he spoke to Mr. Mahon on several occasions about converting his loan into equity between September and October 1990, his evidence was vague on this point and he did not have the benefit of any notes. Regardless, however, of the extent of those conversations, Mr. Campion did not request and did not receive any confirmation from Mr. Mahon that this conversion had, in fact, taken place.

16 There was no dispute that the conversion of Mr. Mahon's loan to shares did not, in fact, take place, and the revisions to the financial statements resulted in a misrepresentation to the bank.

17 There was, however, a divergence in the evidence as to whether Mr. Campion was ever made aware that the financial statements were incorrect. Mr. Campion did not specifically recall a meeting on February 3, 1991 with Mr. Mahon at which Mrs. Walden was also present, although he did not disagree that that meeting had taken place. Mr. Campion also did not recall that Mr. Mahon's loan to Royal City Chrysler was discussed at this meeting. Mr. Campion denied asking Mr. Mahon at this meeting if he had converted his loan into equity. Conversely, Mr. Mahon testified that in February 1991 he and Marlene Walden met with Mr. Campion to discuss the December 1990 financial statements and the forecast for 1991. Mr. Mahon testified that Mr. Campion asked him if he was considering an equity position in Royal City Chrysler, and Mr. Mahon testified that he indicated he would not do so until the company was more profitable. Mr. Campion, according to Mr. Mahon, then referred to the monthly financial statements in which lines 41 and 46 reflected a reduction in other notes and contracts payable and an increase in capital stock. Mr. Mahon testified that he assured Mr. Campion that his loan had not been converted into equity and that Mr. Campion responded by commenting that the changes on the financial statement must have simply been a book entry. Marlene Walden was recalled to testify by Mr. Mahon. She similarly recalled the February 1991 meeting and recalled Mr. Campion asking Mr. Mahon if he would become a shareholder of the corporation and Mr. Mahon's response that he would not do so until dealership was more profitable. She too testified that there was no reaction from Mr. Campion.

18 On his examination for discovery, Mr. Mahon clearly indicated that he never had any discussions with anyone at the Royal Bank as to whether he had converted his debt into equity. He was able, however, to recall this meeting at trial because he had reviewed his appointment book which had refreshed his memory. Mr. Mahon was asked several questions during his examination for discovery which counsel for the Royal Bank referred him to at trial. Mr. Mahon acknowledged that he had not disclosed the February 1991 meeting until he testified at trial. He also acknowledged that his affidavits which form the pleadings in this action did not indicate that he had brought the error on the financial statement to Mr. Campion's attention. This information was first provided to the Royal Bank during the course of the trial. Mr. Mahon also on his examination for discovery

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did not acknowledge that he had noticed the change made to the financial statements for November 1990. At trial, however, he admitted that this misrepresentation on the financial statements should have been significant enough for him to remember.

19 Marlene Walden testified that the first time she recognized Mr. Mahon's loan had not been converted to shares was at the February 1991 meeting. She testified that she then became aware that the financial statements were wrong but took no steps to correct them. She did not speak to Mr. Mahon or Mr. Woytkiw about the year-end financial statements after the meeting. She testified that no changes were made to the financial statements and that this misrepresentation continued in the financial statements.

20 Mr. Mahon dealt with Mr. Campon on a fairly regular basis and was aware that the debt to equity ratio was important to the company's financing by the Royal Bank and recognized in February 1991 that there was a misrepresentation in the company's financial statements. Mr. Mahon did not question Mr. Woytkiw about this misrepresentation on the basis that Mr. Mahon felt it was up to Mr. Woytkiw to change it. Mr. Mahon acknowledged that he did check subsequent financial statements and the supporting schedules to see if they were correct, and he testified that although the financial statements remained incorrect, he did not discuss the matter further with Mr. Woytkiw or Mrs. Walden, nor did he notify Chrysler or the other recipients of the financial statements.

21 Mr. Mark Buczek, the senior sales representative for Chrysler Credit from 1987 to 1991, testified that he was responsible for monitoring the Chrysler Credit financing portfolios of Royal City Chrysler. He testified that while he normally called on dealerships once or twice a week as the financial position of Royal City Chrysler deteriorated he was attending at that dealership daily and was staying there longer because of the difficulty Chrysler Credit was having in getting paid. He testified that the financial situation of Royal City Chrysler progressively worsened from 1989 to 1991, and he had most of his conversations in this regard with Mr. Mahon as Mr. Woytkiw was not at the dealership on a daily basis.

22 Mr. Buczek testified that Chrysler Credit was concerned with the validity of the internal financial statements of Royal City Chrysler and retained the auditor of Chrysler Credit to review the dealership's financial statements. His finding was that the dealership had a negative net worth, and this finding was shared with Mr. Mahon and Mr. Woytkiw so they could see how precarious the dealership's financial position was.

23 Mr. Buczek met with Mr. Mahon on February 19, 1991 and reviewed the financial condition of the company. Mr. Mahon in formed Mr. Buczek at that time that the dealership had little cash and was fully funded on its line of credit.

24 Mr. Stickney, the regional marketing manager for Chrysler Credit, also testified that the financial condition of the dealership deteriorated from 1988 to 1991. On February 28, 1991, Chrysler Credit indicated to Mr. Woytkiw that it was looking for recapitalization and a plan to revitalize the dealership. Chrysler Credit had commenced proceedings to appoint a receiver for the dealership in August 1990 but adjourned those proceedings based on an agreement with Mr. Woytkiw to inject additional working capital. That new capital was injected, but Chrysler Credit indicated on February 28, 1991 that the worsening financial condition of the dealership necessitated new capitalization if Chrysler Credit was to continue providing financing to the dealership.

25 Mr. and Mrs. Mahon testified that in March 1991 they discussed their outstanding loan with Royal City Chrysler and concluded they wanted the loan to be repaid. Mr. Mahon acknowledged that the error in the financial statements helped influence his decision to ask for repayment of his loan. He understood the true extent of the company's financial difficulties. Mr. Mahon made a verbal demand on the company in the first part of March 1991. Although Mr. Woytkiw asked Mr. Mahon to reconsider, Mr. Mahon remained firm in his demand for repayment. Mr. Mahon testified that he again verbally requested the repayment of the loan in April 1991.

26 The draft financial statements dated April 11, 1991 for the period ending December 31, 1990 showed a loss for the 1990 fiscal year of $544,790 compared to a loss of $19,450 for the 1989 fiscal year and a deficit of $303,178. Significant retained earnings from the 1989 fiscal year were depleted in 1990. These draft financial statements also indicated that Royal City Chrysler had sustained an operating loss in its two previous years of operation.

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27 Mr. Mahon testified that in May 1991 he again made a verbal demand for repayment of his loan. In May 1991 a proposal was made to Mr. Mahon by Royal City Chrysler and Mr. Mahon sought legal advice with respect to that proposal. Mr. Campion was made aware that these proposals were under discussion. As of July 1991, these proposals had not resulted in anything concrete and Mr. Mahon decided to enforce his request for repayment of his loan. He delivered a written demand for payment dated July 4, 1991 to Royal City Chrysler.

28 The Royal Bank had demanded repayment of its loans on July16, 1991 although Mr. Mahon testified that he was not aware of the Royal Bank's demand for repayment.

29 Chrysler Credit continued to finance the dealership, but on July10, 1991 it suspended its credit line. Mr. Stickney personally ad vised Mr. Mahon of the suspension of credit on July 10, 1991. As Mr. Stickney testified, Chrysler Credit knew that without drastic action the dealership would not survive, and this was communicated to Mr. Woytkiw and to Mr. Mahon. Mr. Stickney testified that Mr. Mahon was present most of the times he met with Mr. Woytkiw.

30 Mr. Mahon testified that at the end of July 1991 he delivered a release to Royal City Chrysler at Mr. Woytkiw's request but did not receive a cheque.

31 On August 6, 1991, Mr. Woytkiw came to Mr. Mahon and said he would repay him. Mr. Woytkiw then delivered to Mr. Mahon a cheque drawn on the Royal Bank account of Royal City Chrysler and Mr. Mahon issued a receipt. The cheque was deposited by Mr. Mahon on August 6, 1991, and Mr. Mahon's outstanding indebtedness was then repaid in full. Mr. Mahon testified that he assumed the cash flow from the dealership was utilized to repay his loan.

32 In fact, a cheque from Revenue Canada dated April 16, 1991 in favour of Royal City Chrysler representing a rebate of federal sales tax was deposited into the account of Royal City Chrysler on August6, 1991.

33 This cheque had been handled in a very unusual way by Royal City Chrysler. Marlene Walden testified that Royal City Chrysler received the cheque some time in the first part of May 1991. She delivered the cheque to Mr. Woytkiw who retained it. She made no further enquiries with respect to this cheque. Mr. Mahon testified that he was aware that this cheque was missing because Chrysler Credit and specifically Robert Stickney made enquiries of him as to the whereabouts of this cheque in June 1991. It was implicit from Mr. Stickney's memorandum dated June 20, 1991, and Mr. Mahon agreed, that he had been pursuing the whereabouts of this cheque for some time. Mr. Mahon advised Mr. Stickney that he had been dealing with the Kitchener office of Revenue Canada and had confirmed that the cheque had been prepared and forwarded to Royal City Chrysler. Mr. Mahon investigated the procedure for obtaining a replacement cheque, but this replacement cheque was never obtained and from June 20, 1991 to August 16, 1991 Mr. Mahon did not do anything with respect to either locating the original cheque or requesting a replacement cheque. Mr. Mahon testified that this was not a priority for him as the money was going to Chrysler Credit.

34 Mr. Mahon testified that it never occurred to him to ask Mrs. Walden or someone else working for her if the cheque had been received. Mrs. Walden testified that there had never been a suggestion from Mr. Woytkiw, Mr. Mahon or any other employee that the cheque was lost and Mr. Mahon never made any enquiries of her as to where the cheque was.

35 Mr. Woytkiw resigned as a Chrysler dealer on August 19, 1991 and abandoned the dealership on that same date. The Royal Bank appointed Peat Marwick Thorne Inc. as receiver and manager of Royal City Chrysler on August 19, 1991.

36 On October 10, 1991, Royal City Chrysler was adjudged bankrupt, a receiving order was made against it, and Peat Marwick Thorne Inc. was appointed trustee of its estate. Mr. Robert Bradley, a representative of Peat Marwick Thorne Inc. in the receivership and the bankruptcy, testified that he prepared a statement of affairs pursuant to s. 158 of the Act for Royal City Chrysler utilizing the internal financial statements of the dealership. This statement indicated that the dealership had a deficiency of $1,550,705.72 as of October 23, 1991. As Mr. Bradley testified, retail sales tax was not remitted by Royal City Chrysler for the period March 1, 1991 to August 17, 1991 resulting in the Ontario Ministry of Revenue filing a proof of claim dated November 1, 1991 for $455,321.06; G.S.T. was not remitted for the months ending May 31 and June 30, 1991 resulting

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in Revenue Canada Excise/G.S.T. filing a proof of claim dated January 29, 1992 for $61,397.16 and Royal City Chrysler had not paid Reynolds & Reynolds (Canada) Ltd., its computer system supplier, from May to August 1991 resulting in his supplier filing a proof of claim dated November 1, 1991 for $10,890.73 representing amounts owing on this account from May 10, 1991. (The amount owing to this supplier had been in excess of that amount, but the trustee paid down a portion of this debt in order to have the computer service made available to the trustee.)

37 According to Mr. Bradley's evidence, there are many unanswered questions with respect to the operations of Royal City Chrysler in its final days including a series of payments to related parties and the sale of 32 vehicles during the month of August to Mr. Woytkiw's friends, relatives and others at what the trustee described as far less than their cost value.

Does s. 95 of the Act Apply to the Payment by Royal City Chrysler to Robert Mahon?

(1) Was the payment within three months of bankruptcy?

38 There is no question that Royal City Chrysler made a payment to Mr. Mahon to retire its loan with the Mahons within three months of becoming bankrupt. Royal City Chrysler repaid its outstanding loan with Robert Mahon and Gillian Mahon on August 6, 1991, and Royal City Chrysler was adjudged bankrupt on October 10, 1991.

(2) Was the payment to a creditor?

39 There is no question that there was a debtor/creditor relationship between Royal City Chrysler and Robert and Gillian Mahon. Robert and Gillian Mahon are clearly creditors within the meaning of that term as set out in s. 2 of the Act.

(3) Was Royal City Chrysler an insolvent person on August 6, 1991 when the payment was made?

40 It is clear from the evidence that Royal City Chrysler was an insolvent person as that term is defined in s. 2 of the Act on August 6, 1991 when the cheque was delivered to Robert Mahon.

41 The dealership clearly had financial difficulties in the latter part of 1990 and throughout 1991. The appointment of a receiver by Chrysler Credit was staved off by the injection of further capital. However, there was concern in the latter part of 1990 that the debt to equity ratio required by the Royal Bank would not be complied with. Chrysler Credit's auditors indicated in their report that the company had a negative net worth and these results, the difficulty in complying with the debt to equity ratio required by the Royal Bank, and the need for further equity were clearly recognized by Chrysler Credit, Mr. Woytkiw and Mr. Mahon at least as early as February 1991.

42 Mr. Woytkiw, Mr. Mahon, the dealership's lawyer, and Mr. Campion met on May 13, 1991 to review the financial position of the dealership. Mr. Mahon testified that he understood the dealership had serious problems and knew that the Royal Bank and Chrysler Credit were pressuring Mr. Woytkiw for recapitalization.

43 It was also clear from a proposal presented to Mr. Mahon in June 1991 that the company had no ability to pay its unsecured creditors, and pursuant to the proposal the unsecured creditors would remain unpaid.

44 Chrysler Credit suspended its credit line on July 10, 1991. Although the dealership was still able to finance new cars contracted for sale, nonetheless the credit line was suspended.

45 Mr. Woytkiw delivered to Mr. Mahon a summary of the dealership's balance sheet as of July 4, 1991 which Mr. Mahon reviewed and from which he did his own calculations and concluded that the dealership required additional equity in order to survive.

46 Marlene Walden testified that the dealership was unable to pay its accounts payable as they became due, that Chrysler Credit attended the dealership on a daily basis and required its payments by certified cheque, and a number of other suppliers required payment by certified cheque or would not supply the dealership at all.

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47 Operations of the dealership ceased on August 16, 1991. The report of the trustee in bankruptcy indicated that as of such date there was a serious deficiency in the dealership. There were assets of $2,556,510 available to pay secured creditors $2,369.607.11, preferred creditors $568,888 and unsecured creditors $1,168,720.21. Clearly, as of August 6, 1991 the dealership's position would not have been significantly improved.

48 In addition, it was clear that the dealership had not satisfied its obligation to the Ontario Ministry of Revenue and Revenue Canada on an ongoing basis with respect to the remittance of retail sales tax and G.S.T. and that the supplier of the dealership's computer system also had been unpaid since May 1991.

49 Accordingly, Royal City Chrysler was an insolvent person within the meaning of that term as set forth in s. 2 of the Act. As of August 6, 1991, it was unable to meet its obligations as they became due, it ceased paying current obligations in the ordinary course of business as they generally became due, and the fair value of its assets was insufficient to pay all of its obligations due and accruing due.

Does the Presumption Set Forth in s. 95(2) of the Act Apply?

50 Did the payment to Robert Mahon give Robert and Gillian Mahon a preference in fact over another creditor or other creditors with the result that the payment is presumed to have been made with a view to giving the Mahons a preference over other creditors?

51 In these circumstances there is no question that the repayment in full by Royal City Chrysler to the Mahons on August 6, 1991 gave the Mahons a preference over other creditors. The preferred creditors and the unsecured creditors received no dividend from the trustee in bankruptcy. The Royal Bank's debt remains unpaid.

52 Pursuant to s. 95(2) of the Act, the payment by Royal City Chrysler is presumed to have been made with a view to giving the Mahons a preference over other creditors.

Has the Presumption Created by s. 95(2) of the Act been Rebutted?

53 In *Hudson v. Benallack* (1975), 21 C.B.R. (N.S.) 111 the Supreme Court of Canada unanimously determined that whether or not a transaction is a fraudulent preference depends entirely on the intention of the debtor. Therefore only the intention of Royal City Chrysler must be considered in this case. It is unnecessary to determine the intentions of Robert and Gillian Mahon. I note however that I concur with Anderson J. in *Kisluk v. B.L. Armstrong Co.* (1982), (sub nom. *Re Pontiac Forest Products Ltd.)* 44 C.B.R. (N.S.) 251 (Ont. S.C.) when he concluded at p. 261 that knowledge on the part of the creditor that the debtor was insolvent is a relevant factor in the inquiry and may make the task of the creditor in discharging the onus more difficult, but it does not make it impossible.

54 Mr. Woytkiw did not give evidence at this trial. It appears his whereabouts are unknown as he has left the country. There is, therefore, no direct evidence as to his intention. Of more relevance in any event is the objective evidence as to the operations of Royal City Chrysler preceding the August 6, 1991 payment to Robert Mahon, the circumstances surrounding such payment and what Mr. Woytkiw, as a responsible officer of the dealership, did.

55 Mr. Mahon clearly had knowledge of the financial difficulties of Royal City Chrysler in August 1991. Mr. Woytkiw would also have had that knowledge. In fact as early as November 1990 Mr. Woytkiw was motivated to misrepresent the debt and equity in the dealership's financial statements.

56 Mr. Woytkiw withheld the FST rebate cheque from deposit to the dealership's bank account from May 1991 to August 6, 1991. Mr. Woytkiw misled Chrysler Credit's representatives when they made inquiries about the cheque and directed them to Mr. Mahon. Mr. Woytkiw kept the cheque from Chrysler Credit who was to receive these monies according to Mr. Mahon.

57 At a time when the dealership's credit with Chrysler Credit was suspended, its major bank had demanded its loan, the suppliers were having difficulty being paid, the FST cheque was deposited three months after its receipt on the same day Mr.

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Woytkiw delivered to Mr. Mahon the cheque to repay his loan. The deposit of this cheque on August 6, 1991 enabled the repayment of the loan to Robert and Gillian Mahon.

58 The payment by Royal City Chrysler to Robert Mahon on August 6, 1991 was not a payment in the ordinary course of business, nor was it a payment made for the purpose of enabling the dealership to stay in business. The payment was not made to satisfy the demands of an important supplier in order for business operations to continue.

59 Mr. Woytkiw may have been motivated to pay Mr. Mahon on August 6, 1991 out of friendship or loyalty or to protect Loren Robin's guarantee. Regardless of his motivation, an objective consideration of the evidence advanced in this trial leads to the conclusion that Mr. Woytkiw arranged for the payment by Royal City Chrysler to Robert Mahon on August 6, 1991 with the intention of giving the Mahons a preference over other creditors. I find that the presumption in s. 95(2) of the Act has not been rebutted.

Does s. 136 of the Act Result in s. 95 Having No Application to the Payment Made to Robert and Gillian Mahon, as Secured Creditors of Royal City Chrysler?

60 Section 136 sets out a scheme of distribution of the proceeds realized from the property of a bankrupt subject to the rights of secured creditors. Section 2 of the Act defines a secured creditor to include a person holding a charge on or against the property of the debtor as security for the debt due to them from the debtor. Clearly, Robert and Gillian Mahon fit within this definition.

61 The Mahons' position is that payment by a debtor to a secured creditor, as defined by s. 2 of the Act, cannot be a fraudulent preference under s. 95 of the Act.

62 In support of this position the Mahons submit that because s. 136 of the Act gives a preference to certain classes of creditors, a payment to a preferred creditor of the amount referred to in s. 136 cannot be attacked by the trustee, and a fortiori, payment by a debtor to a secured party cannot be attacked by a trustee in bankruptcy. The defendants rely on *Kisluk v. B.L. Armstrong Co.* [supra]; *Imperial Lumber Ltd. v. Coast Mill Works Ltd.* (1956), 36 C.B.R. (B.C. S.C.); *Newton v. White* (1930), 11 C.B.R. 348 (Man. K.B.); and *Re Alaska Construction Ltd.* (1973), 18 C.B.R. (N.S.) 221 (Ont. S.C.); *Canadian Imperial Bank of Commerce v. Sitarenios* (1976), 23 C.B.R. (N.S.) 6 (Ont. C.A.) and *Gonvill (Trustee of) v. Patent Caramel Co.*, [1912] 1 K.B. 599 as authority for their position.

63 In *Kisluk v. B.L. Armstrong Co.* the plaintiffs sought a declaration that payments made within three months of bankruptcy by the bankrupt to the defendant, the landlord of, a supplier to and a purchaser from the bankrupt were fraudulent and void as against the trustee as a preference. In considering the application of what was then s. 73 of the Act, Anderson J. noted on p. 261 with respect to the amount of the payments equivalent to rent due to the defendant:

> It is submitted on behalf of the defendant that as landlord it was a preferred creditor and that it is anomalous to speak of a preferred creditor receiving a preference which is deemed to be fraudulent. I incline to the view that, as far as it goes, that submission is sound.

In the annotation to this decision, W.J. Meyer, Q.C. of the Ontario Bar notes at p. 253:

> This decision appears to be the first to indicate that payment to a creditor that would be prima facie a preference under the Bankruptcy Act is not to be the subject of a judgment in favour of a trustee where "the defendant was entitled to such payment as a preferred claim as landlord". It therefore follows that a creditor who is preferred under s. 107 [now s. 136] of the Bankruptcy Act cannot be found to have received a preference for anything less than that creditor would have been entitled to have proved for under the distributory scheme of the Act.

64 *Imperial Lumber Ltd.* dealt with the issue of whether a creditor was a secured creditor and therefore exempt from a stay of proceedings resulting from the bankruptcy.

65 *Newton v. White* dealt with whether a trustee in bankruptcy of a member of a grain exchange could dispute a lien claimed by the counsel of the exchange pursuant to its by-law.

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66 In *Re Alaska Construction Ltd.*, Houlden J. considered whether a payment made by the bankrupt to its bank was a fraudulent preference. He noted at p. 224:

> I cannot see how it can be said that the principals of the debtor company were intending to prefer the bank when they asked the bank to settle the loan account by using the proceeds received from the collection of the accounts receivable of the debtor. The guarantors were not in my opinion intending to prefer the bank. Rather, their intention was to give the bank what it was legally entitled to receive so that the guarantors would not be called on, on their guarantees.

and at p. 225:

> There was nothing to indicate to the bank before 16th February 1970, that Alaska was encountering any financial difficulties.

and concluded at p. 225:

> On all of the evidence, I cannot find that the plaintiffs have satisfied me on the balance of probabilities that the debtor company had an intention to prefer the defendant bank over other creditors.

67 In *Canadian Imperial Bank of Commerce v. Sitarenios*, the issue before the Court of Appeal was whether the bank was entitled to monies paid to the bank by its customer, which monies represented receivables paid to the bank's customer after demand by the bank and default by the customer. It was held that pursuant to the language of the assignment of book debts in favour of the Bank, the customer received the monies in trust for the bank and the transfer of those monies to the bank did not constitute a fraudulent preference.

68 In the *Gonvill* decision there was a finding that an assignment of a partnership interest to a limited company was fraudulent and must be set aside, but a second action was dismissed because there was a finding that no property was assigned.

69 In my view the foregoing cases do not support the proposition put forward by the Mahons in this case. Section 136 of the Act simply outlines a scheme of distribution of the property of the debtor in the hands of the trustee in bankruptcy and sets out the order of priority of the claims of the persons named in s. 136. It does not provide a scheme of distribution to secured creditors. In *Bankruptcy and Insolvency Law of Canada* (3rd ed.) Houlden and Morawetz, the authors of this leading text, state at p. 5-100 [G§71]:

> Section 136 makes provision for the order of priority of the claims of the persons named therein, in the distribution of the property of the debtor. It is confined to those assets which come into the trustee's hands and are available for distribution among the unsecured creditors. The rights of secured creditors, or those claiming ownership to specific assets, or claiming that they are entitled to certain property in the hands of the trustee by reason of its being impressed with some trust, are dealt with in the sections governing the respective rights of such creditors.

70 Accordingly, s. 136 does not exempt a payment to a secured creditor from scrutiny by the trustee pursuant to s. 95 of the Act.

71 The decision of Anderson J. in *Kisluk v. B.L. Armstrong Co.* and the proposition that because s. 136 of the Act gives a preference to certain classes of creditors a payment to a preferred creditor of the amount set out in s. 136 cannot be attacked by the trustee does not lead to the conclusion a fortiori that payment by a debtor to a secured party cannot be attacked by the trustee. A secured creditor is entitled to realize upon its security. However, the fact that a person is a secured creditor does not result in payment to that person being completely exempt from attack pursuant to s. 95 of the Act. The annotation by W.J. Meyer to the decision *Kisluk v. B.L. Armstrong Co.* in my view correctly states what payments may be made to a secured creditor without attack by the trustee. He states at p. 253:

> A payment by a debtor to a secured creditor is protected and is not to be construed as a fraudulent preference where the payment does not exceed the value of the security ...

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The security held by the Mahons for their loan to Royal City Chrysler had no value on August 6, 1991. In these circumstances the trustee is entitled to attack the payment to the Mahons pursuant to s. 95 of the Act notwithstanding that they are secured creditors of Royal City Chrysler. The Royal Bank as the assignee of the trustee's rights pursuant to s. 38(2) of the Act may also attack such payment.

Conclusion

72 The payment made by Royal City Chrysler to Robert Mahon and Gillian Kathleen Mahon on August 6, 1991, in the sum of $182,403 is fraudulent and void as against the creditors of Royal City Chrysler as a preference within the meaning of s. 95 of the Act.

73 Counsel may make submissions as to costs in writing within 30 days of the date of release of these Reasons for Judgment.

Application allowed.

End of Document

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TAB LL

In the Court of Appeal of Alberta

Citation: Orion Industries Ltd. v. Neil's General Contracting Ltd., 2013 ABCA 330

Date: 20130930
Docket: 1201-0233-AC
Registry: Calgary

2013 ABCA 330 (CanLII)

Between:

Grant Thornton Alger Inc. in its capacity as Trustee of Orion Industries Ltd.

Appellant
(Applicant)

- and -

Neil's General Contracting Ltd.

Respondent
(Respondent)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice S.J. LoVecchio
Dated the 29th day of August, 2012
Entered on the 26th day of September, 2012
(Docket: 25-1517829)

Memorandum of Judgment

The Court:

[1] This is an appeal of a bankruptcy judge's refusal to set aside a payment made by a company to one of its creditors on the eve of company's bankruptcy.

[2] The appellant is the trustee in bankruptcy of the bankrupt company which sought to set aside the payment made by the insolvent company. The respondent is the creditor of the bankrupt company which received the payment.

[3] The trustee in bankruptcy had applied for a declaration that the payment to the respondent creditor was void by virtue of section 95(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3. Section 95(1)(a) provides that a payment made by an insolvent person to a creditor with a view to giving that creditor a preference is void as against the trustee in bankruptcy.

[4] Section 95(2) of the *Bankruptcy and Insolvency Act* provides that if a payment to a creditor has the effect of giving that creditor a preference, it will be presumed to have been made with a view to giving a voidable preference unless there is evidence establishing that the payment was not made with the view to giving that creditor a preference over other creditors.

[5] The term "fraudulent preference" has sometimes been used in this context. Obviously, if the preference is fraudulent, it is voidable. However, in *Piikani Energy Corporation (Re)*, 2012 ABQB 187, 537 AR 211, rev'd on other grounds 2013 ABCA 293, Justice Graesser suggested that the use of the term "fraudulent" is sometimes inappropriate. We agree. Using the term "fraudulent preference" may wrongly impugn the integrity of the creditor receiving the payment because it may not know that it is being paid in preference to others. It may also wrongly impugn the integrity of the debtor making the payment because it may not know that its destiny, within the next three months, is bankruptcy. As Justice Graesser pointed out, neither may be aware that bankruptcy is imminent when the payment is made. Also, when the payment is made, it may not be apparent to either party that the payment in fact gives a preference to the recipient creditor over other creditors. That is, the fact that such payment has had the effect of conferring a preference may only be apparent with the benefit of hindsight. Sometimes, of course, only the insolvent debtor knows that a preference is being given. The creditor receiving the payment does not.

[6] A preferable phrase to describe these potentially voidable payments is "preferential payment". Preferential payments are those which in fact confer a preference on one creditor over another. Preferential payments are not voidable *per se.* Only those preferential payments made with a view to giving the preference are voidable at the instance of the trustee. But if the payment confers a preference in fact, the presumption will be that the payment was intended to confer the preference. And if the presumption is not rebutted, the payment will be void as against the trustee.

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[7] Here it is acknowledged that the impugned payment gave the respondent creditor a preference over other creditors. It is also acknowledged that this occurred within three months of the insolvent company's bankruptcy. So, there was no doubt the payment was a preferential payment capable of being set aside at the instance of the trustee in the absence of evidence that it was not made with a view to giving the preference.

[8] The issue before the bankruptcy judge and on appeal was whether the creditor which received the preferential payment had rebutted the presumption in section 95(2) of the *Bankruptcy and Insolvency Act*, namely the presumption that a payment which has the effect of giving a preference is presumed to be a payment made with a view to giving a preference. The issue then was whether there was "evidence to the contrary", i.e., evidence that the payment was not made with a view to giving a preference or, put another way, evidence that the payment was not intended to be preferential.

[9] The bankruptcy judge found that the presumption had been rebutted by evidence about why the payment had been made. The evidence was that it was made by the insolvent company to secure access to an asset which might be sold to generate revenue. As such, the bankruptcy judge found that the payment was valid, not made with a view to giving a preference, and therefore not voidable at the instance of the trustee.

[10] It is settled law that the onus or burden of rebutting the presumption in section 95(2) is on the creditor receiving the preferential payment. Discharging that burden is difficult because the creditor receiving the payment may not know what motivated the payment. And though the onus is on the creditor receiving the payment to rebut the presumption of preference, it is the intention of the insolvent debtor which governs: *Salter & Arnold Ltd v Dominion Bank*, [1926] SCR 621, [1926] 3 DLR 684 at 686.

[11] It is also settled law that a payment made in the ordinary course of business, such as those made to discharge debts incurred in the conduct of the bankrupt's business, will not be found to have been made with a view to giving a preference. If it can be established that the preferential payment was made in the ordinary course of the bankrupt's business, the presumption that the payment was made with a view to giving a preference will be rebutted, see *Canadian Credit Men's Association Ltd v Jenkins*, [1928] 3 DLR 139 at 144, 10 CBR 77 (Ont SC App Div).

[12] What constitutes a payment made in the ordinary course of business is fact dependent. But, payments made to purchase goods or services required for the on-going conduct of the bankrupt's business have been found to be payments made in the ordinary course of business. Payments made to honor contractual obligations allowing the insolvent to carry on business have been found to be payments made in the ordinary course of business. And even a preferential payment made by an insolvent company at a time when its financial collapse is inevitable may be found to be legitimate if the payment was made with a view to generating income or liquidating assets to satisfy the

insolvent's creditors: *St Anne-Nackawic Pulp Co(Trustee of) v. Logistec Stevedoring (Atlantic) Inc*., 2005 NBCA 55, 255 DLR (4th) 137, *[St Anne-Nackawic]*.

[13] In this case, the evidence with respect to why the preferential payment was made came from the chief financial officer of the insolvent company which handled the insolvent company's accounting and financial affairs and which was also its majority shareholder and largest creditor. Evidence with respect to the payment also came from the principal of the creditor which received the payment.

[14] The insolvent company's chief financial officer testified that the preferential payment was made because he believed that the creditor which received the payment could and would deny the insolvent company access to, and thereby prevent the sale of, a piece of equipment which it was trying to sell in order to avoid bankruptcy. Additionally, he testified that the payment was made in the belief that the creditor who received the preferential payment could and would cause a major client of the insolvent company to quit doing business with it, thereby putting the insolvent company out of business.

[15] The creditor's evidence was that it had dismantled the insolvent company's asset and then, at the insolvent company's request, transported the components to a storage site which the creditor owned. The insolvent company's plan was to sell the asset to generate revenue. A similar asset had previously been sold for just that purpose. It was the creditor's evidence that more than half the money it was owed by the insolvent company was for dismantling and transporting the asset which the insolvent company hoped to sell to generate income. The creditor's evidence was that it would not release the asset unless it was paid for the services it had provided.

[16] Having considered the foregoing evidence and the parties' arguments, the bankruptcy judge found that the section 95(2) statutory presumption that the preferential payment was made with a view to giving the creditor which received the payment a preference had been rebutted. That is, the bankruptcy judge found that the evidence to the contrary rebutted the presumption that the preferential payment was intended to give a preference. We see no palpable or overriding error in that finding.

[17] The bankruptcy judge found that the "dominant intent" of the insolvent company in making the payment was "to ensure that a certain valuable asset ... could be protected because they (the insolvent company) wanted to liquidate it and hopefully get their money back." The bankruptcy judge found that to be a legitimate and sensible business decision.

[18] The New Brunswick Court of Appeal's decision in *St Anne-Nackawic* is instructive. There the Court held that when the insolvent debtor paid one creditor at the expense of others for the purposes of generating income to pay a secured creditor of the insolvent debtor, the payment was not a voidable preference.

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[19] The facts of that case were similar to those in this appeal. The bankrupt operated a pulp mill. It typically shipped pulp to the creditor's warehouse. One day prior to declaring bankruptcy, the bankrupt paid this creditor about $500,000 to ensure that pulp being stored there would be shipped, thereby generating income. When it made this payment, the bankrupt knew it would be declaring bankruptcy the following day.

[20] The trustee in bankruptcy sought and obtained a declaration that the payment was void under section 95 of the *Bankruptcy and Insolvency Act*. The Court of Appeal set aside the bankruptcy judge's declaration, holding that the evidence disclosed that the payment was not made with a view to giving the creditor a preference over other creditors, but rather was intended to generate income, which income would be available to satisfy the claims of the secured creditor.

[21] While the Court of Appeal did not articulate a test for determining whether a payment is made with a view to giving a preference, it did consider what the trustee might have done had the impugned payment not been made by the insolvent prior to bankruptcy. The Court of Appeal was of the view that the trustee might well have made the payment it was now attacking because it would have generated much needed income for the bankrupt.

[22] That analysis is instructive. What would the trustee have done with the funds used to pay the preferred creditor in this appeal? Assuming the trustee had no better information than the financial officer of the insolvent company had at the time of the impugned payment, it might well have paid the creditor with a view to generating income by freeing up a stored asset for a possible sale.

[23] Counsel for the trustee argues that the payment, unlike the payment in *St Anne-Nackawic*, did not generate income for the insolvent company. Furthermore, he argues, it was not objectively reasonable for the insolvent company to pay the creditor because there was no actual or pending sale of the asset. Indeed, there was not even a prospective purchaser on the horizon. Given that fact, counsel for the trustee argued that it was not commercially necessary, reasonable or sensible to protect the asset by paying the creditor for dismantling, transporting and storing it.

[24] However, the bankruptcy judge concluded that the payment was commercially necessary in order to secure access to an asset which could be sold to generate revenue and it was therefore not made with a view to giving a preference. That conclusion must be accorded deference.

[25] But, to address the appellant's argument, the absence of an actual or pending sale did not make the purpose of the payment, or the intention of the insolvent debtor in making it, objectively unreasonable. The payment might well have paved the way for the generation of income and certainly removed an obstacle to generating income. Had the payment not been made, the very least that could be said is that the prospects of selling the asset would have been diminished.

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[26] This raises the issue of "pressure". As previously set out, section 95(2) of the *Bankruptcy and Insolvency Act* provides that, in the absence of evidence to the contrary, a payment which has the effect of giving a creditor a preference is presumed to have been made with a view to giving the preference, even if made under pressure. The section also provides that evidence of pressure is not admissible to validate a preferential payment. So, evidence of pressure cannot be used to rebut the presumption that a preferential payment was made with a view to giving the preference and therefore voidable.

[27] The pressure argued by the trustee was evidence of a threat or perceived threat by the creditor to inform the insolvent company's largest customer that the insolvent company was delinquent in paying its debts. The insolvent company's largest customer apparently had a policy which required those providing services to it to pay their suppliers in a timely manner, or else lose its business.

[28] This pressure argument was not advanced before the bankruptcy judge. The argument below revolved around the presumption that the preferential payment made with a view to conferring a preference and therefore voidable at the instance of the trustee in the absence of evidence to the contrary. And the evidence to the contrary argument revolved around the reasonableness of paying the creditor in order to protect an asset which might not be capable of generating revenue for the insolvent company.

[29] It may not, strictly speaking, be necessary for us to deal with the pressure argument because if there is evidence rebutting the presumption that a preferential payment was made with a view to giving the preference, then the fact that there might also have been evidence of pressure is irrelevant. Evidence of pressure, of course, cannot be adduced to rebut the presumption of preference; but in this case there was evidence independent of the pressure evidence which was found to rebut the presumption. There is nothing in the bankruptcy judge's reasons or in his exchanges with counsel to suggest that he relied on the evidence of pressure which was argued on appeal to support his finding that the presumption had been rebutted.

[30] However, in addition to the evidence of the pressure of the threat or perceived threat that the insolvent company's delinquencies would be reported to its largest customer, there was also the evidence of the creditor's insistence that it be paid before access to the asset would be given. That evidence might also be construed as evidence of pressure and the bankruptcy judge did rely on that evidence as rebutting the presumption that a preference was intended. However, the bankruptcy judge characterized that evidence not as evidence of pressure but rather as evidence of a normal business imperative.

[31] Prior to the enactment of Canada's bankruptcy legislation, a payment by an insolvent debtor which had the effect of giving one or more of the debtor's creditors a preference over other creditors was not voidable if it were made under pressure. The rationale for this judicial exception to the rule that preferential payments by insolvent debtors were voidable (in those days at the instance of the

insolvent debtor's creditors) was that the conferring of a preference necessarily involved a voluntary act. The making of a payment under pressure was not considered to be a voluntary act. Indeed, a creditor's mere demand for payment was sufficient to show that the payment was involuntary and therefore not voidable: *Molson Bank v Halter* (1890), 18 SCR 88 (available on QL).

[32] Then, Canada's first bankruptcy legislation, in 1919, prohibited pressure as a factor capable of validating an otherwise voidable preferential payment. Likewise, under today's *Bankruptcy and Insolvency Act*, pressure cannot be invoked to rebut the presumption that a preferential payment to a creditor was made with a view to giving a preference. Indeed, evidence of pressure is inadmissible.

[33] The question then is, was the evidence that the respondent creditor would not release the asset unless it was paid, evidence of pressure and therefore inadmissible and not capable of validating an otherwise preferential payment? Or, was it simply evidence of a commercial imperative which required the payment to be made in order to generate income?

[34] The answer, of course, depends upon how the evidence is characterized. And characterizing such evidence is something upon which reasonable people can disagree: *Norris (Bankrupt), Re* (1996), 193 AR 15, 45 Alta LR (3d) 1 (CA).

[35] The bankruptcy judge characterized the evidence of the insolvent company's desire to realize upon its asset as a reasonable response to a financial imperative. The amount of income hoped to be generated by liquidating the asset was considerably greater than the cost of paying the creditor. Also, if the asset had been sold for the price the insolvent debtor thought it could fetch, the income generated might have gone a long way toward saving the insolvent company from bankruptcy. For those reasons, we find that the bankruptcy judge's characterization of the evidence was reasonable and entitled to deference.

[36] In the result, the trustee's appeal is dismissed.

Appeal heard on March 7, 2013

Memorandum filed at Calgary, Alberta
this 30th day of September, 2013

Rowbotham J.A.

2013 ABCA 330 (CanLII)

O'Ferrall J.A.

"as authorized" Veldhuis J.A.

2013 ABCA 330 (CanLII)

Appearances:

R.N. Billington, Q.C.
J.M. Blitt
for the Appellant

M.L. Engelking
for the Respondent

2013 ABCA 330 (CanLII)

TAB MM

Indexed as:

Fisher v. Moffatt & Powell (Perth) Ltd.

IN THE MATTER OF the bankruptcy of Arend Van Pelt of R.R. No. 3, Mitchell, County of Perth, Province of Ontario, Contractor formerly operating a hog farm in his own name at R.R. No. 3, Mitchell, Ontario
Between
Dalton Fisher, plaintiff, and
Moffatt & Powell (Perth) Limited, defendant

[1984] O.J. No. 2337

53 C.B.R. (N.S.) 28

27 A.C.W.S. (2d) 434

No. 35-018235

Ontario Supreme Court - High Court of Justice
In Bankruptcy

Anderson J.

Oral judgment: September 20, 1984

(34 paras.)

Counsel:

S.C. Monteith, for the bankrupt.
W.J. Meyer, Q.C., for the trustee.
R. Pickett, for the plaintiff.
F. Highley, for the defendant.

---

1 **ANDERSON J.** (orally):-- This is the trial of an issue or, more accurately, of two issues directed by my order of 16th February 1984.

2 The issues directed to be tried are defined in the order in the following terms:

> (a) Whether certain payments made by the bankrupt to Moffatt and Powell (Perth) Ltd. constituted a fraudulent preference within the provisions of s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3; and
>
> (b) Whether or not certain payments made to Moffatt and Powell (Perth) Ltd. after the bankruptcy up to and including 22nd August 1983 are after-acquired property under the provisions of s. 47 of the Bankruptcy Act.

3 The disposition of the matter therefore resolves itself into two parts: the first dealing with what is a relatively routine claim that certain payments constitute fraudulent preferences, and the second, a more unusual one attacking certain payments made after the bankruptcy as comprising dispositions of after-acquired property. The impugned payments made in the three months prior to the bankruptcy were made over a period from 16th October 1981 to 12th December 1981 and comprise in the aggregate $10,777.01.

4 With respect to the payments impugned on the second branch of the issue a statement of claim alleges that the defendant sold to the bankrupt merchandise and received payments in the amount of $39,151.16. It is the latter amount which is sought to be recovered as comprising after-acquired property.

5 The plaintiff is a farmer and a businessman. The defendant is a supplier of building materials. The bankrupt prior to the bankruptcy, the assignment having been made on 7th December 1981 and filed on 14th or 15th December, was a farmer and general contractor. The debt of the bankrupt to the plaintiff of some $85,000 arose out of a course of dealings in which the plaintiff supplied the bankrupt with feed for hogs. The impugned payments, and when I say "the impugned payments" I mean those impugned as fraudulent preferences, were made by the bankrupt to the defendant in the course of dealings in which the defendant supplied the bankrupt with construction materials for use in the construction business which the bankrupt carried on.

6 The section of the Bankruptcy Act relevant for consideration in dealing with the issue of fraudulent preference is, of course, s. 73 which insofar as material is in the following terms:

> 73.(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as

against the trustee in the bankruptcy.

(2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed prima facie to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

7 The constituent elements of a case under s. 73 were outlined some years ago by Houlden J. (as he then was) in Re Van der Liek (1970), 14 C.B.R. (N.S.) 229 (Ont. H.C.). The statements there made by Houlden J. were obiter but they have since been affirmed and adopted in many cases. The three constituent elements of the case which must be made out in the first instance are the following:

1. The conveyance, transfer, charge, payment, etc., took place within three months of bankruptcy...

2. It must be proved that the debtor was an insolvent person at the date of the alleged preference...

3. It must be shown that as a result of the conveyance, transfer, etc., the creditor received a preference...

8 When the trustee has proved these three essentials, he need proceed no further and the onus is then on the creditor to satisfy the court, if he can, that there was no intent on the part of the debtor to give a preference. If the creditor can show on the balance of probabilities that the dominant intent of the debtor was not to prefer the creditor but was some other purpose, then the application will be dismissed, but if the creditor fails to meet the onus, then the trustee succeeds.

9 In the instant case it may be said at the outset that the requirements of the first and third points have been met. The impugned payments were clearly within the statutory period and there is no doubt that the defendant obtained a preference. Number 2, in my view, has not been proved. In other words, it has not been proved that the debtor was an insolvent person at the date of the alleged preference.

10 There is no doubt that the evidence discloses financial difficulty and that some obligations of the bankrupt were not being promptly met. However, it was only at the end of November that the bank, which was providing the bankrupt with his principal financing, decided to demand payment.

11 Proof of insolvency at the time the impugned payments were made must be clear and

convincing and I do not find it so in this case. I arrive at that conclusion with somewhat less concern than might otherwise be the case because I am satisfied that the defendant has satisfied the onus of showing that the dominant intent of the bankrupt was not to prefer the defendant but to keep his enterprise alive and operating and to avoid the necessity of going into bankruptcy.

12 As I have already indicated, there is no doubt evidence of financial pressures. The efforts which the bankrupt was making may well have been overly optimistic and in the long run doomed to failure. But those efforts in my view comprise the dominant intent of the bankrupt in making the impugned payments. There is no evidence that the account of the defendant was being treated any differently than other suppliers to the bankrupt of construction material. It would appear that the bankrupt was paying his creditors whose debts arose by reason of the supply of construction materials, rather than those whose debts arose by reason of the supply of feed, but in my view that does not affect the conclusion which I have just expressed. It does not affect the dominant intent as I have found it to be. In his desperate efforts to keep his enterprises alive it was simply of greater importance to him, or at any rate was perceived by him to be of greater importance, that the suppliers of construction materials should be kept satisfied. In this regard I might make passing reference to the judgment of Smith J. in Touche Ross Ltd. v. Weldwood of Can. Sales Ltd. (1983), 48 C.B.R. (N.S.) 83. There, Smith J. seems to have had a similar problem to deal with and has found it significant that the account in question was treated no differently from that of a normal supplier. I therefore find that the attack on the payments impugned as fraudulent preferences fails and that claim must be dismissed.

13 The second issue is one which, as I have indicated at the outset, involves an element of some novelty. After making the assignment the bankrupt continued his construction business. His evidence is to the effect that it was on a greatly limited scale and that it was carried on simply with a view to providing himself and his large family with a livelihood. I accept his evidence in respect of those matters. In doing so he continued to deal with the defendant as a supplier of the necessary materials and in the course of dealing which ensued made to the defendant the payments which are impugned as comprising after-acquired property of the bankrupt.

14 On the evidence I conclude and find as a fact that the course of dealing between the bankrupt and the defendant after the making of the assignment was entirely regular, unexceptionable and unobjectionable save possibly for the effect of the bankruptcy. It is that possible effect which comprises the fundamental question that I must decide on this branch of the case.

15 In this connection I must consider first of all s. 47 of the Bankruptcy Act which insofar as material for present purposes is in the following terms:

> 47. The property of a bankrupt divisible among his creditors shall not comprise...

16 Then follow cls. (a) and (b) which are not material, the section continuing:

> 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.

17 The definition section of the act defines property so as to include money.

18 Also to be noted in this connection is the language of s. 50 (5) which is in the following terms:

> (5) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

19 I note and emphasize the words "subject to this Act".

20 There is, I think, an irresistible inference that the money which comprised the payments by the bankrupt to the defendant after the bankruptcy was after-acquired property and that prima facie it was property divisible among the creditors and vested in the trustee. Indeed, no submission to the contrary was made by counsel on behalf of the defendant.

21 Counsel for the defendant, however, relies on the provisions of s. 77 of the Act. The relevant portion of that section is subs. (1) which reads as follows:

> 77.(1) All transactions by a bankrupt with any person dealing with him bona fide and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate or interest in such property that by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

22 Viewing the constituent elements of that subsection it would appear that in such a case as this the onus is on a person seeking to have the benefit of the subsection for the purpose of supporting a transaction or transactions by which after-acquired property was obtained to prove the following things:

1. that such person was dealing bona fide;
2. that such person was dealing for value; and
3. that the transactions were completed before any intervention by the trustee.

23 In the submissions of counsel, both of whom gave evidence of careful preparation, no case was referred to in which, as in this case, the person seeking to sustain transactions under s. 77(1) has had an uninterrupted course of dealings with the bankrupt before and after the assignment. The evidence establishes that the defendant had notice first informally and subsequently formally of the fact of the bankruptcy and therefore was on notice during the course of dealing which is now attacked.

24 Although no cases directly in point were available, a number of cases were referred to dealing with a predecessor section of the Act. An example is the judgment of Mr. Justice Urquhart in Re Hord, [1946] O.W.N. 86, decided in 1945. In that judgment the following pronouncements are of interest in this case. First of all, commencing at the bottom of p. 186 of the report and continuing to p. 187, the case dealt with dispositions of money and farm implements and Mr. Justice Urquhart said:

> The result was that although the properties into which the above moneys went and the aforesaid implements were divisible among his creditors anyone dealing with him "bona fide and for value" in respect of such after-acquired property was protected by virtue of sec. 67 ...

25 And continuing on p. 187 we find the following:

> And apparently it does not matter if the person dealing with the debtor had knowledge of the bankruptcy or not: See Cohen v. Mitchell (1890), 25 Q.B.D. 262. That case decides that until the trustee intervenes all transactions by an undischarged bankrupt after bankruptcy with a person dealing with him bona fide and for value in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee: See In Re Gadsby (1925), 7 C.B.R. 329, at 335. Both requirements must be present: the transaction must be bona fide and for value.

26 He goes further on on the same page to discuss the meaning of the term bona fide in that context. He says:

> "Bona fide" is defined in Murray's English Dictionary as meaning "in good faith, with sincerity, or genuinely". It is really the object of the transaction which counts. The bona fides required by sec. 67 has reference only to the conduct of the person dealing with the undischarged bankrupt. If he dealt in good faith, that of the debtor in respect of his creditors is immaterial.

27 And at p. 188 the following paragraph:

> The words "bona fide" in the section, I think, mean about the same as those often employed in statutes in connection with the word "purchaser". A bona fide

> purchaser means that he really should be a purchaser and not merely one who is taking a conveyance for another purpose.

28 Reference may also be had to Bankruptcy Law of Canada, (1960), by Houlden and Morawetz, where at p. 166 we find the following statement of the law:

> Until the trustee intervenes, all transactions by an undischarged bankrupt after his bankruptcy with a person dealing with him bona fide and for value in respect of his after-acquired property are valid whether with or without knowledge of the bankruptcy. Thus even if the person knows of the bankruptcy, the transaction with the debtor so long as it is bona fide and for value will be protected ...

29 In the instant case it is clear on the evidence and I conclude and find as a fact that the transactions in which the impugned payments were made were bona fide transactions within that term as defined in Hord. The payments were made for straightforward sales of goods sold and delivered by the defendant to the bankrupt on the usual terms and entirely without basis for comment save for the existence of the bankruptcy. Knowledge of bankruptcy, as is clearly indicated by the authorities to which I have referred, is immaterial in the circumstances. It is likewise clear, and I conclude and find as fact, that the transactions were for value. Indeed, there is no evidence or suggestion to the contrary. Equally clearly there is no evidence or suggestion to the contrary but that they occurred before any intervention by the trustee.

30 Counsel for the plaintiff placed some reliance on the provisions of the Act which are designed to cause an insolvent person or a bankrupt to cease trading and in this regard reference may be made to s. 143 (1)(c) of the Act and to s. 170 of the Act. Reference was also made by counsel on behalf of the plaintiff to Re Newman, [1956] O.W.N. 465, decided by Smily J. in 1956 where he says at p. 238:

> "But the policy of bankruptcy laws has always been to prevent bankrupts while undischarged from re-engaging in trade. People who sell goods to undischarged bankrupts do so at their peril."

31 Reference was also made to Re Proulx, [1946] O.W.N. 169, decided in 1945 by Urquhart J. and to the language of that learned judge at p. 172 where he is quoting a judgment of Orde J.A. in a earlier case:

> "That this conclusion operates harshly as against the subsequent creditors is, of course, apparent. But the policy of bankruptcy laws has always been to prevent bankrupts while undischarged from re-engaging in trade. People who sell goods to undischarged bankrupts do so at their peril and are not entitled to much sympathy when the peril becomes a reality."

32 There would appear to be little doubt that the public policy which dictates that trading stop

upon bankruptcy is to protect those who, without knowledge of bankruptcy, might advance credit to the bankrupt, an undischarged bankrupt, and thereby create a debt which would rank subsequent to the claims of pre-bankruptcy creditors. Those sections, however, are aimed at the conduct of the bankrupt and on the facts of this case have, in my view, no bearing on the position or rights of the defendant. If, as in this case, a person who has traded with the bankrupt elects to continue the trading after and with knowledge of the bankruptcy, I see nothing in the Act which denies him the benefit of s. 77. That there are certain latent perils in such a course of dealing has been pointed out in the judgments to which I have referred but they are perils which did not become a reality insofar as this defendant is concerned. It may also be of significance that in this case there is an element of public policy involved in sustaining a course of dealing entered into by the bankrupt in the entirely laudable exercise of providing a living for himself and his family. The claim on the second issue is likewise dismissed.

33 In my view costs should follow the event and should be upon the customary party-and-party scale. Counsel indicated some interest in speaking to the matter of costs and if a disposition other than that which I have just suggested is sought I may be spoken to in that regard.

34 I have endorsed the record: "For oral reasons given, plaintiff's claims are dismissed with costs to the defendant."

ANDERSON J.
qp/s/plh/qlafr

TAB NN

BCE Inc. and Bell Canada *Appellants/Respondents on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

BCE Inc. et Bell Canada *Appelantes/Intimées aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

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et

2008 SCC 69 (CanLII)

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

- and -

6796508 Canada Inc. *Appellant/Respondent on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

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Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

- et -

6796508 Canada Inc. *Appelante/Intimée aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada,

2008 SCC 69 (CanLII)

CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/ Appellants on cross-appeals*

and

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

Indexed as: BCE Inc. *v.* 1976 Debentureholders

Neutral citation: 2008 SCC 69.

File No.: 32647.

2008: June 17; 2008: June 20.

Reasons delivered: December 19, 2008.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Fiduciary duty of directors of corporation to act in accordance with best interests of corporation — Reasonable expectation of security holders of fair treatment — Directors approving change of control transaction which would affect economic interests of security holders — Whether evidence supported reasonable expectations

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

Répertorié : BCE Inc. *c.* Détenteurs de débentures de 1976

Référence neutre : 2008 CSC 69.

N° du greffe : 32647.

2008 : 17 juin; 2008 : 20 juin.

Motifs déposés : 19 décembre 2008.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Obligation fiduciaire des administrateurs envers la société d'agir au mieux des intérêts de la société — Attente raisonnable des détenteurs de valeurs mobilières d'être traités équitablement — Approbation par les administrateurs d'une opération de changement de contrôle qui porterait atteinte aux intérêts financiers de

* Le juge Bastarache a pris part au jugement du 20 juin 2008, mais n'a pas pris part aux présents motifs de jugement.

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asserted by security holders — Whether reasonable expectation was violated by conduct found to be oppressive, unfairly prejudicial or that unfairly disregards a relevant interest — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1)(a), 241.

Commercial law — Corporations — Plan of arrangement — Proposed plan of arrangement not arranging rights of security holders but affecting their economic interests — Whether plan of arrangement was fair and reasonable — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192.

At issue is a plan of arrangement that contemplates the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers (the "Purchaser") by way of a leveraged buyout. After BCE was put "in play", an auction process was held and offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. BCE's board of directors found that the Purchaser's offer was in the best interests of BCE and BCE's shareholders. Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser represents a premium of approximately 40 percent over the market price of BCE shares at the relevant time. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

The plan of arrangement was approved by 97.93 percent of BCE's shareholders, but was opposed by a group of financial and other institutions that hold debentures issued by Bell Canada. These debentureholders sought relief under the oppression remedy under s. 241 of the *Canada Business Corporations Act* ("*CBCA*"). They also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA*. The crux of their complaints is that, upon the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status.

détenteurs de valeurs mobilières — Les attentes raisonnables invoquées par les détenteurs de valeurs mobilières étaient-elles étayées par la preuve? — Une attente raisonnable a-t-elle été frustrée par un comportement constituant un abus, un préjudice injuste ou une omission injuste de tenir compte d'un intérêt pertinent? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1)a), 241.

Droit commercial — Sociétés par actions — Plan d'arrangement — Plan d'arrangement proposé ne visant pas les droits de détenteurs de valeurs mobilières, mais portant atteinte à leurs intérêts financiers — Le plan d'arrangement était-il équitable et raisonnable? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 192.

Le litige porte sur un plan d'arrangement concernant l'achat des actions de BCE Inc. (« BCE ») par un consortium (l'« acquéreur ») au moyen d'une acquisition par emprunt. BCE ayant été « mise en jeu », un processus d'enchères a été lancé et trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada, une filiale en propriété exclusive de BCE. Le conseil d'administration de BCE a conclu que l'offre d'achat de l'acquéreur servait les intérêts de BCE et des actionnaires de BCE. Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE. Le prix offert par l'acquéreur représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions de BCE à la date pertinente. Le capital requis pour l'opération s'élève au total à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. L'acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

Les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100, mais des détenteurs de débentures de Bell Canada, notamment des institutions financières, s'y sont opposés. Ces détenteurs de débentures ont intenté un recours pour abus prévu à l'art. 241 de la *Loi canadienne sur les sociétés par actions* (« *LCSA* »). Ils ont aussi allégué que l'arrangement n'était pas « équitable et raisonnable » et contesté l'approbation de l'arrangement exigée par l'art. 192 *LCSA*. Leur principal argument est que, une fois la transaction achevée, la valeur marchande à court terme de leurs débentures fléchirait de 20 p. 100 en moyenne, et leurs débentures ne seraient plus cotées comme admissibles pour des placements.

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The Quebec Superior Court approved the arrangement as fair and dismissed the claim for oppression. The Court of Appeal set aside that decision, finding the arrangement had not been shown to be fair and held that it should not have been approved. It held that the directors had not only the duty to ensure that the debentureholders' contractual rights would be respected, but also to consider their reasonable expectations which, in its view, required directors to consider whether the adverse impact on debentureholders' economic interests could be alleviated. Since the requirements of s. 192 of the *CBCA* were not met, the court found it unnecessary to consider the oppression claim. BCE and Bell Canada appealed the overturning of the trial judge's approval of the plan of arrangement, and the debentureholders cross-appealed the dismissal of the claims for oppression.

La Cour supérieure du Québec a approuvé l'arrangement, le jugeant équitable, et elle a rejeté la demande de redressement pour abus. La Cour d'appel a annulé cette décision, jugeant que le caractère équitable de l'arrangement n'avait pas été démontré et qu'il n'aurait pas dû être approuvé. Elle a statué que les administrateurs avaient l'obligation non seulement de s'assurer du respect des droits contractuels des détenteurs de débentures, mais aussi de tenir compte de leurs attentes raisonnables, ce qui, selon elle, les obligeait à examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Les conditions fixées par l'art. 192 n'étant pas remplies, la cour a jugé inutile d'examiner la demande de redressement pour abus. BCE et Bell Canada ont interjeté appel de l'annulation de l'approbation du plan d'arrangement par le juge de première instance, et les détenteurs de débentures ont formé un appel incident contre le rejet des demandes de redressement pour abus.

Held: The appeals should be allowed and the cross-appeals dismissed.

Arrêt : Les pourvois sont accueillis et les pourvois incidents sont rejetés.

The s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. The Court of Appeal's decision rested on an approach that erroneously combined the substance of the s. 241 oppression remedy with the onus of the s. 192 arrangement approval process, resulting in a conclusion that could not have been sustained under either provision, read on its own terms. [47] [165]

La demande de redressement pour abus prévue à l'art. 241 et l'approbation judiciaire d'une modification de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. La décision de la Cour d'appel s'appuie sur un raisonnement qui combine à tort les éléments substantiels de la demande de redressement pour abus de l'art. 241 et le fardeau de la preuve applicable à l'approbation d'un arrangement exigée par l'art. 192, ce qui l'a menée à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier. [47] [165]

1. *The Section 241 Oppression Remedy*

1. *La demande de redressement pour abus prévue à l'art. 241*

The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]

La demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity d'un vaste éventail de parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours confère au tribunal un vaste pouvoir d'imposer le respect non seulement du droit, mais de l'équité. Le sort d'une demande de redressement pour abus dépend en outre des faits : ce qui est juste et équitable est fonction des attentes raisonnables des parties intéressées compte tenu du contexte et des rapports entre les parties. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"

Le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étayet-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste

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of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one. [81-83]

Here, the debentureholders did not establish that they had a reasonable expectation that the directors of BCE would protect their economic interests by putting forth a plan of arrangement that would maintain the investment grade trading value of their debentures. The trial judge concluded that this expectation was not made out on the evidence, given the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, the fact that the claimants could have protected themselves against reductions in market value by negotiating appropriate contractual terms, and that any statements by Bell Canada suggesting a commitment to retain investment grade ratings for the debentures were accompanied by warnings precluding such expectations. The trial judge recognized that the content of the directors' fiduciary duty to act in the best interests of the corporation was affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation

de tenir compte » d'un intérêt pertinent? En ce qui a trait à la première question, les facteurs utiles d'appréciation d'une attente raisonnable qui ressortent de la jurisprudence incluent : les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées. En ce qui concerne la deuxième question, le plaignant doit prouver que le défaut de répondre à son attente raisonnable est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241. [68] [72] [89] [95]

Lorsque surgit un conflit d'intérêts, les administrateurs doivent le résoudre conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société. Dans son ensemble, la jurisprudence en matière d'abus confirme que cette obligation inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues ni de principe voulant que les intérêts d'un groupe doivent prévaloir sur ceux d'un autre groupe. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable. Lorsqu'il est impossible de satisfaire toutes les parties intéressées, il importe peu que les administrateurs aient écarté d'autres transactions qui n'étaient pas plus avantageuses que celle qui a été choisie. [81-83]

En l'espèce, les détenteurs de débentures n'ont pas démontré qu'ils s'attendaient raisonnablement à ce que les administrateurs de BCE protègent leurs intérêts financiers en proposant un plan d'arrangement qui maintiendrait la valeur marchande de leurs débentures cotées comme admissibles pour des placements. Le juge de première instance a conclu que la preuve de cette attente n'avait pas été établie compte tenu du contexte global de la relation, de la nature de la société, de sa situation en tant que cible de plusieurs offres d'achat, du fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées et que les déclarations de Bell Canada concernant son engagement à conserver aux débentures une cote de placements admissibles s'accompagnaient de mises en garde excluant pareilles attentes. Le juge de première instance a reconnu que le contenu de l'obligation fiduciaire des administrateurs d'agir au mieux des intérêts de la société dépendait des divers intérêts en jeu dans le contexte du processus

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but which benefited some groups at the expense of others. All three competing bids required Bell Canada to assume additional debt. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. In this case, there was no error in the principles applied by the trial judge nor in his findings of fact. [96-100]

d'enchères et qu'ils pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada. La règle de l'appréciation commerciale commande la retenue à l'égard des décisions commerciales prises de bonne foi par les administrateurs dans l'exécution des fonctions pour lesquelles ils ont été élus. En l'espèce, le juge de première instance n'a pas commis d'erreur dans son application des principes ni dans ses conclusions de fait. [96-100]

The debentureholders had also argued that they had a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures. While the evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration, it is apparent that the directors considered the interests of debentureholders, and concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests and did not amount to "unfair disregard" of the interests of debentureholders. What the claimants contend is, in reality, an expectation that the directors would take positive steps to restructure the purchase in a way that would provide a satisfactory price to shareholders and preserve the high market value of the debentures. There was no evidence that it was reasonable to suppose this could be achieved, since all three bids involved a substantial increase in Bell Canada's debt. Commercial practice and reality also undermine their claim. Leveraged buyouts are not unusual or unforeseeable, and the debentureholders could have negotiated protections in their contracts. Given the nature and the corporate history of Bell Canada, it should not have been outside the contemplation of debentureholders that plans of arrangements could occur in the future. While the debentureholders rely on the past practice of maintaining the investment grade rating of the debentures, the events precipitating the leveraged buyout transaction were market realities affecting what were reasonable practices. No representations had been made to debentureholders upon which they could reasonably rely. [96] [102] [104-106] [108-110]

Les détenteurs de débentures avaient aussi fait valoir qu'ils s'attendaient raisonnablement à ce que les administrateurs tiennent compte de leurs intérêts financiers en préservant la valeur marchande des débentures. La preuve, considérée objectivement, permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures dans leurs décisions sur les diverses offres à l'étude, mais ils ont manifestement pris en considération les intérêts des détenteurs de débentures et conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures et ne constituait pas une « omission injuste de tenir compte » de leurs intérêts. Ce que les plaignants font valoir en réalité, c'est qu'ils comptaient que les administrateurs adoptent des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint, puisque les trois offres comportaient toutes un accroissement substantiel de l'endettement de Bell Canada. Le réalité et les pratiques commerciales affaiblissent aussi leur prétention. Les acquisitions par emprunt n'ont rien d'inhabituel ou d'imprévisible, et les détenteurs de débentures auraient pu négocier des mesures de protection contractuelles. Compte tenu de la nature et de l'historique de Bell Canada, les détenteurs de débentures devaient savoir que des arrangements pouvaient être conclus dans l'avenir. Bien que les détenteurs de débentures invoquent les pratiques antérieures selon lesquelles la cote des débentures comme admissibles pour des placements avait toujours été maintenue, les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie des conditions du marché au gré desquelles les pratiques raisonnables peuvent changer. Aucune déclaration à laquelle les détenteurs de débentures auraient pu raisonnablement se fier ne leur avait été faite. [96] [102] [104-106] [108-110]

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With respect to the duty on directors to resolve the conflicting interests of stakeholders in a fair manner that reflected the best interests of the corporation, the corporation's best interests arguably favoured acceptance of the offer at the time. The trial judge accepted the evidence that Bell Canada needed to undertake significant changes to be successful, and the momentum of the market made a buyout inevitable. Considering all the relevant factors, the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression. [111-113]

En ce qui a trait à l'obligation des administrateurs de résoudre les conflits entre parties intéressées de façon équitable conformément aux intérêts de la société, il est possible de soutenir que les intérêts de la société favorisaient à l'époque l'acceptation de l'offre. Le juge de première instance a retenu la preuve tendant à démontrer que Bell Canada devait procéder à des changements substantiels pour continuer à prospérer et la dynamique du marché rendait l'acquisition inévitable. Compte tenu de tous les facteurs pertinents, les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. [111-113]

2. *The Section 192 Approval Process*

The s. 192 approval process is generally applicable to change of control transactions where the arrangement is sponsored by the directors of the target company and the goal is to require some or all shareholders to surrender their shares. The approval process focuses on whether the arrangement, viewed objectively, is fair and reasonable. Its purpose is to permit major changes in corporate structure to be made while ensuring that individuals whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance between conflicting interests. In seeking court approval of an arrangement, the onus is on the corporation to establish that (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is "fair and reasonable". [119] [126] [128] [137]

2. *Le processus d'approbation prévu à l'art. 192*

Le processus d'approbation prévu à l'art. 192 s'applique en général aux changements de contrôle lorsque l'arrangement est appuyé par les administrateurs de la société ciblée et vise la remise d'une partie ou de la totalité des actions. Le processus d'approbation est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif. Il a pour but de permettre la réalisation de changements importants dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés, et l'esprit du processus consiste à établir un juste équilibre entre des intérêts opposés. La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est « équitable et raisonnable ». [119] [126] [128] [137]

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan. Courts must focus on the terms and impact of the arrangement itself, rather than the process by which it was reached, and must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. Courts on a

Pour approuver un plan d'arrangement, parce qu'il le juge équitable et raisonnable, un tribunal doit être convaincu que l'arrangement a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. Pour décider si un arrangement répond à ces critères, on tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société, l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés. En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan. Le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir, et être convaincu que l'intérêt de la société justifie le fardeau imposé par

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s. 192 application should refrain from substituting their views of the "best" arrangement, but should not surrender their duty to scrutinize the arrangement. [136] [138] [145] [151] [154-155]

l'arrangement aux détenteurs de valeurs mobilières. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception du « meilleur » arrangement, mais ne doivent pas renoncer pour autant à s'acquitter de leur obligation d'examiner l'arrangement. [136] [138] [145] [151] [154-155]

The purpose of s. 192 suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. It is the fact that the corporation is permitted to alter individual rights that places the matter beyond the power of the directors and creates the need for shareholder and court approval. However, in some circumstances, interests that are not strictly legal could be considered. The fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities generally does not, without more, constitute a circumstance where non-legal interests should be considered on a s. 192 application. [133-135]

L'objet de l'art. 192 laisse croire qu'il ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. C'est le fait que la société puisse modifier les droits des parties qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Toutefois, dans certaines circonstances, des intérêts qui ne constituent pas des droits à strictement parler peuvent être pris en considération. Une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, une situation où de simples intérêts doivent être pris en compte pour l'examen d'une demande sous le régime de l'art. 192. [133-135]

Here, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192, and the trial judge was correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests, and he did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The arrangement did not fundamentally alter the debentureholders' rights, as the investment and return they contracted for remained intact. It was well known that alteration in debt load could cause fluctuations in the trading value of the debentures, and yet the debentureholders had not contracted against this contingency. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada. No superior arrangement had been put forward and BCE had been assisted throughout by expert legal and financial advisors. Recognizing that there is no such thing as a perfect arrangement, the trial judge correctly concluded that the arrangement

En l'espèce, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat porte sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures ne constituaient pas une catégorie touchée pour l'application de cette disposition et le juge de première instance était fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures et il n'a pas commis d'erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. L'arrangement ne modifiait pas fondamentalement les droits des détenteurs de débentures, l'investissement et le rendement prévus par leur contrat demeurant inchangés. Il était bien connu qu'une variation de l'endettement pouvait faire fluctuer la valeur marchande des débentures et les détenteurs de débentures ne se sont malgré tout pas prémunis contractuellement contre cette éventualité. Il était clair pour le juge que, pour la continuité de la société, l'approbation

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had been shown to be fair and reasonable. [157] [161] [163-164]

d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance. Reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu à bon droit que le caractère équitable et raisonnable de l'arrangement avait été démontré. [157] [161] [163-164]

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APPEALS and CROSS-APPEALS from judgments of the Quebec Court of Appeal (Robert C.J.Q. and Otis, Nuss, Pelletier and Dalphond JJ.A.), [2008]

POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Otis,

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R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] Q.J. No. 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] Q.J. No. 4170 (QL), 2008 QCCA 930; [2008] Q.J. No. 4171 (QL), 2008 QCCA 931; [2008] Q.J. No. 4172 (QL), 2008 QCCA 932; [2008] Q.J. No. 4174 (QL), 2008 QCCA 933; [2008] Q.J. No. 4175 (QL), 2008 QCCA 934, setting aside decisions by Silcoff J., [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] Q.J. No. 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] Q.J. No. 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] Q.J. No. 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] Q.J. No. 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] Q.J. No. 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Appeals allowed and cross-appeals dismissed.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* and *Steve Tenai*, for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* and *Christopher L. Richter*, for the appellant/respondent on cross-appeals 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* and *Mark Meland*, for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* and *Erin Cowling*, for the respondent/appellant on cross-appeals Group of 1997 Debentureholders.

Written submissions only by *Robert Tessier* and *Ronald Auclair*, for the respondent Computershare Trust Company of Canada.

Christian S. Tacit, for the intervener Catalyst Asset Management Inc.

Nuss, Pelletier et Dalphond), [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] J.Q. n° 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] J.Q. n° 4170 (QL), 2008 QCCA 930; [2008] J.Q. n° 4171 (QL), 2008 QCCA 931; [2008] J.Q. n° 4172 (QL), 2008 QCCA 932; [2008] J.Q. n° 4174 (QL), 2008 QCCA 933; [2008] J.Q. n° 4175 (QL), 2008 QCCA 934, qui ont infirmé des décisions du juge Silcoff, [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] J.Q. n° 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] J.Q. n° 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] J.Q. n° 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] J.Q. n° 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] J.Q. n° 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Pourvois principaux accueillis et pourvois incidents rejetés.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* et *Steve Tenai*, pour les appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* et *Christopher L. Richter*, pour l'appelante/intimée aux pourvois incidents 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* et *Mark Meland*, pour les intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* et *Erin Cowling*, pour l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997.

Argumentation écrite seulement par *Robert Tessier* et *Ronald Auclair*, pour l'intimée la Société de fiducie Computershare du Canada.

Christian S. Tacit, pour l'intervenante Catalyst Asset Management Inc.

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Raynold Langlois, *Q.C.*, and *Gerald Apostolatos*, for the intervener Matthew Stewart.

Raynold Langlois, *c.r.*, et *Gerald Apostolatos*, pour l'intervenant Matthew Stewart.

The following is the judgment delivered by

Version française du jugement rendu par

THE COURT —

LA COUR —

I. Introduction

I. Introduction

[1] These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

[1] Les pourvois ont pour origine une offre d'acquisition visant la totalité des actions d'une grande société de télécommunications, BCE Inc. (« BCE »), offre émanant d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario (« RREO ») et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, filiale en propriété exclusive de BCE. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations. Lors de l'examen de la demande d'approbation d'un arrangement exigée par l'art. 192 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« *LCSA* »), ils ont fait valoir que l'arrangement ne devait pas être jugé équitable. Ils ont également plaidé qu'il constituait un abus de leurs droits au sens de l'art. 241 de la *LCSA*.

[2] The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

[2] Le juge Silcoff de la Cour supérieure du Québec a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus. La Cour d'appel du Québec a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Elle n'a donc pas jugé utile d'examiner la demande de redressement pour abus.

[3] On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

[3] Le 20 juin 2008, notre Cour a accueilli les pourvois interjetés contre le refus de la Cour d'appel d'approuver l'arrangement et elle a rejeté deux pourvois incidents formés à l'encontre du rejet des demandes de redressement pour abus, avec motifs à suivre. Voici maintenant ces motifs.

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II. Facts

[4] At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

[5] Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

[6] At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

[7] Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance

II. Les faits

[4] Le litige porte sur un plan d'arrangement d'une valeur approximative de 52 milliards de dollars concernant l'achat des actions de BCE au moyen d'une acquisition par emprunt. Un groupe de détenteurs de débentures, composé principalement d'institutions financières, s'est opposé à l'arrangement. Son principal argument est que l'arrangement ferait fléchir la valeur marchande de leurs débentures de 20 p. 100 en moyenne, tout en permettant aux actionnaires de toucher une prime d'environ 40 p. 100 par rapport au cours des actions de BCE.

[5] Bell Canada a été constituée en société en 1880 par une loi spéciale du Parlement du Canada. Elle a ensuite été prorogée en vertu de la *LCSA*. BCE est une société de portefeuille de gestion qui a été constituée en 1970, puis prorogée en vertu de la *LCSA* en 1979. Bell Canada est devenue une filiale en propriété exclusive de BCE en 1983, conformément à un plan d'arrangement en vertu duquel les actionnaires de Bell Canada ont reçu des actions de BCE en échange de leurs actions. BCE et Bell Canada sont des entités juridiques distinctes possédant chacune leurs propres chartes, statuts constitutifs et règlements administratifs. Depuis janvier 2003, elles ont les mêmes administrateurs et quelques hauts dirigeants en commun.

[6] À l'époque pertinente pour l'examen des pourvois, Bell Canada avait une dette à long terme de 7,2 milliards de dollars composée de débentures émises en vertu de trois actes de fiducie établis respectivement en 1976, 1996 et 1997. Ces actes ne comportent aucune disposition concernant le changement de contrôle ou la cote financière et ils autorisent expressément Bell Canada à contracter ou à garantir de nouvelles dettes sous réserve de certaines restrictions.

[7] Les débentures de Bell Canada étaient considérées comme des placements sûrs par les investisseurs et, jusqu'à la proposition d'acquisition par emprunt, elles étaient cotées admissibles pour des placements. Les détenteurs de débentures sont des institutions financières, des caisses de retraite et

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companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada. Ce sont des participants d'envergure dans les marchés de la dette, qui ont une expérience approfondie et une connaissance historique des marchés financiers.

[8] A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

[8] Le secteur d'activité de BCE a connu des changements d'ordre technologique, réglementaire et concurrentiel qui en ont profondément modifié le cadre. Auparavant très réglementée et axée sur la téléphonie classique par ligne téléphonique, l'industrie des télécommunications obéit aujourd'hui principalement aux forces du marché et se caractérise par l'augmentation continue des participants, l'arrivée de nouveaux concurrents et des attentes croissantes en matière de services aux consommateurs. Pour s'ajuster à ces changements, BCE a établi un nouveau plan d'entreprise mettant l'accent sur son activité centrale, les télécommunications, et prévoyant l'abandon de sa participation dans des entreprises non liées à ce secteur. Ce plan, toutefois, n'a pas donné les résultats escomptés, de sorte que les gains des actionnaires de BCE sont demeurés beaucoup moindres que ceux des actionnaires de ses concurrents.

[9] Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

[9] En outre, à la fin de 2006, BCE disposait d'un important flux de trésorerie et ses indicateurs financiers étaient très positifs, caractéristiques qui en faisaient une cible toute désignée pour une acquisition aux yeux des analystes financiers. Au mois de novembre 2006, BCE a appris que Kohlberg Kravis Roberts & Co. (« KKR »), une société américaine gérant un fonds privé d'investissement, pouvait être intéressée par une transaction visant BCE. Monsieur Michael Sabia, président et chef de la direction de BCE, a pris contact avec KKR pour lui indiquer que BCE n'était alors pas intéressée par une telle transaction.

[10] In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with

[10] Au mois de février 2007, la rumeur que KKR et l'Office d'investissement du régime de pensions du Canada préparaient le montage financier d'une offre d'achat de BCE a recommencé à courir. Peu après, d'autres rumeurs se sont propagées, selon lesquelles une société bancaire d'investissement assistait le RREO relativement à une éventuelle

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BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

transaction visant BCE. Après avoir rencontré le conseil d'administration de BCE (« Conseil d'administration »), M. Sabia a communiqué avec les représentants de KKR et avec ceux du RREO et leur a réitéré que BCE n'était pas intéressée à une « opération de fermeture » parce que BCE avait pour objectif de créer une valeur actionnariale par la réalisation de son plan d'entreprise de 2007.

[11] On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

[11] Le 29 mars 2007, à la suite de la parution à la une du *Globe and Mail* d'un article faisant incorrectement état de discussions entre BCE et un consortium constitué de KKR et du RREO, BCE a publié un communiqué de presse dans lequel elle affirmait qu'aucune discussion n'était en cours avec des fonds privés d'investissement au sujet d'une « opération de fermeture » de BCE.

[12] On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

[12] Le 9 avril 2007, le RREO a déposé un formulaire 13D auprès de la Securities and Exchange Commission des États-Unis, dans lequel il indiquait que, de passive, sa participation comme actionnaire de BCE devenait active. Le dépôt de ce formulaire est venu renforcer l'hypothèse, véhiculée par les médias, de la transformation possible de BCE en société fermée.

[13] Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

[13] Devant la recrudescence des conjectures et la « mise en jeu » de BCE résultant du dépôt du formulaire 13D par le RREO, le Conseil d'administration a convoqué ses conseillers juridiques et financiers afin d'examiner différentes options stratégiques. Il en est venu à la conclusion qu'il était dans l'intérêt de BCE et de ses actionnaires de bénéficier de la concurrence entre plusieurs groupes soumissionnaires et de parer au risque qu'un groupe soumissionnaire mobilise à lui seul une telle part des prêts et des capitaux disponibles qu'il empêcherait les groupes concurrents potentiels de participer efficacement au processus d'enchères.

[14] In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its

[14] Dans un communiqué de presse daté du 17 avril 2007, BCE a annoncé qu'elle examinait les options stratégiques qui s'offraient à elle en vue d'améliorer davantage la valeur actionnariale. Le même jour, elle a mis sur pied un comité de surveillance stratégique (« CSS »), dont aucun des

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mandate was, notably, to set up and supervise the auction process.

membres n'avait déjà fait partie de la direction de BCE. Le mandat du CSS consistait notamment à mettre en marche et à surveiller le processus d'enchères.

[15] Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

[15] À la suite du communiqué de presse du 17 avril, plusieurs détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant la possibilité d'une acquisition par emprunt. Ils voulaient recevoir l'assurance que le Conseil d'administration tiendrait compte de leurs intérêts. BCE leur a répondu par écrit qu'elle avait l'intention de respecter les dispositions contractuelles des actes de fiducie.

[16] On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

[16] Le 13 juin 2007, BCE a communiqué aux soumissionnaires potentiels les règles de soumission des propositions ainsi qu'une ébauche générale d'entente définitive. Elle les a informés que, lorsqu'elle étudierait les offres, elle tiendrait compte de l'incidence du mécanisme de financement proposé sur BCE et sur les détenteurs de débentures de Bell Canada et, en particulier, du fait que leurs offres respectent ou non les droits contractuels que les actes de fiducie conféraient aux détenteurs de débentures.

[17] Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. (the "Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

[17] Trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada. Les trois offres auraient probablement pour effet d'abaisser la cote des débentures au-dessous de celle requise pour qu'elles constituent un placement admissible. L'offre initiale présentée par l'appelante 6796508 Canada Inc. (l'« Acquéreur »), une société constituée par le RREO, et des membres du groupe de Providence Equity Partners Inc. et de Madison Dearborn Partners LLC, prévoyait une fusion de Bell Canada qui aurait déclenché l'exercice des droits de vote des détenteurs de débentures en vertu des actes de fiducie. Le Conseil d'administration a informé l'Acquéreur que ce projet de fusion rendait son offre moins attrayante. L'Acquéreur a donc présenté une nouvelle offre dans laquelle il proposait une structure différente pour la transaction qui n'impliquait pas de fusion de Bell Canada. De plus, il haussait à 42,75 $ le prix de 42,25 $ initialement offert pour chaque action.

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[18] The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

[18] Après avoir étudié les trois offres, le Conseil d'administration a conclu, suivant la recommandation du CSS, que l'offre révisée de l'Acquéreur servait les intérêts de BCE et des actionnaires de BCE. Pour évaluer le caractère équitable de la contrepartie qui serait versée aux actionnaires selon cette offre, le Conseil d'administration et le CSS ont sollicité l'avis de plusieurs conseillers financiers réputés. Par ailleurs, l'Acquéreur a accepté de prêter son concours au Conseil d'administration pour l'obtention d'un certificat de solvabilité attestant que BCE demeurerait solvable (et serait donc en mesure de respecter ses obligations une fois la transaction achevée). Le Conseil d'administration n'a pas sollicité l'avis d'experts sur le caractère équitable de la transaction pour les détenteurs de débentures, estimant que l'arrangement ne visait pas leurs droits.

[19] On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

[19] Le 30 juin 2007, l'Acquéreur et BCE ont conclu une entente définitive. Le 21 septembre suivant, les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100.

[20] Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

[20] Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE au prix de 42,75 $ l'action ordinaire, ce qui représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions en date du 28 mars 2007. Le capital requis pour la transaction s'élève à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. Enfin, l'Acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

[21] As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

[21] L'annonce de cette entente a entraîné une baisse de la cote de crédit des débentures de sorte que, lors du procès, elles n'étaient plus considérées comme des placements admissibles. Du point de vue des détenteurs de débentures, cette décote pose problème à deux égards. Premièrement, elle a entraîné une diminution de la valeur des débentures de l'ordre d'environ 20 p. 100 en moyenne. Deuxièmement, elle risque d'obliger les détenteurs de débentures qui sont assujettis à des restrictions concernant la cote de crédit des titres qu'ils détiennent à vendre leurs débentures à perte.

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[22] The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us: (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

[22] En première instance, les détenteurs de débentures ont invoqué plusieurs motifs d'opposition à l'arrangement. Ils ont d'abord invoqué la disposition de la *LCSA* applicable en cas d'abus, l'art. 241. Ils ont ensuite contesté la demande d'approbation de l'arrangement exigée par l'art. 192 de la *LCSA* en alléguant que l'arrangement n'était pas « équitable et raisonnable » en raison de ses effets préjudiciables sur leurs intérêts financiers. Enfin, ils ont présenté des demandes de jugement déclaratoire fondées sur les actes de fiducie, sur lesquelles la Cour n'est pas appelée à se prononcer : (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

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III. Judicial History

III. Historique judiciaire

[23] The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[23] Le juge de première instance a examiné les demandes de redressement pour abus à la fois contre Bell Canada et contre BCE, puisque l'art. 241 vise la situation provoquée par « la société ou l'une des personnes morales de son groupe ». Il a rejeté ces recours parce que, selon lui, la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue : (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests

[24] Pour parvenir à ces conclusions, le juge a considéré que l'art. 122 de la *LCSA* imposait aux administrateurs de BCE l'obligation fiduciaire d'agir au mieux des intérêts de la société. Selon lui, bien que les intérêts de la société ne doivent pas être confondus avec ceux des actionnaires ou d'autres parties intéressées, le droit des sociétés reconnaît l'existence de différences fondamentales entre les actionnaires et les détenteurs de titres de créance. À son avis, ces différences ont une incidence sur le contenu de l'obligation fiduciaire des administrateurs. Ainsi, leur devoir d'agir au mieux des intérêts de la société pourrait les obliger à

of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

approuver des transactions qui, tout en servant les intérêts de la société, privilégient une partie ou la totalité des actionnaires au détriment d'autres parties intéressées. Le juge a aussi indiqué que, suivant la règle de l'appréciation commerciale, les tribunaux canadiens ont tendance à faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi et dans l'exécution des fonctions que les actionnaires leur ont confiées en les élisant.

[25] The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

[25] Le juge de première instance a statué que les attentes raisonnables des détenteurs de débentures doivent être évaluées objectivement et qu'elles doivent, à moins de motifs impérieux, découler des actes de fiducie et des prospectus d'émission des débentures. Les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles n'ont été d'aucun secours pour les détenteurs de débentures, car ces déclarations étaient accompagnées de mises en garde, réitérées dans les prospectus d'émission des débentures, qui excluaient toute attente quant au maintien indéfini de cette politique. En outre, le fait que les détenteurs de débentures auraient pu se protéger contractuellement contre les risques associés à un changement de contrôle en négociant des clauses de protection rendait leurs prétendues attentes déraisonnables. Le fait que la transaction serait profitable pour les actionnaires alors qu'elle désavantagerait les détenteurs de débentures ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que leurs auteurs étaient disposés à traiter les détenteurs de débentures différemment. Par conséquent, la réalisation de certains risques par suite des décisions prises par les administrateurs en conformité avec leur obligation fiduciaire envers la société ne constituait ni un abus des droits des détenteurs de débentures ni une omission injuste de tenir compte de leurs intérêts.

[26] Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA*: (2008), 43 B.L.R. (4th) 1, 2008 QCCS

[26] Après avoir rejeté les demandes de redressement pour abus, le juge de première instance a examiné la demande d'approbation de la transaction exigée par l'art. 192 de la *LCSA* : (2008), 43 B.L.R.

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905. He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

(4th) 1, 2008 QCCS 905. Il a refusé aux détenteurs de débentures le droit de voter sur l'arrangement, estimant que celui-ci ne compromettait pas leurs droits et qu'il serait injuste de leur permettre en fait d'opposer leur veto au vote des actionnaires. Toutefois, pour déterminer si l'arrangement était équitable et raisonnable — la question déterminante pour l'octroi de l'approbation — le juge a examiné le caractère équitable de la transaction à l'égard à la fois des actionnaires et des détenteurs de débentures, et il a conclu que l'arrangement était équitable et raisonnable. Il a pris en compte la nécessité de l'arrangement pour la continuité des activités de Bell Canada; le fait que le Conseil d'administration — constitué presque entièrement d'administrateurs indépendants — avait déterminé que l'arrangement était équitable et raisonnable et qu'il servait au mieux les intérêts de BCE et des actionnaires; l'approbation de l'arrangement par plus de 97 p. 100 des actionnaires; le fait que l'arrangement était l'aboutissement d'un processus rigoureux d'analyse stratégique et d'enchères; l'aide de conseillers juridiques et financiers renommés reçue par le Conseil d'administration pendant tout le processus; l'absence d'offre supérieure; et le fait que l'offre ne modifiait ni ne visait les droits contractuels des détenteurs de débentures. Bien que l'offre modifie les intérêts financiers des détenteurs de débentures, au sens où l'accroissement de l'endettement ferait fléchir la valeur marchande de leurs titres, leurs droits contractuels demeuraient intacts. Le juge de première instance a souligné que les détenteurs de débentures auraient pu se protéger contractuellement contre ce risque, mais qu'ils ne l'avaient pas fait. Il a conclu dans l'ensemble que, compte tenu de tous les facteurs pertinents, l'arrangement était équitable et raisonnable et devait être approuvé.

[27] The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, the Court of Appeal found that the directors were required to consider

[27] La Cour d'appel a accueilli les appels, jugeant que BCE n'avait pas démontré que la transaction était équitable et raisonnable pour les détenteurs de débentures, de sorte qu'elle ne satisfaisait pas au critère d'approbation d'un arrangement en vertu de l'art. 192. S'appuyant sur nos motifs dans l'affaire *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68, elle a conclu que les administrateurs avaient l'obligation

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the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

d'examiner les intérêts non contractuels des détenteurs de débentures. À son avis, les déclarations que Bell Canada avaient faites au cours des années pouvaient avoir créé des attentes raisonnables qui s'ajoutaient aux droits contractuels des détenteurs de débentures. Les administrateurs n'avaient donc pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. Comme cet examen n'avait pas été fait, BCE ne s'était pas acquittée de son obligation d'établir le caractère équitable et raisonnable de l'arrangement pour l'application de l'art. 192. La Cour d'appel a donc infirmé l'ordonnance d'approbation rendue par le juge de première instance : (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

[28] La Cour d'appel a jugé inutile d'examiner les demandes de redressement pour abus fondées sur l'art. 241, estimant que le rejet de la demande d'approbation visée à l'art. 192 en scellait en fait le sort. Selon elle, lorsqu'une demande d'approbation présentée en vertu de l'art. 192 est contestée, les détenteurs de valeurs mobilières touchés n'ont généralement nullement besoin de présenter une demande de redressement pour abus sous le régime de l'art. 241.

[29] BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

[29] BCE et Bell Canada se pourvoient devant notre Cour, soutenant que la Cour d'appel a infirmé à tort l'approbation du plan d'arrangement par le juge de première instance. Bien qu'ils aient officiellement formé un pourvoi incident fondé sur l'art. 241, les détenteurs de débentures font valoir que la Cour d'appel a statué à bon droit sur leurs prétentions sous le régime de l'art. 192, ce qui rendait théoriques leurs appels fondés sur l'art. 241.

IV. Issues

IV. Les questions en litige

[30] The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan

[30] En résumé, la Cour doit décider si la Cour d'appel a commis une erreur en rejetant les demandes de redressement pour abus des détenteurs de débentures fondée sur l'art. 241 et en infirmant

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of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

l'ordonnance d'approbation du plan d'arrangement prononcée par la Cour supérieure en vertu de l'art. 192. Pour ce faire, la Cour doit déterminer quelle preuve doit être faite pour établir l'existence d'un abus des droits des détenteurs de débentures dans le contexte du changement de contrôle d'une société et comment le juge saisi d'une demande d'approbation d'un arrangement en vertu de l'art. 192 de la *LCSA* doit traiter des prétentions de la nature de celles formulées en l'espèce par les détenteurs de débentures. Les présents motifs traitent de ces deux questions.

[31] In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

[31] Pour situer ces questions dans le contexte du droit canadien des sociétés, il peut être utile de décrire d'abord les recours que peuvent exercer les actionnaires et les autres parties intéressées sous le régime de la *LCSA* devant la perspective d'un changement de contrôle de la société.

[32] Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

[32] Par conséquent, les présents motifs comportent :

(1) un aperçu des droits, obligations et recours prévus par la *LCSA*;

(2) un examen du droit des détenteurs de débentures à un redressement en cas d'abus en application de l'art. 241;

(3) une analyse du droit des détenteurs de débentures à un redressement dans le contexte de l'approbation d'un arrangement exigée par l'art. 192.

[33] We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the

[33] Il n'est pas nécessaire pour trancher les pourvois de faire une distinction entre le comportement des administrateurs de BCE, la société de portefeuille, et celui des administrateurs de Bell Canada. Les mêmes administrateurs siégeaient aux conseils d'administration de l'une et l'autre de ces sociétés. Bien que la demande de redressement pour abus ait été dirigée à la fois contre Bell Canada et contre BCE, les juridictions inférieures ont tenu compte de toutes les circonstances dans lesquelles les administrateurs ont été appelés à prendre leurs décisions, ce qui incluait les obligations de Bell Canada envers ses détenteurs de débentures. Elles n'ont pas conclu que les administrateurs de BCE et de Bell

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distinct corporate character of the two entities does not figure in our analysis.

Canada auraient dû prendre des décisions différentes relativement aux deux sociétés. Par conséquent, le caractère distinct des deux entités ne sera pas pris en considération dans notre analyse.

V. Analysis

V. Analyse

A. *Overview of Rights, Obligations and Remedies Under the CBCA*

A. *Aperçu des droits, obligations et recours prévus par la LCSA*

[34] An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438. While the corporation is ongoing, shares confer no right to its underlying assets.

[34] Une composante essentielle d'une société est son capital social, qui est fractionné en actions : *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), p. 767; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438. Tant que la société continue d'exister, les actions ne confèrent aucun droit sur ses éléments d'actifs.

[35] A share "is not an isolated piece of property . . . [but] a 'bundle' of interrelated rights and liabilities": *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

[35] Une action « n'est pas un bien pris isolément [. . .] [mais] un "ensemble" de droits et d'obligations étroitement liés entre eux » : *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1025, le juge La Forest. Ces droits comprennent le droit à une part proportionnelle des éléments d'actif de la société lors de sa liquidation et un droit de regard sur la façon dont le conseil d'administration gère la société, qui s'exprime par l'exercice du droit de vote lors des assemblées des actionnaires.

[36] The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

[36] Les administrateurs sont responsables de la gouvernance de la société. À ce titre, ils doivent s'acquitter de deux obligations : leur obligation fiduciaire envers la société prévue à l'al. 122(1)*a*) (l'obligation fiduciaire) et l'obligation d'agir avec le soin, la diligence et la compétence dont ferait preuve une personne prudente en pareilles circonstances, prévue à l'al. 122(1)*b*) (l'obligation de diligence). Cette deuxième obligation n'est pas en cause en l'espèce, car on ne reproche pas aux administrateurs d'avoir manqué à leur obligation de diligence. L'obligation fiduciaire des administrateurs envers la société est toutefois en cause, plus particulièrement en ce qui concerne l'une de ses composantes, soit l'obligation de « traitement équitable » qui, comme on le verra, est fondamentale pour ce qui est des attentes raisonnables des parties intéressées qui présentent une demande de redressement pour abus.

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[37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

[37] L'obligation fiduciaire des administrateurs envers la société tire son origine de la common law. Elle leur impose d'agir au mieux des intérêts de la société. Souvent les intérêts des actionnaires et des parties intéressées concordent avec ceux de la société. Toutefois, lorsque ce n'est pas le cas, l'obligation des administrateurs est claire : elle est envers la société (*Magasins à rayons Peoples*).

[38] L'obligation fiduciaire des administrateurs est un concept large et contextuel. Elle ne se limite pas à la valeur des actions ou au profit à court terme. Dans le contexte de la continuité de l'entreprise, cette obligation vise les intérêts à long terme de la société. Son contenu varie selon la situation. Elle exige à tous le moins des administrateurs qu'ils veillent à ce que la société s'acquitte de ses obligations légales mais, selon le contexte, elle peut aussi englober d'autres exigences. Quoi qu'il en soit, l'obligation fiduciaire des administrateurs est de nature impérative; ils sont tenus d'agir au mieux des intérêts de la société.

[39] Selon l'arrêt *Magasins à rayons Peoples* de notre Cour, bien que les administrateurs *doivent* agir au mieux des intérêts de la société, il peut également être opportun, *sans être obligatoire*, qu'ils tiennent compte de l'effet des décisions concernant la société sur l'actionnariat ou sur un groupe particuliers de parties intéressées. Comme l'ont indiqué les juges Major et Deschamps au par. 42 :

> Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

On verra plus loin que la jurisprudence sur les recours en cas d'abus a clarifié davantage le contenu de l'obligation fiduciaire des administrateurs quant à l'éventail des intérêts qu'ils doivent prendre en compte pour déterminer ce qui est au mieux des intérêts de la société, en agissant de façon équitable et responsable.

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[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[40] En déterminant ce qui sert au mieux les intérêts de la société, les administrateurs peuvent examiner notamment les intérêts des actionnaires, des employés, des créanciers, des consommateurs, des gouvernements et de l'environnement. Les tribunaux doivent faire preuve de la retenue voulue à l'égard de l'appréciation commerciale des administrateurs qui tiennent compte de ces intérêts connexes, comme le veut la « règle de l'appréciation commerciale ». Cette règle appelle les tribunaux à respecter une décision commerciale, pourvu qu'elle s'inscrive dans un éventail de solutions raisonnables possibles : voir *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44. Elle rend compte du fait que les administrateurs qui, aux termes du par. 102(1) de la *LCSA*, ont pour fonction de gérer les activités commerciales et les affaires internes de la société, sont souvent plus à même de déterminer ce qui sert au mieux ses intérêts. Cela vaut tant pour les décisions touchant les intérêts des parties intéressées que pour d'autres décisions relevant des administrateurs.

[41] Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

[41] Normalement, seul le bénéficiaire d'une obligation fiduciaire peut en réclamer l'exécution. Toutefois, dans le contexte du droit des sociétés, suivre cette règle se révélerait souvent illusoire. Il est en effet invraisemblable que les administrateurs qui contrôlent la société intentent contre eux-mêmes une action pour manquement à leur propre obligation fiduciaire. Les actionnaires ne peuvent agir à la place de la société. Leur seul pouvoir réside dans leur droit de regard sur le comportement des administrateurs qui s'exprime par l'exercice de leur droit de vote aux assemblées des actionnaires. D'autres parties intéressées n'ont même pas ce pouvoir.

[42] To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

[42] Pour pallier ces difficultés, la common law a élaboré des recours spéciaux visant à protéger les intérêts des actionnaires et des parties intéressées. La *LCSA* a maintenu, modifié et complété ces recours.

[43] The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling

[43] Le premier recours prévu par la *LCSA* est l'action oblique, décrite à l'art. 239, qui permet aux parties intéressées de forcer les administrateurs récalcitrants à s'acquitter de leurs obligations

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to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

envers la société. Le plaignant peut, avec l'autorisation du tribunal, intenter une action oblique au nom et pour le compte de la société ou de l'une de ses filiales (ou y intervenir) pour faire respecter un droit de la société, et notamment un droit corrélatif à une obligation des administrateurs envers la société. (L'obligation d'obtenir une autorisation vise à prévenir les actions frivoles ou vexatoires ainsi que les actions qui, même intentées de bonne foi, ne servent pas les intérêts de la société.)

[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[44] Deuxièmement, les administrateurs peuvent faire l'objet d'une action civile pour manquement à leur obligation de diligence. Comme il en a été fait mention, l'al. 122(1)*b*) de la *LCSA* oblige les administrateurs et les dirigeants d'une société à agir « avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente ». Cette obligation, à la différence de l'obligation fiduciaire énoncée à l'al. 122(1)*a*), n'est pas uniquement envers la société. Elle peut donc engager la responsabilité des administrateurs envers les autres parties intéressées, conformément aux principes régissant la responsabilité délictuelle et extracontractuelle : *Magasins à rayons Peoples*. L'alinéa 122(1)*b*) ne peut servir de fondement indépendant à un recours, mais les tribunaux peuvent s'en inspirer, conformément aux principes énoncés dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, pour définir la norme de conduite à laquelle on peut raisonnablement s'attendre.

[45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

[45] Un troisième recours de common law codifié par la *LCSA* est la demande de redressement pour abus prévue à l'art. 241. Contrairement à l'action oblique, qui a pour objet le respect d'un droit de la société proprement dite, la demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity des parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours est ouvert à un large éventail de parties intéressées — détenteurs de valeurs mobilières, créanciers, administrateurs et dirigeants.

[46] Additional "remedial" provisions are found in provisions of the *CBCA* providing for court

[46] Enfin, les dispositions de la *LCSA* qui exigent l'obtention d'une approbation judiciaire

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approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

dans certains cas ont aussi une vocation réparatrice. L'article 192, relatif aux arrangements, en est un exemple. Bien que cet article ne puisse pas être décrit comme une disposition qui établit un recours à proprement parler, il comporte des aspects qui s'y apparentent. Il vise les situations où une société envisage des changements fondamentaux qui modifient les droits d'une partie intéressée. La *LCSA* prévoit que de tels arrangements doivent être approuvés par le tribunal. Contrairement à l'action civile et à la demande de redressement pour abus, qui mettent l'accent sur le comportement des administrateurs, l'examen prévu à l'art. 192 exige simplement que le tribunal qui approuve un plan d'arrangement soit convaincu que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable. Si la société ne s'acquitte pas de son fardeau de prouver ces éléments, sa demande d'approbation sera rejetée et elle ne pourra procéder au changement proposé. Pour décider s'il approuvera l'arrangement, le tribunal entend les détenteurs de valeurs mobilières dont les droits sont visés par l'arrangement et qui s'y opposent, ce qui leur donne la possibilité de faire valoir leurs objections au changement proposé.

[47] Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims

[47] Deux de ces recours sont en cause en l'espèce : la demande de redressement pour abus et l'approbation d'un arrangement sous le régime de l'art. 192. Le juge de première instance a appliqué des considérations distinctes à chacun de ces recours, et conclu que les détenteurs de débentures n'avaient établi le bien-fondé ni de l'un ni de l'autre. La Cour d'appel a considéré, au contraire, que les recours se chevauchaient de façon importante, en ce qu'ils posaient tous deux la question de savoir si les administrateurs avaient suffisamment tenu compte des attentes des détenteurs de débentures. Ayant conclu, à cet égard, que les exigences de l'art. 192 n'avaient pas été respectées, elle a considéré la demande de redressement pour abus comme théorique. La Cour ne souscrit pas à ce raisonnement, comme elle l'expliquera plus loin. À notre avis, la demande de redressement pour abus et l'approbation judiciaire d'une modification

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for oppression and the s. 192 application for approval.

de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. Par conséquent, la Cour estime nécessaire d'examiner tant les demandes de redressement pour abus que la demande d'approbation fondée sur l'art. 192.

[48] The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

[48] Les détenteurs de débentures ont formé officiellement un pourvoi incident relativement à la demande de redressement pour abus. Toutefois, la Cour d'appel ne s'étant pas prononcée sur ce recours, ils n'ont pas présenté d'argumentation distincte à cet égard devant notre Cour. Néanmoins, comme certains aspects de leur position sont traités à bon droit dans le cadre de l'analyse de la demande de redressement pour abus en vertu de l'art. 241, ils seront examinés dans les présents motifs.

[49] Against this background, we turn to a more detailed consideration of the claims.

[49] À la lumière de ce qui précède, la Cour passe maintenant à l'examen plus approfondi des demandes.

B. *The Section 241 Oppression Remedy*

B. *La demande de redressement pour abus prévue à l'art. 241*

[50] The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*.

[50] Les détenteurs de débentures soutiennent que les administrateurs ont agi de façon abusive en l'espèce en approuvant la vente de BCE, contrevenant ainsi à l'art. 241 de la *LCSA*.

[51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

[51] Les détenteurs de valeurs mobilières d'une société ou de l'une des personnes morales de son groupe appartiennent à la catégorie des personnes qui peuvent être autorisées à demander un redressement pour abus en vertu de l'art. 241 de la *LCSA*. Le juge de première instance a autorisé les détenteurs de débentures à présenter une telle demande, mais il a conclu en bout de ligne qu'ils n'en avaient pas établi le bien-fondé. Il faut maintenant déterminer si le juge de première instance a commis une erreur en rejetant cette demande.

[52] We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

[52] La Cour décrira d'abord la preuve exigée pour que soit établi le droit à un redressement en vertu de l'art. 241, puis elle examinera le comportement visé à la lumière de ces exigences.

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(1) The Law

[53] Section 241(2) provides that a court may make an order to rectify the matters complained of where

> (*a*) any act or omission of the corporation or any of its affiliates effects a result,
>
> (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[54] Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct. . . . The difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention."

(1) L'état du droit

[53] Le paragraphe 241(2) permet au tribunal de

> redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :
>
> *a*) soit en raison de son comportement;
>
> *b*) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[54] Deux façons différentes d'aborder les dispositions de la *LCSA* applicables en cas d'abus se dégagent de la jurisprudence relative à l'art. 241 : M. Koehnen, *Oppression and Related Remedies* (2004), p. 79-80 et 84. L'une d'elles appelle à une interprétation stricte des trois types de comportement énumérés à l'art. 241 (abus, préjudice injuste et omission injuste de tenir compte des intérêts) : voir *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (C.S.); *Stech c. Davies*, [1987] 5 W.W.R. 563 (B.R. Alb.). Les arrêts guidés par cette interprétation s'intéressent à la teneur exacte d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » des intérêts en cause. Bien que ces décisions puissent fournir des indications valables sur ce qui constitue un abus dans une situation donnée, envisager la notion d'abus à partir de catégories définies pose problème parce que les termes utilisés ne peuvent être classés dans des compartiments étanches ni définis une fois pour toutes. Comme le dit Koehnen (p. 84) : [TRADUCTION] « Les trois composantes légales de l'abus sont en fait des qualificatifs destinés à décrire un comportement incorrect. [. . .] Le problème lié aux qualificatifs tient à ce qu'ils ne sont d'aucun secours pour la formulation des principes qui doivent fonder l'intervention du tribunal. »

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[55] Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

[55] D'autres décisions sont axées sur les principes plus larges qui sous-tendent et unifient les différents aspects de la notion d'abus : voir *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (B.R. Alb.), mod. par (1989), 45 B.L.R. 110 (C.A. Alb.); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C. div. Ont.); *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48 (C.A. Alb.).

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[56] À notre avis, la meilleure façon d'interpréter le par. 241(2) est de combiner les deux approches exposées dans la jurisprudence. Il faut d'abord considérer les principes sur lesquels repose la demande de redressement pour abus et, en particulier, le concept des attentes raisonnables. S'il est établi qu'une attente raisonnable a été frustrée, il faut déterminer si le comportement reproché constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause au sens du par. 241(2) de la *LCSA*.

[57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

[57] En guise d'introduction aux deux volets de l'examen d'une allégation d'abus, la Cour formulera deux remarques préliminaires issues de l'ensemble de la jurisprudence.

[58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice — ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité : *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (C. Ont. (Div. gén.)), p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (C.A. Alb.), p. 374; voir, de façon plus générale, Koehnen, p. 78-79. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques : *Scottish Co-operative Wholesale Society*, p. 343.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les

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relationships at play. Conduct that may be oppressive in one situation may not be in another.

attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[60] À partir de ces considérations générales, la Cour passe maintenant au premier volet de l'analyse, soit à l'examen des principes qui sous-tendent la demande de redressement pour abus. Dans *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), p. 379, lord Wilberforce, qui interprétait l'art. 222 de la *Companies Act, 1948* du Royaume-Uni, a décrit la demande de redressement pour abus en ces termes novateurs :

[TRADUCTION] Par ces mots [« juste et équitable »] on reconnaît le fait qu'une société à responsabilité limitée est davantage qu'une simple entité légale dotée d'une personnalité morale propre. Il y a place, en droit des sociétés, pour la reconnaissance du fait que, derrière cette société, ou au sein de celle-ci, il y a des individus et que ces individus ont des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société.

[61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

[61] Lord Wilberforce a présenté le recours en equity en faisant référence aux « droits », « attentes » et « obligations » des individus. Les mots « droits » et « obligations » renvoient à des intérêts dont on peut exiger le respect en droit sans faire appel à des recours spéciaux, par exemple, au moyen d'un recours contractuel ou de l'action oblique prévue à l'art. 239 de la *LCSA*. Restent donc les « attentes » des parties intéressées comme objet de la demande de redressement pour abus. Les attentes raisonnables de ces parties intéressées constituent la pierre angulaire de la demande de redressement pour abus.

[62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[62] Comme le suggère le mot « raisonnable », le concept d'attentes raisonnables est objectif et contextuel. Les attentes réelles d'une partie intéressée en particulier ne sont pas concluantes. Lorsqu'il s'agit de déterminer s'il serait « juste et équitable » d'accueillir un recours, la question est de savoir si ces attentes sont raisonnables compte tenu des faits propres à l'espèce, des rapports en cause et de l'ensemble du contexte, y compris la possibilité d'attentes et de demandes opposées.

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[63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[63] Des circonstances particulières suscitent des attentes particulières. Les parties intéressées entretiennent des rapports entre elles et avec la société, sur le fondement de perceptions et d'attentes sur lesquelles elles sont en droit de miser, sous réserve de leur caractère raisonnable dans les circonstances : voir *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (C.S.J. Ont.). Le recours en cas d'abus vise précisément à assurer le respect de ces attentes.

[64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[64] La possibilité d'un conflit entre les intérêts et les attentes de différentes parties intéressées ajoute à la complexité de l'appréciation du caractère raisonnable d'une attente particulière. La demande de redressement pour abus reconnaît qu'une société est une entité qui comprend et touche différents groupes et individus dont les intérêts peuvent être opposés. Les administrateurs ou d'autres parties impliquées dans les affaires de la société peuvent, en prenant des décisions à son égard ou en tentant de résoudre des conflits, retenir des solutions qui maximisent abusivement ou injustement les intérêts d'un groupe en particulier au détriment d'autres parties intéressées. Certes, la société et les actionnaires ont le droit de maximiser les bénéfices et la valeur des actions, mais ils ne peuvent le faire en traitant des parties intéressées inéquitablement. Un traitement équitable est, fondamentalement, ce à quoi les parties intéressées peuvent « raisonnablement s'attendre » — et le thème central récurrent de toute la jurisprudence en matière d'abus.

[65] Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable

[65] Le paragraphe 241(2) parle du « comportement » de la société ou de l'une des personnes morales de son groupe, de la conduite de « ses activités commerciales ou ses affaires internes » et de l'exercice par « ses administrateurs » de leurs « pouvoirs ». La situation dont on se plaint est souvent provoquée par le comportement de la société ou de ses administrateurs, qui sont responsables de la gouvernance de la société. Une demande de redressement pour abus peut toutefois découler du comportement d'autres parties impliquées dans les affaires de la société, comme des actionnaires : voir Koehnen, p. 109-110; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (C. Ont. (Div. gén.)). Dans les présents pourvois,

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expectations of the debentureholders, and it is unnecessary to go beyond this.

les demandes de redressement pour abus sont fondées sur des allégations selon lesquelles les administrateurs de BCE et de Bell Canada ont frustré les attentes raisonnables des détenteurs de débentures et il est inutile d'étendre notre examen au-delà de ces allégations.

[66] The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[66] Le fait que le comportement des administrateurs soit souvent au centre des actions pour abus peut sembler indiquer que les administrateurs sont assujettis à une obligation directe envers les parties intéressées qui risquent d'être touchées par une décision de la société. En agissant au mieux des intérêts de la société, les administrateurs peuvent être obligés de considérer les effets de leurs décisions sur les parties intéressées, comme les détenteurs de débentures en l'espèce. C'est ce qu'on entend lorsqu'on affirme qu'un administrateur doit agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable. Toutefois, les administrateurs ont une obligation fiduciaire envers la société, et uniquement envers la société. Certes, on parle parfois de l'obligation des administrateurs envers la société et envers les parties intéressées. Cela ne porte habituellement pas à conséquence, puisque les attentes raisonnables d'une partie intéressée quant à un résultat donné coïncident souvent avec les intérêts de la société. Il peut néanmoins arriver (comme en l'espèce) que ce ne soit pas le cas. Il importe de préciser que l'obligation des administrateurs est alors envers la société et non envers les parties intéressées, et que les parties intéressées ont pour seule attente raisonnable celle que les administrateurs agissent au mieux des intérêts de la société.

[67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of

[67] Après avoir examiné le concept des attentes raisonnables qui sous-tend la demande de redressement pour abus, la Cour passe au second volet du recours prévu à l'art. 241. Toutes les attentes déçues, même lorsqu'elles sont raisonnables, ne donnent pas ouverture à une demande sous le régime de l'art. 241. Cette disposition exige que le comportement visé constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause. Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste »

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interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[69] Against the background of this overview, we turn to a more detailed discussion of these inquiries.

(a) *Proof of a Claimant's Reasonable Expectations*

[70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is

peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées : voir Koehnen, p. 81-88. Ces expressions décrivent, à l'aide de qualificatifs, des façons dont les parties impliquées dans les affaires d'une société peuvent frustrer les attentes raisonnables des parties intéressées.

[68] En résumé, les considérations qui précèdent indiquent que le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions interreliées : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement qui correspond à la définition d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » d'un intérêt pertinent?

[69] C'est sur cette toile de fond que la Cour examinera maintenant ces questions de façon plus approfondie.

a) *La preuve de l'attente raisonnable*

[70] L'auteur de la demande de redressement doit d'abord préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable. Comme cela a déjà été mentionné, on peut d'emblée déduire qu'une partie intéressée s'attend raisonnablement à être traitée équitablement. Toutefois, comme on l'a vu, l'abus touche généralement une attente particulière propre à une situation donnée. Il faut dès lors établir l'existence de cette attente raisonnable de la partie intéressée. La preuve d'une attente peut se faire de différentes façons selon les faits.

[71] Il est impossible de dresser une liste exhaustive des situations qui peuvent susciter une attente raisonnable, compte tenu de leur nature circonstancielle. Il est toutefois possible d'énoncer quelques

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not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

principes généraux. Le recours prévu par l'art. 241 n'exige pas qu'il y ait illégalité; cet article entre en jeu « lorsque la conduite attaquée est [fautive], même si elle n'est pas en fait illégale » : Comité Dickerson (R. W. V. Dickerson, J. L. Howard et L. Getz), *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971), vol. I, p. 188. Ce recours est axé sur les notions de justice et d'équité plutôt que sur les droits. Pour déterminer si des intérêts ou attentes raisonnables doivent être pris en considération, les tribunaux vont au-delà de la légalité et se demandent ce qui est équitable compte tenu de tous les intérêts en jeu : *Re Keho Holdings Ltd. and Noble*. Il s'ensuit que toute conduite préjudiciable pour une partie intéressée ne donnera pas nécessairement ouverture à une demande de redressement pour abus contre la société.

[72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[72] Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

(i) Commercial Practice

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)), var'd (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 1 S.C.R. vi.

(i) Les pratiques commerciales

[73] Les pratiques commerciales jouent un rôle important dans la formation des attentes raisonnables des parties. Une dérogation aux pratiques commerciales habituelles qui entrave ou rend impossible l'exercice de ses droits par le plaignant donnera généralement (mais pas inévitablement) ouverture à un recours : *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.); *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (C. Ont. (Div. gén.)), mod. par (1998), 110 O.A.C. 160 (C. div.); *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289 (C.A. Ont.), autorisation d'appel refusée, [2002] 1 R.C.S. vi.

(ii) The Nature of the Corporation

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable

(ii) La nature de la société

[74] La taille, la nature et la structure de la société constituent également des facteurs pertinents

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expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

dans l'appréciation d'une attente raisonnable : *First Edmonton Place*; G. Shapira, « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134, p. 138 et 145-146. Il est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iii) Les rapports existants

[75] Les rapports personnels entre le plaignant et d'autres parties impliquées dans les affaires de la société peuvent également donner naissance à des attentes raisonnables. Par exemple, il se peut que les rapports entre actionnaires fondés sur des liens familiaux ou des liens d'amitié n'obéissent pas aux mêmes normes que les rapports entre actionnaires sans lien de dépendance d'une société ouverte. Pour reprendre les propos tenus dans l'affaire *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (C.A. Ont.), [TRADUCTION] « lorsqu'une société fermée est en cause, le tribunal peut tenir compte du rapport entre les actionnaires et non simplement des droits » (p. 727).

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

(iv) Les pratiques antérieures

[76] Les pratiques antérieures peuvent faire naître des attentes raisonnables, plus particulièrement chez les actionnaires d'une société fermée quant à leur participation aux profits et à la gouvernance de la société : *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. Dans *Gibbons*, par exemple, la Cour a jugé que les actionnaires pouvaient légitimement s'attendre à ce que tous les versements faits aux actionnaires par la société soient proportionnels au pourcentage d'actions qu'ils détenaient. La décision des nouveaux administrateurs de se verser des honoraires, pour lesquels les actionnaires ne recevraient pas de paiements correspondants, était contraire à ces attentes.

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the

[77] Il importe de souligner que les pratiques et les attentes peuvent changer avec le temps. Lorsqu'un changement est motivé par des raisons

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change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

commerciales valides et qu'il ne porte pas atteinte aux droits du plaignant, il ne saurait exister d'attente raisonnable que les administrateurs s'abstiendront de déroger aux pratiques antérieures : *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (B.R. Alb.), conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(v) Les mesures préventives

[78] Lorsqu'il apprécie le caractère raisonnable d'une attente d'une partie intéressée, le tribunal peut se demander si le plaignant aurait pu prendre des mesures pour se protéger contre le préjudice qu'il allègue avoir subi. Ainsi, il peut être pertinent de déterminer si un créancier garanti qui se plaint d'un abus aurait pu négocier des mesures de protection contre le préjudice en cause : *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.), var'd (1998), 38 O.R. (3d) 749 (C.A.).

(vi) Les déclarations et conventions

[79] On peut considérer une convention d'actionnaires comme l'expression des attentes raisonnables des parties : *Main*; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (C.A.C.-B.).

[80] Les déclarations faites à des parties intéressées ou au public dans des documents promotionnels, des prospectus, des circulaires d'offre et d'autres communications peuvent également influer sur les attentes raisonnables : *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613 (B.R. Sask.), conf. par (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (C. Ont. (Div. gén.)); *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Div. gén.), mod. par (1998), 38 O.R. (3d) 749 (C.A.).

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary

(vii) La conciliation équitable d'intérêts opposés

[81] Comme cela a été souligné, des conflits peuvent surgir soit entre les intérêts de différentes parties intéressées, soit entre les intérêts des parties intéressées et ceux de la société. Lorsque le conflit touche les intérêts de la société, il revient aux administrateurs de la société de le résoudre

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duty to act in the best interests of the corporation, viewed as a good corporate citizen.

[82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, *per* Weiler J.A., at p. 192.

[84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[85] On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

[86] The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon, Inc. v. MacAndrews*

conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable.

[82] Dans son ensemble, la jurisprudence en matière d'abus confirme que l'obligation des administrateurs d'agir au mieux des intérêts de la société inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées qui sont touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable.

[83] Les administrateurs peuvent se retrouver dans une situation où il leur est impossible de satisfaire toutes les parties intéressées. [TRADUCTION] « Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie » : *Maple Leaf Foods*, la juge Weiler, p. 192.

[84] Aucun principe n'établit que les intérêts d'un groupe — ceux des actionnaires, par exemple — doivent prévaloir sur ceux d'un autre groupe. Tout dépend des particularités de la situation dans laquelle se trouvent les administrateurs et de la question de savoir si, dans les circonstances, ils ont agi de façon responsable dans leur appréciation commerciale.

[85] En l'espèce, les appelantes ont fait valoir que le courant jurisprudentiel émanant du Delaware et représenté par l'arrêt *Revlon* appuie le principe voulant qu'un conflit entre les intérêts des actionnaires et ceux des créanciers doive être résolu en faveur des actionnaires.

[86] Le courant jurisprudentiel dit *Revlon* regroupe une série de décisions rendues au Delaware dans le contexte d'offres publiques d'achat (« OPA ») et

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& Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, . . . such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

dont les deux plus importantes sont *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), et *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Dans ces deux décisions, il s'agissait de déterminer comment les administrateurs devaient réagir à une OPA hostile. L'arrêt *Revlon* donne à croire que, dans ce contexte, les intérêts des actionnaires doivent l'emporter sur ceux des autres parties intéressées, comme les créanciers. L'arrêt *Unocal* a appliqué cette approche aux situations dans lesquelles la société ne poursuivra pas ses activités et précisé que, bien que le conseil d'administration d'une société visée par une OPA hostile [TRADUCTION] « puisse tenir compte de diverses parties intéressées lorsqu'il s'acquitte de ses fonctions [. . .] il n'est pas approprié de prendre ainsi en compte les intérêts des non-actionnaires lorsque [. . .] l'objectif n'est plus de protéger la société ou d'en poursuivre les activités, mais de la vendre au plus offrant » (p. 182).

[87] What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

> [I]t is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]

(E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on

[87] Ce qui est clair, c'est que le courant jurisprudentiel dit *Revlon* n'a pas remplacé la règle fondamentale selon laquelle l'obligation des administrateurs ne peut se réduire à l'application de règles de priorité particulières, mais relève plutôt de l'appréciation commerciale de ce qui sert le mieux les intérêts de la société, dans la situation où elle se trouve. L'ancien juge en chef de la Cour suprême du Delaware, E. Norman Veasey, s'est exprimé ainsi dans une analyse des tendances jurisprudentielles en droit des sociétés au Delaware :

> [TRADUCTION] [I]l faut garder à l'esprit le contenu précis du concept « d'obligation d'agir au mieux des intérêts » — c'est-à-dire envers qui et quand s'applique cette obligation. Naturellement, on pense souvent que les administrateurs sont ainsi obligés tant envers la société qu'envers les actionnaires. Cette façon de voir est le plus souvent inoffensive parce qu'il y a concordance des intérêts, puisque ce qui est bon pour la société est habituellement bon pour les actionnaires. Il arrive bien sûr que l'accent soit mis directement sur les intérêts des actionnaires [comme dans *Revlon*]. En général, cependant, les administrateurs sont obligés envers la *société*, et non envers les actionnaires. [En italique dans l'original.]

(E. Norman Veasey, assisté de Christine T. Di Guglielmo, « What Happened in Delaware Corporate Law and Governance from 1992-2004?

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Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

[88] Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(*b*) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) *Conduct Which Is Oppressive, Is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests*

[89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

A Retrospective on Some Key Developments » (2005), *153 U. Pa. L. Rev.* 1399, p. 1431)

[88] Par ailleurs, l'arrêt *Magasins à rayons Peoples* n'établit pas non plus de règle fixe qui ferait prévaloir les droits des créanciers. Dans cet arrêt, la Cour devait décider s'il fallait accorder une attention particulière aux créanciers d'une société menacée de faillite (par. 46). Elle a statué que l'obligation fiduciaire envers la société ne change pas au cours de la période précédant la faillite, mais qu'une partie intéressée peut intenter un recours en cas de manquement des administrateurs à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la *LCSA* (par. 66).

b) *La conduite abusive ou injuste à l'égard des intérêts du plaignant en ce qu'elle lui porte préjudice ou ne tient pas compte de ses intérêts*

[89] Jusqu'à maintenant, la Cour a examiné la façon dont le plaignant doit établir la preuve du premier élément de la demande de redressement pour abus — à savoir qu'il s'attendait raisonnablement à être traité d'une certaine manière. Or, pour parfaire sa demande de redressement pour abus, le plaignant doit prouver que le défaut de répondre à cette attente est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241 de la *LCSA*. Ce ne sont pas, en effet, tous les cas où une attente raisonnable a été frustrée qui commandent la prise en compte des considérations en equity sur lesquelles repose la demande de redressement pour abus. Le tribunal doit être convaincu que la conduite en cause relève des notions d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » des intérêts du plaignant, au sens de l'art. 241 de la *LCSA*. Dans cette perspective, l'analyse des attentes raisonnables qui constitue l'assise théorique de la demande de redressement pour abus et les types particuliers de comportement décrits à l'art. 241 apparaissent comme des approches complémentaires, et non des approches distinctes, comme on l'a parfois supposé. Ensemble, ces approches offrent un tableau complet de ce qui constitue une conduite injuste et inéquitable, pour reprendre les termes de l'arrêt *Ebrahimi*.

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[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[90] Dans la plupart des cas, la preuve d'une attente raisonnable sera liée aux notions d'abus, de préjudice injuste ou d'omission injuste de tenir compte des intérêts, ainsi que le prévoit l'art. 241, et les deux volets de la preuve se trouveront dans les faits réunis. Il faut néanmoins souligner que, comme dans toute action en equity, la demande de redressement pour abus requiert que l'on prouve la conduite fautive, le lien de causalité et le préjudice indemnisable.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[91] Les notions d'abus, de préjudice injuste et d'omission injuste de tenir compte des intérêts pertinents sont de nature descriptive. Elles indiquent le type de faute ou de comportement visé par le recours prévu à l'art. 241 de la *LCSA*. Toutefois, il ne s'agit pas de compartiments étanches. Ces notions se chevauchent et s'enchevêtrent souvent.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[92] À l'origine, la jurisprudence décrivait simplement l'acte fautif comme un abus, généralement associé à une conduite qualifiée selon les cas d'[TRADUCTION] « accablante, dure et illégitime », d'« écart marqué par rapport aux normes de traitement équitable », ou d'« abus de pouvoir » mettant en cause la probité dans la conduite des affaires de la société : voir Koehnen, p. 81. C'est de cet acte fautif que le recours tire son nom, lequel sert dorénavant à désigner de façon générale tous les recours fondés sur l'art. 241. Toutefois, ce terme sous-entend également un type particulier de préjudice relevant de la conception moderne de l'abus au sens général, soit un acte fautif très grave.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees

[93] À la notion initiale de la common law, la *LCSA* a ajouté les notions de « préjudice injuste » et d'« omission injuste de tenir compte » des intérêts, indiquant ainsi clairement que les actes fautifs qui ne peuvent être qualifiés d'abusifs peuvent néanmoins tomber sous le coup de l'art. 241. Règle générale, le « préjudice injuste » est considéré comme supposant une conduite moins grave que l'« abus », par exemple l'éviction d'un actionnaire minoritaire, l'omission de divulguer des transactions avec des apparentés, la modification de la structure de la société pour changer radicalement les ratios d'endettement, l'adoption d'une « pilule

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and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

(2) Application to These Appeals

[95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[96] The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

[97] As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation

empoisonnée » pour éviter une OPA, le versement de dividendes sans déclaration formelle, le fait de privilégier certains actionnaires par le paiement d'honoraires de gestion et le paiement aux administrateurs d'honoraires plus élevés que la norme appliquée dans le secteur d'activité en cause : voir Koehnen, p. 82-83.

[94] L'« omission injuste de tenir compte » des intérêts est considérée comme le moins grave des trois préjudices ou actes fautifs mentionnés à l'art. 241. Favoriser un administrateur en omettant d'engager une poursuite, réduire indûment le dividende d'un actionnaire ou ne pas remettre au plaignant un bien lui appartenant en sont autant d'exemples : voir Koehnen, p. 83-84.

(2) Application aux présents pourvois

[95] Comme cela a déjà été expliqué (au par. 68), le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » d'un intérêt pertinent?

[96] En l'espèce, les détenteurs de débentures soutiennent avoir eu deux attentes distinctes. Leur position première est qu'ils avaient des motifs raisonnables de s'attendre à ce que les administrateurs de BCE protègent leurs intérêts financiers comme détenteurs de débentures de Bell Canada en proposant un plan d'arrangement qui maintiendrait la cote de leurs débentures comme admissibles pour des placements. Devant notre Cour, cependant, ils ont plaidé subsidiairement avoir eu une attente plus limitée — l'attente raisonnable que les administrateurs tiendraient compte de leurs intérêts financiers en préservant la valeur marchande des débentures.

[97] Ainsi que la Cour l'a exposé brièvement plus haut (au par. 25), le juge de première instance a étudié la prétention des détenteurs de débentures qu'ils s'attendaient à ce que les administrateurs agissent de façon à préserver la cote de placements

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was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

admissibles de leurs débentures. Il a conclu que la preuve de cette attente n'avait pas été établie étant donné que les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles s'accompagnaient de mises en garde faisant explicitement en sorte que les investisseurs ne pourraient former de telles attentes, mises en garde qui figuraient aussi dans les prospectus d'émission des débentures.

[98] The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

[98] L'absence d'une attente raisonnable quant au maintien de la cote de placements admissibles des débentures trouvait confirmation, selon le juge de première instance, dans le contexte global de la relation entre la société et les détenteurs de débentures, la nature de la société, sa situation en tant que cible de plusieurs offres d'achat, de même que dans le fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées.

[99] The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

[99] Le juge de première instance a procédé à l'examen des facteurs pertinents en utilisant le cadre juridique approprié. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Il a conclu que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que les soumissionnaires étaient disposés à accepter un endettement moindre. Selon la règle de l'appréciation commerciale, il faut faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi dans l'exécution des fonctions pour lesquelles ils ont été élus par les actionnaires.

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[100] We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

[100] La Cour estime que le juge de première instance n'a commis aucune erreur dans son application des principes ni dans ses conclusions de fait, qui étaient amplement étayées par la preuve. La Cour est donc d'accord pour dire que la première attente alléguée en l'espèce — soit le maintien de la cote de placements admissibles des débentures — n'a pas été établie.

[101] The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

[101] L'attente subsidiaire, plus limitée, avancée par les plaignants, est que les administrateurs prendraient en compte les intérêts des créanciers obligataires en maintenant la valeur marchande des débentures. Dans le contexte de ses motifs concernant l'application de l'art. 192, la Cour d'appel a reconnu qu'il s'agissait là d'une attente raisonnable. Elle a conclu que les déclarations faites au cours des années, bien que non juridiquement contraignantes, avaient créé des attentes qui s'ajoutaient aux droits contractuels. Elle a ajouté que, dans ces circonstances, il incombait aux administrateurs non seulement de retenir la meilleure offre, mais encore d'examiner s'il était possible de restructurer l'arrangement de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures.

[102] The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

[102] Considérée objectivement, la preuve permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures pour prendre leurs décisions concernant les diverses offres à l'étude. Comme cela a été mentionné, dans le cadre d'une demande de redressement pour abus, les attentes raisonnables ne se limitent pas aux droits. Étant donné les répercussions potentielles des transactions proposées sur les détenteurs de débentures, on s'attendrait à ce que les administrateurs, agissant au mieux des intérêts de la société, tiennent compte de leurs intérêts à court et à long termes dans leur décision ultime.

[103] Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North,

[103] De fait, la preuve indique que les administrateurs ont effectivement tenu compte des intérêts des détenteurs de débentures. Un certain nombre de détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant l'acquisition par emprunt proposée et demander l'assurance que leurs intérêts seraient pris en

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representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

compte. L'un des administrateurs, M. Pattison, a rencontré les représentants des détenteurs de débentures, Phillips, Hager & North. Les administrateurs ont répondu à l'expression de ces inquiétudes en affirmant qu'ils respecteraient les dispositions contractuelles rattachées aux débentures, mais aucune autre assurance n'a été donnée.

[104] It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

[104] Les administrateurs ont manifestement pris en considération les intérêts des détenteurs de débentures et, cela fait, ils ont conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures. Cela ne constituait pas une « omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme nous l'avons vu, il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, le Conseil d'administration a pris en compte les intérêts des plaignants. Cela fait, et après avoir examiné ses options dans les circonstances difficiles auxquelles il faisait face, il a pris la décision qui lui paraissait servir le mieux des intérêts de la société.

[105] What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

[105] Ce que les plaignants font valoir en réalité dans le présent pourvoi, ce n'est pas simplement qu'ils s'attendaient à ce qu'on tienne compte de leurs intérêts, mais bien qu'ils comptaient que le Conseil d'administration adopte des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Sur ce point, la seconde attente, plus limitée, rejoint la première attente alléguée, soit le maintien de la cote de placements admissibles des débentures.

[106] The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value

[106] La difficulté rattachée à cette prétention est que rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint. Dans la perspective d'une prise de contrôle certaine, BCE a agi de façon raisonnable pour créer un processus de soumissions concurrentiel. Le processus a suscité trois offres. Toutes les offres comportaient un emprunt, qui accroîtrait substantiellement

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of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

l'endettement de Bell Canada. C'est ce facteur qui mettait à risque la valeur des débentures. Rien dans la preuve n'indique que BCE aurait pu faire quoi que ce soit pour écarter ce risque. En fait, la preuve démontrait le contraire.

[107] We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

[107] Il a déjà été fait mention de facteurs à prendre en considération pour déterminer si une attente est raisonnable dans le cadre d'une demande de redressement pour abus fondée sur l'art. 241, notamment les pratiques commerciales, la taille, la nature et la structure de la société, les rapports entre les parties, les pratiques antérieures, l'omission de négocier une protection, les conventions et déclarations, ainsi que la conciliation des intérêts opposés. De l'avis de la Cour, tous ces facteurs militent contre la conclusion qu'il existait en l'espèce une attente allant au-delà du respect des obligations contractuelles rattachées aux débentures.

[108] Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

[108] Les pratiques commerciales — en fait la réalité commerciale — affaiblissent la prétention qu'il aurait été possible de trouver une façon de préserver la valeur marchande des débentures dans le cadre d'une acquisition par emprunt. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Plus généralement, deux considérations sont pertinentes en ce qui concerne l'influence des pratiques commerciales générales sur le caractère raisonnable des attentes des détenteurs de débentures. Premièrement, les acquisitions par emprunt de ce type n'ont rien d'inhabituel ou d'imprévisible, bien que la transaction en cause en l'espèce se démarque par son ampleur. Deuxièmement, les actes de fiducie peuvent inclure des dispositions concernant un changement de contrôle et la cote financière dans les cas où ces protections ont été négociées. Des protections de ce type auraient assuré aux détenteurs de débentures un droit de vote, peut-être par l'intermédiaire de leur fiduciaire, sur l'acquisition par emprunt, comme l'a souligné le juge de première instance. Le défaut de négocier des mesures de protection revêtait de l'importance dans un cas où, soulignons-le, les détenteurs de débentures étaient en règle générale des institutions financières, des caisses de retraite et des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada.

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[109] The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

[109] La nature et la taille de la société viennent également ébranler la prétention selon laquelle il aurait été raisonnable de s'attendre à ce que les administrateurs rejettent les offres présentées et recherchent un arrangement susceptible de préserver la cote de placements admissibles des débentures. On a déjà signalé (au par. 74) qu'il est possible que les tribunaux accordent plus de latitude quant aux attentes raisonnables dans le cas d'une petite société fermée que dans celui d'une société ouverte de plus grande taille. Bell Canada était devenue une filiale en propriété exclusive de BCE en 1983, en vertu d'un plan d'arrangement par lequel les actionnaires de Bell Canada cédaient leurs actions en échange d'actions de BCE. Compte tenu de l'historique du rapport en cause, les détenteurs de débentures de Bell Canada de 1996 et 1997 devaient savoir, lorsqu'ils les ont acquises, que des arrangements de ce type avaient déjà été conclus et pouvaient l'être dans l'avenir.

[110] The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

[110] Les détenteurs de débentures invoquent les pratiques antérieures, affirmant que la cote de placements admissibles avait toujours été maintenue. Rappelons toutefois que les pratiques raisonnables peuvent changer au gré des fluctuations de l'économie et des conditions du marché. Les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie de ces conditions. Le juge de première instance n'a pas non plus conclu que des déclarations auxquelles les détenteurs de débentures auraient pu raisonnablement se fier leur avaient été faites.

[111] Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

[111] Enfin, il faut examiner la demande sous l'angle de l'obligation des administrateurs de résoudre les conflits entre les parties intéressées de façon équitable, au mieux des intérêts de la société.

[112] The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization

[112] À l'époque, les intérêts de la société concordaient sans doute avec l'acceptation de l'offre. BCE avait été mise en jeu, et la dynamique du marché rendait l'acquisition inévitable. La preuve, acceptée par le juge de première instance, indiquait que Bell Canada devait procéder à des changements substantiels pour continuer à

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would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

[113] Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

[114] Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

prospérer, et que la fermeture de la société élargirait la marge de manœuvre nécessaire à l'atteinte de ses objectifs à long terme en supprimant la pression à court terme créée par les obligations de communication de l'information financière au public et en permettant l'injection de capitaux propres par des investisseurs avisés soucieux d'améliorer le rendement de la société. Dans la mesure où il conclut que la décision des administrateurs se situe dans l'éventail des solutions raisonnables qu'ils auraient pu choisir en soupesant des intérêts opposés, le tribunal ne poursuivra pas son examen pour déterminer si cette décision est la solution parfaite.

[113] Considérant tous les facteurs pertinents, la Cour conclut que les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. Comme l'a dit le juge de première instance, l'allégation selon laquelle on pouvait s'attendre au maintien de la cote de placements admissibles des débentures n'est pas étayée par la preuve. On a démontré que les détenteurs de débentures pouvaient raisonnablement s'attendre à ce que leurs intérêts soient pris en compte, mais cette attente a trouvé satisfaction. La preuve ne permet pas de conclure à une attente plus grande, à savoir qu'il était possible de négocier un meilleur arrangement répondant aux exigences auxquelles la société faisait face, tout en préservant mieux la valeur marchande des débentures.

[114] Les détenteurs de débentures n'ayant pas démontré que leurs prétendues attentes étaient raisonnables, ou qu'elles avaient été frustrées, il n'est pas utile d'examiner en détail la question de savoir si le comportement dont ils se plaignent constituait un abus, un préjudice injuste ou une omission injuste de tenir compte de leurs intérêts au sens de l'art. 241 de la *LCSA*. Disons simplement que l'« abus », dans son sens où il implique la mauvaise foi, n'a pas été allégué et encore moins prouvé. Au mieux, on a plaidé l'« omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme cela a été dit plus tôt, cette prétention n'est pas étayée par la preuve.

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C. *The Section 192 Approval Process*

[115] The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seem[ed] only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected": (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 151. On the basis of Corporations Canada's *Policy concerning Arrangements Under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

[116] The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

C. *Le processus d'approbation prévu à l'art. 192*

[115] La seconde voie de droit empruntée par les détenteurs de débentures est le processus d'approbation des arrangements complexes établi par l'art. 192 de la *LCSA*. BCE a présenté une demande d'approbation sous le régime de cette disposition. À l'instruction, les détenteurs de débentures ont été autorisés à contester la demande. Le juge de première instance a conclu qu'[TRADUCTION] « [i]l n'est que logique et "équitable" de procéder à cette analyse en tenant compte des intérêts de BCE et des intérêts de ses actionnaires et autres parties intéressées, le cas échéant, dont les intérêts sont visés ou touchés par l'arrangement » : (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 151). En se fondant sur la *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA* de Corporations Canada, datant de novembre 2003 (« Énoncé de politique 15.1 »), le juge de première instance a conclu que le processus d'approbation prévu à l'art. 192 n'obligeait pas le Conseil d'administration à accorder un droit de vote aux détenteurs de débentures. Il a néanmoins pris leurs intérêts en compte dans l'évaluation du caractère équitable de l'arrangement. Après une audition complète, il a approuvé l'arrangement, l'estimant « équitable et raisonnable » en dépit des objections des détenteurs de débentures selon lesquelles il aurait un effet préjudiciable sur la valeur marchande de leurs titres.

[116] La Cour d'appel a infirmé cette décision, concluant essentiellement que les administrateurs n'avaient pas suffisamment tenu compte des attentes raisonnables des détenteurs de débentures, lesquelles ne s'arrêtaient pas, selon elle, à leurs droits, mais commandaient aux administrateurs d'examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Elle a jugé que la société ne s'était pas acquittée du fardeau de prouver qu'il était impossible de structurer la vente de façon à éviter les effets financiers préjudiciables sur les débentures et, par suite, qu'elle n'avait pas établi que le plan d'arrangement proposé était équitable et raisonnable.

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[117] Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

[117] Avant d'examiner la question de la preuve exigée pour l'approbation d'un arrangement en vertu de l'art. 192, il peut être utile de revenir brièvement à la question, déjà abordée, des différences entre la demande de redressement pour abus prévue à l'art. 241 de la *LCSA* et la demande d'approbation d'un arrangement fondée sur l'art. 192.

[118] As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

[118] Comme on l'a vu (au par. 47), le raisonnement de la Cour d'appel a eu pour effet d'amalgamer la demande de redressement pour abus de l'art. 241 et la procédure d'approbation prévue à l'art. 192 et de convertir cette dernière en un examen axé sur les attentes raisonnables.

[119] As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

[119] La Cour estime que la demande de redressement pour abus de l'art. 241 et le processus d'approbation de l'art. 192 constituent des recours différents comportant des exigences différentes. Bien que la conclusion que l'arrangement proposé a des conséquences abusives puisse étayer celle qu'il ne s'agit pas d'un arrangement équitable et raisonnable au sens de l'art. 192, il importe de garder à l'esprit les différences entre les deux recours. La demande de redressement pour abus est un recours en equity, d'une grande portée, qui met l'accent sur les attentes raisonnables des parties intéressées, alors que le processus d'approbation prévu à l'art. 192 est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif, et tient principalement compte des intérêts des parties dont les droits sont visés par l'arrangement. De plus, dans le cadre d'une demande de redressement pour abus, c'est au plaignant qu'il incombe de prouver l'abus ou l'injustice, tandis que c'est à la société qu'il appartient d'établir que l'arrangement est « équitable et raisonnable » dans le cadre de la procédure prévue à l'art. 192.

[120] These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

[120] Il ressort de ces différences qu'un plaignant pourrait ne pas réussir à prouver l'abus au sens de l'art. 241, mais néanmoins avoir gain de cause sous le régime de l'art. 192 en établissant que la société ne s'est pas acquittée du fardeau de prouver que l'arrangement est équitable et raisonnable. C'est pourquoi la Cour doit examiner les prétentions soumises par les détenteurs de débentures dans le cadre de l'art. 192, en dépit de sa conclusion antérieure selon laquelle ils n'ont pas établi l'abus.

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[121] Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

[121] La Cour n'a pas à se demander en l'espèce si l'inverse est vrai. Compte tenu des différences entre les deux recours en ce qui concerne le fardeau de la preuve et la perspective dans laquelle l'examen est effectué, on pourrait soutenir qu'il est possible, en théorie, de conclure à l'existence d'un abus au sens de l'art. 241 tout en approuvant l'arrangement en application de l'art. 192. Par contre, le bon sens donne à penser, comme l'a fait la Cour d'appel, qu'on peut difficilement conclure à la fois qu'il y a abus et que l'arrangement est équitable et raisonnable. Cette intéressante question devra toutefois être résolue dans le cadre d'une affaire où elle se posera.

(1) The Requirements for Approval Under Section 192

(1) La preuve exigée pour l'approbation selon l'art. 192

[122] We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

[122] La Cour commencera par décrire la nature et l'objet du processus prévu à l'art. 192. Elle examinera ensuite la philosophie sous-jacente à l'approbation requise par cette disposition, les circonstances dans lesquelles elle s'applique, les intérêts en jeu dans le processus et les critères que le juge doit appliquer pour trancher une demande présentée en vertu de l'art. 192.

(a) *The Nature and Purpose of the Section 192 Procedure*

a) *La nature et l'objet de la procédure prévue par l'art. 192*

[123] The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

[123] Le processus d'approbation établi à l'art. 192 remonte à une loi de 1923 qui visait à permettre aux sociétés de modifier leur capital-actions : *Loi de 1923 modifiant la Loi des compagnies*, S.C. 1923, ch. 39, art. 4. Cette loi avait pour but de permettre des modifications aux droits des actionnaires tout en protégeant les actionnaires. En 1974, les plans d'arrangement n'ont pas été inclus dans la *LCSA*, parce que le législateur les jugeait superflus et craignait qu'ils puissent être utilisés pour évincer les actionnaires minoritaires. Après avoir constaté que ces plans offraient un moyen pratique et souple de réaliser des transactions complexes, le législateur a ajouté à la *LCSA* une disposition les régissant, en 1978 : Consommation et Corporations Canada, *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes* (1977), p. 5 (« Exposé détaillé »).

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[124] In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

[124] La souplesse de cette disposition lui a valu d'être élargie pour s'appliquer, non seulement à la réorganisation du capital-actions, mais plus généralement aux réaménagements d'une société. Suivant le par. 192(1) de la loi actuelle, un arrangement s'entend de la modification des statuts d'une société, de la fusion de deux sociétés ou plus, du fractionnement de l'activité commerciale d'une société, d'une opération de fermeture ou d'éviction, de la liquidation ou de la dissolution d'une société ou de toute combinaison de ces transactions.

[125] This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

[125] Il ne s'agit pas là d'une liste exhaustive, et les tribunaux lui ont donné une interprétation large. L'article 192 est de plus en plus utilisé dans le cadre d'un changement de contrôle en raison des avantages qu'il comporte pour l'acquéreur : C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), p. 76. Il permet notamment à l'acquéreur d'acheter des actions de la société ciblée sans avoir à se conformer aux règles provinciales régissant une OPA.

[126] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

[126] Le processus prévu à l'art. 192 s'applique, en général, aux changements de contrôle qui présentent deux caractéristiques : l'arrangement est appuyé par les administrateurs de la société ciblée et il vise la remise, à l'acquéreur ou à la société ciblée, d'une partie ou de la totalité des actions.

[127] Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

[127] Fondamentalement, la procédure prévue à l'art. 192 repose sur le principe selon lequel la décision sur une transaction qui modifiera les droits des détenteurs de valeurs mobilières ne constitue pas une décision de simple gestion des affaires de la société, qui relève des administrateurs. L'article 192 crée deux mécanismes pour surmonter cet obstacle. Premièrement, les propositions d'arrangement peuvent généralement être soumises aux détenteurs de valeurs mobilières pour approbation. Bien que l'art. 192 n'exige pas expressément un vote des détenteurs de valeurs mobilières, comme on le verra, leur vote constitue une caractéristique importante du processus d'approbation des plans d'arrangement. Deuxièmement, les plans d'arrangement doivent être approuvés par le tribunal à la suite d'une audience à laquelle peuvent participer les parties dont les droits sont touchés.

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(b) *The Philosophy Underlying Section 192*

[128] The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> . . . the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.

(Detailed Background Paper, at p. 6)

[129] Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) *Interests Protected by Section 192*

[130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

[131] Section 192 clearly contemplates the participation of security holders in certain situations.

b) *La philosophie qui sous-tend l'art. 192*

[128] Comme cela a été mentionné, l'art. 192 a pour but de permettre la réalisation de changements substantiels dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés. Le juge qui procède à l'examen exigé par l'art. 192 ne doit pas perdre de vue l'esprit de cette disposition, qui consiste à établir un juste équilibre entre des intérêts opposés. Le ministre de Consommation et Corporations Canada a présenté ainsi l'objectif de la disposition relative aux arrangements introduite dans la *LCSA* en 1978 :

> . . . le projet de loi tente d'atteindre un juste équilibre entre une gestion souple et le traitement équitable des actionnaires minoritaires, d'une façon qui corresponde aux autres pratiques de modification de structure stipulées dans la Partie XIV.

(Exposé détaillé, p. 5-6)

[129] Bien que l'art. 192 ait été conçu initialement et utilisé principalement pour permettre des restructurations utiles tout en protégeant les actionnaires minoritaires contre leurs effets préjudiciables, l'objectif du maintien d'un juste équilibre entre les différentes parties touchées s'applique avec autant de force lorsqu'il s'agit des droits de détenteurs de valeurs mobilières non-actionnaires visés à l'art. 192. L'article 192 reconnaît que des changements substantiels peuvent être opportuns même s'ils ont des effets préjudiciables sur les droits de personnes ou groupes particuliers. Il vise à garantir le traitement équitable et la prise en compte des intérêts de ces titulaires de droits et, en définitive, à confirmer que l'arrangement devrait être mis en œuvre.

c) *Les intérêts protégés par l'art. 192*

[130] La procédure prévue à l'art. 192 visait initialement à protéger les actionnaires touchés par la restructuration de la société. Bien que cet objet demeure fondamental, cette protection s'est par la suite étendue à d'autres détenteurs de valeurs mobilières, dans certaines circonstances.

[131] L'article 192 envisage clairement la participation des détenteurs de valeurs mobilières dans

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Section 192(1)(*f*) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(*c*) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

[132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

[133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary

certaines situations. L'alinéa 192(1)*f*) précise qu'un arrangement peut inclure l'échange de valeurs mobilières contre des biens. L'alinéa 192(4)*c*) énonce que le tribunal peut rendre une ordonnance enjoignant à la société « de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières ». Le directeur nommé en vertu de la *LCSA* est d'avis, au moins, que tous les détenteurs de valeurs mobilières dont les droits sont touchés par la transaction doivent être autorisés à voter sur l'arrangement : Énoncé de politique 15.1, par. 3.08.

[132] Une question difficile se pose toutefois : l'art. 192 s'applique-t-il uniquement aux détenteurs de valeurs mobilières dont les *droits* sont touchés par la proposition ou aussi à ceux dont les droits demeurent intacts, mais dont les *intérêts financiers* risquent de subir un préjudice.

[133] L'objet de l'art. 192, exposé précédemment, laisse croire que cette disposition ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. La procédure établie par l'art. 192 a été conçue et généralement perçue comme visant à permettre aux sociétés d'effectuer des changements qui ont une incidence sur des *droits* des parties. C'est la modification des droits qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Le fait que le processus d'approbation d'un arrangement soit axé sur les droits et la demande de redressement pour abus sur les attentes raisonnables de parties est une distinction cruciale. La demande de redressement pour abus est fondée sur le traitement inéquitable des parties intéressées, plutôt que sur leurs droits au sens strict.

[134] Toutefois, cette règle générale n'écarte pas la possibilité que, dans certaines circonstances — par exemple en présence d'un risque d'insolvabilité ou de réclamations de certains actionnaires minoritaires —, des intérêts qui ne constituent pas des droits à strictement parler soient pris en considération : Énoncé de politique 15.1, par. 3.08, faisant état de « circonstances particulières ».

[135] Il n'est pas nécessaire pour trancher les pourvois de statuer sur ce qui constituerait exactement

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circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

des « circonstances particulières » autorisant la prise en compte de simples intérêts dans l'examen d'une demande fondée sur l'art. 192. La Cour est d'avis qu'une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, ce type de circonstances.

(d) *Criteria for Court Approval*

d) *Les critères d'approbation*

[136] Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

[136] Le paragraphe 192(3) exige que la société fasse approuver le plan par un tribunal. Pour statuer sur la demande d'approbation, le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir. Il faut que l'arrangement lui-même, considéré substantiellement et objectivement, soit de nature à pouvoir être approuvé.

[137] In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

[137] La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable : voir *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (B.R.), p. 444. En comparaison, c'est le plaignant qui doit prouver ses prétentions dans le cas de la demande de redressement pour abus prévue par l'art. 241. Le respect des deux premières conditions n'est pas contesté en l'espèce. La seule question en litige est celle du caractère équitable et raisonnable de l'arrangement.

[138] In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

[138] Pour conclure, sous le régime de l'art. 192, que la décision des administrateurs au sujet de l'arrangement proposé est équitable et raisonnable, le tribunal doit être convaincu que l'arrangement : a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. C'est en appliquant ce cadre d'analyse à deux volets que les tribunaux peuvent établir si un plan est équitable et raisonnable.

[139] In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the

[139] Certains tribunaux ont déjà statué sur le caractère équitable et raisonnable d'un arrangement en appliquant le test dit de l'appréciation

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business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

commerciale, qui consiste à déterminer si un homme ou une femme d'affaires intelligent et honnête, membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt, approuverait raisonnablement l'arrangement : voir *Trizec*, p. 444; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. Toutefois, bien que cette question puisse être importante, elle ne constitue pas un énoncé utile et complet des éléments à considérer pour l'examen d'une demande fondée sur l'art. 192.

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[140] First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830. To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

[140] Premièrement, la similitude d'appellation du test de l'appréciation commerciale qui nous intéresse ici et de la règle de l'appréciation commerciale examinée précédemment (au par. 40) sème la confusion. La *règle* de l'appréciation commerciale exprime la nécessité de faire preuve de retenue à l'égard de l'appréciation par les administrateurs de ce qui sert le mieux les intérêts de la société. Le *test* de l'appréciation commerciale pour l'application de l'art. 192, quant à lui, vise à déterminer si l'arrangement proposé est équitable et raisonnable compte tenu des intérêts de la société et des parties intéressées. Ces deux analyses diffèrent passablement. Or, la similitude des termes employés pour les désigner sème la confusion. Ainsi, il est arrivé que des tribunaux citent le test de l'appréciation commerciale à l'appui du principe selon lequel il n'est pas nécessaire que les arrangements soient parfaits, c.-à-d. en tant que principe de retenue judiciaire : voir *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. n° 16158 (QL), 2007 QCCS 6830. Lorsqu'on confond le test de l'appréciation commerciale et la règle de l'appréciation commerciale, il devient plus difficile de comprendre le sens de l'expression « équitable et raisonnable » et la façon dont un arrangement peut satisfaire à cette condition.

[141] Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable.

[141] Deuxièmement, lorsque les détenteurs de valeurs mobilières dont les droits sont touchés ont voté en faveur d'un plan d'arrangement, il paraît redondant de se demander ce que ferait une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt. Comme on le verra plus loin (au par. 150), les

However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

votes tenus au sujet d'arrangements constituent un indicateur important de leur caractère équitable et raisonnable. Toutefois, le critère de l'appréciation commerciale n'est pas plus éclairant que le résultat d'un vote. L'article 192 établit clairement que, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement qui lui est soumis, le juge doit aller au-delà de la question de savoir si un homme ou une femme d'affaires raisonnable l'approuverait. Dans la mesure où le critère de l'appréciation commerciale donne à entendre qu'il suffit au juge d'adopter le point de vue du groupe majoritaire, il est incomplet.

[142] In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

[142] En résumé, la Cour conclut que le critère de l'appréciation commerciale n'est pas utile dans le contexte de l'application de l'art. 192, et qu'il peut même semer la confusion.

[143] The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (Que. Sup. Ct.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[143] Le cadre proposé dans les présents motifs reformule le critère d'appréciation du caractère équitable et raisonnable pour l'application de l'art. 192 en accord avec la logique de cette disposition et la jurisprudence. L'appréciation du caractère équitable et raisonnable suppose deux examens. Le premier consiste à déterminer si l'arrangement poursuit un objectif commercial légitime, et le second s'il répond d'une façon juste et équilibrée aux objections de ceux dont les droits sont visés. Les tribunaux appelés à approuver un arrangement ont souvent mentionné des facteurs qui répondaient à ces deux questions, comme cela sera expliqué plus loin : *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Qué.); *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] We now turn to a more detailed discussion of the two prongs.

[144] Passons maintenant à un examen plus détaillé de chacun de ces deux volets.

[145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation.

[145] Le volet de l'analyse du caractère équitable et raisonnable qui se rapporte à l'objectif commercial légitime reconnaît que l'arrangement doit procurer à la société un avantage qui compense l'atteinte aux droits. Autrement dit, le tribunal doit être convaincu que l'intérêt de la société justifie le fardeau imposé par l'arrangement aux détenteurs de

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The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

valeurs mobilières. Le plan proposé doit en outre servir les intérêts de la société dans la perspective de la continuité de l'entreprise, critère qui peut avoir une portée plus réduite que le critère de ce qui est « au mieux des intérêts de la société » utilisé pour définir l'obligation fiduciaire imposée aux administrateurs par l'art. 122 de la *LCSA* (voir les par. 38-40).

[146] The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, <u>the lower the degree of necessity, the higher the degree of scrutiny that should be applied</u>. [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

[146] L'examen de l'objectif commercial légitime est invariablement lié aux faits. Par conséquent, la nature et l'étendue de la preuve requise pour répondre à ce critère variera suivant les circonstances. Un important facteur à considérer pour établir si un plan d'arrangement poursuit un objectif commercial légitime est celui de la nécessité de l'arrangement pour la poursuite des activités de la société. Cette nécessité est fonction des conditions du marché, notamment sur les plan de la technologie, de la réglementation et de la concurrence. L'existence de solutions de rechange et la réaction du marché au plan constituent des indices de la nécessité du plan. Le degré de nécessité de l'arrangement a une incidence directe sur la rigueur de l'examen. Dans *Canadian Pacific*, la juge Austin a conclu :

> [TRADUCTION] . . . bien que les tribunaux soient disposés à exercer leur compétence malgré l'absence de nécessité suffisante pour la société, <u>moins la nécessité est grande, plus l'examen doit être rigoureux</u>. [Nous soulignons; p. 223.]

Si le plan d'arrangement est nécessaire pour que la société continue d'exister, les tribunaux seront plus enclins à l'approuver en dépit de ses effets préjudiciables sur certains détenteurs de valeurs mobilières. À l'inverse, si la situation financière ou commerciale de la société ne requiert pas l'arrangement, les tribunaux se montreront plus circonspects et procéderont à un examen minutieux pour s'assurer qu'il ne sert pas uniquement les intérêts d'une partie intéressée en particulier. Par conséquent, la nécessité relative de l'arrangement peut en justifier les effets négatifs sur les intérêts des détenteurs de valeurs mobilières touchés.

[147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

[147] Le second volet de l'analyse du caractère équitable et raisonnable est axé sur la question de savoir si les objections de ceux dont les droits sont visés ont été résolues de façon juste et équilibrée.

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[148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[148] Un plan d'arrangement peut susciter des objections lorsqu'il existe des tensions entre les intérêts de la société et ceux de détenteurs de valeurs mobilières ou lorsque différents groupes dont les droits sont touchés ont des intérêts opposés. Le juge doit être convaincu que l'arrangement établit un juste équilibre compte tenu des intérêts continus de la société et des circonstances de l'affaire. Pour cela, il devra souvent procéder à une pondération complexe en déterminant si des mesures d'accommodement ou de protection appropriées ont été offertes aux parties concernées. Toutefois, comme l'a indiqué le juge Forsyth dans *Trizec*, par. 36,

> [TRADUCTION] le tribunal doit prendre garde de ne pas s'attacher aux besoins particuliers d'un groupe donné et s'efforcer de traiter équitablement tous ceux qui sont touchés par la transaction compte tenu des circonstances. Le caractère équitable de l'arrangement doit s'apprécier globalement ainsi qu'à l'égard de chacune des différentes parties intéressées.

[149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

[149] Il faut se demander si le plan, considéré dans cette perspective, est équitable et raisonnable. Pour répondre à cette question, les tribunaux ont tenu compte de divers facteurs, selon la nature de l'affaire. Aucun de ces facteurs n'est déterminant à lui seul et la pertinence de chacun varie d'un cas à l'autre, mais ils fournissent des indications utiles.

[150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Gen. Div.).

[150] Le fait que la majorité des détenteurs de valeurs mobilières aient voté en faveur du plan constitue un facteur important. Le caractère équitable et raisonnable d'un plan qui ne recueille qu'une minorité ou une faible majorité des voix peut être mis en doute, tandis qu'une majorité substantielle a l'effet inverse. Bien que le résultat du vote des détenteurs de valeurs mobilières ne soit pas déterminant pour l'approbation judiciaire du plan, les tribunaux attribuent un poids considérable à ce facteur. Il s'agit d'un indice capital permettant de savoir si les parties touchées estiment que l'arrangement est équitable et raisonnable : *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Div. gén.).

[151] Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and

[151] En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de

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acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's

la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan : *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] La proportionnalité du compromis entre les divers détenteurs de valeurs mobilières, la situation des détenteurs de valeurs mobilières avant et après l'arrangement et les effets de l'arrangement sur les droits des divers détenteurs de valeurs mobilières sont aussi des indices de son caractère équitable : voir *Canadian Pacific*; *Trizec*. Les tribunaux peuvent également tenir compte de la réputation des administrateurs et conseillers qui défendent l'arrangement et ses modalités. Ainsi, les tribunaux ont déjà tenu compte du fait qu'un plan avait été approuvé par un comité spécial d'administrateurs indépendants, de l'existence d'une opinion formulée par un spécialiste de renom sur le caractère équitable du plan et des moyens auxquels les actionnaires avaient accès pour exprimer leur dissidence et obtenir une évaluation : voir *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (C.S.J. Ont.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] Les facteurs susmentionnés représentent les éléments pris en considération jusqu'à maintenant pour l'examen des demandes prévues à l'art. 192. Cette énumération n'est pas exhaustive, mais vise simplement à donner un aperçu des facteurs retenus par les tribunaux pour établir si un plan avait résolu de façon raisonnable les objections soulevées et les conflits entre parties intéressées. Beaucoup de ces facteurs pourront aussi indiquer si le plan poursuit un objectif commercial légitime. L'appréciation globale du caractère équitable et raisonnable d'un arrangement dépend des faits et peut faire intervenir différents facteurs suivant les circonstances.

[154] Cela mène donc à la conclusion suivante : pour qu'un plan d'arrangement soit déclaré équitable et raisonnable, le juge doit être convaincu qu'il poursuit un objectif commercial légitime et qu'il répond adéquatement aux objections et aux conflits entre différentes parties intéressées. Pour décider si un arrangement répond à ces critères, le juge tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société,

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continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés.

[155] As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

[155] Comme cela a souvent été dit, il n'existe pas d'arrangement parfait. Ce qui est requis, c'est que la décision soit raisonnable au regard des circonstances particulières de l'espèce, et non qu'elle soit parfaite : *Trizec*; *Maple Leaf Foods*. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception de ce qui constituerait le « meilleur » arrangement. Mais ils ne doivent pas pour autant renoncer à s'acquitter de leur obligation d'examiner l'arrangement. Étant donné que l'art. 192 facilite la modification de droits, le tribunal doit procéder à un examen attentif des transactions proposées. Comme la juge Lax l'a déclaré dans *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (C.S.J. Ont.), par. 153 : [TRADUCTION] « Bien qu'il n'y ait pas lieu de scruter les décisions du conseil d'administration à la loupe dans la perspective idéale que permet le recul, il faut tout de même les examiner. »

(2) Application to These Appeals

(2) Application aux présents pourvois

[156] As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

[156] Comme il a déjà été mentionné (aux par. 137-138), la société qui soumet une demande en vertu de l'art. 192 doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande est soumise de bonne foi et (3) l'arrangement est équitable et raisonnable au sens où a) il poursuit un objectif commercial légitime et b) il répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés par l'arrangement.

[157] The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

[157] En l'espèce, les deux premières conditions sont indiscutablement remplies et, en ce qui concerne la troisième, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat, devant la Cour, porte donc sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée.

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[158] The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

[159] The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

[160] Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding

[158] Suivant les détenteurs de débentures de Bell Canada, l'arrangement ne tient pas compte de leurs droits d'une façon équitable et équilibrée. Leur principal argument porte que le processus adopté par les administrateurs pour négocier et conclure l'arrangement n'a pas tenu suffisamment compte de leurs intérêts, plus particulièrement parce que l'arrangement, bien qu'il maintienne leurs droits contractuels, réduirait la valeur marchande de leurs débentures et, dans certains cas, leur ferait perdre leur cote de placements admissibles.

[159] La première question qui se pose est de savoir si les administrateurs étaient tenus de prendre en considération les intérêts financiers des détenteurs de débentures quant au maintien de la valeur marchande de leurs titres dans le cadre de l'application de l'art. 192. La Cour a conclu précédemment qu'il ressort des principes et de la jurisprudence que l'art. 192 concerne généralement les droits, en l'absence de circonstances particulières. Elle a aussi indiqué que la diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits sont demeurés intacts ne constitue habituellement pas ce type de circonstances.

[160] En s'appuyant sur l'Énoncé de politique 15.1, le juge de première instance a conclu que les détenteurs de débentures ne devaient pas se voir accorder le droit de voter sur le plan d'arrangement parce qu'il ne visait pas leurs droits : [TRADUCTION] « Leur accorder ce droit [leur] conférerait injustement un droit de veto sur une transaction d'une valeur totale d'environ 35 milliards de dollars d'actions ordinaires, approuvée par plus de 97 p. 100 des actionnaires » (par. 166). Le juge a néanmoins tenu compte du point de vue des détenteurs de débentures.

[161] Selon la Cour, le juge de première instance pouvait à bon droit conclure ainsi. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures

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that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

[162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> . . . the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

[163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of

ne constituaient pas une catégorie touchée pour l'application de cette disposition. Le juge de première instance était donc fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures, comme il l'a fait, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement en vertu de l'art. 192.

[162] Il faut ensuite se demander si le juge de première instance a conclu à tort que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. Il a indiqué que les détenteurs de débentures, s'ils l'avaient désiré, auraient pu négocier des mesures de protection contre l'accroissement de la dette ou les risques de changement dans la structure de la société. Il a ajouté :

> [TRADUCTION] . . . la preuve révèle que leurs droits [des détenteurs de débentures] ont effectivement été pris en compte et évalués. Le Conseil d'administration a conclu, à juste titre, que les actes de fiducie de 1976, 1996 et 1997 ne renfermaient aucune stipulation concernant un changement de contrôle et que, par ailleurs, aucun changement de contrôle de Bell Canada n'était envisagé, de sorte que les détenteurs de débentures ne pouvaient raisonnablement s'attendre à ce que BCE rejette une transaction qui maximisait la valeur actionnariale parce qu'elle avait des effets négatifs pour eux.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 162, citant (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, par. 199)

[163] La Cour ne décèle aucune erreur dans ces conclusions. L'arrangement ne modifie pas fondamentalement les droits des détenteurs de débentures. L'investissement et le rendement prévus par contrat demeurent inchangés. La fluctuation de la valeur marchande des débentures associée à une variation de l'endettement est un phénomène commercial bien connu. Les détenteurs de débentures

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the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

ne se sont pas prémunis contractuellement contre une telle éventualité. La diminution éventuelle de la valeur marchande de leurs titres par suite de l'arrangement prévoyant l'accroissement de l'endettement constituait un risque prévisible, et non des circonstances particulières. Il était clair pour le juge que, pour la continuité de la société, l'approbation d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. La nécessité était établie. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance, ce qui donne à croire que l'arrangement poursuivait un objectif commercial légitime.

[164] Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

[164] En s'appuyant sur ces considérations, et reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu que le caractère équitable et raisonnable de l'arrangement avait été démontré. Cette conclusion n'est à notre avis entachée d'aucune erreur.

[165] The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

[165] Comme cela a déjà été précisé, l'opinion contraire de la Cour d'appel procédait d'un raisonnement qui amalgamait la demande de redressement pour abus de l'art. 241, axé sur les attentes raisonnables, et le processus d'approbation d'un arrangement établi à l'art. 192. Après avoir conclu que les attentes raisonnables des détenteurs de débentures (que le Conseil d'administration tienne compte de leurs intérêts) n'avaient pas été satisfaites, la cour a associé cette conclusion au fardeau de preuve imposé à la société par l'art. 192. Elle a ainsi combiné les éléments substantiels de la demande de redressement pour abus au fardeau de la preuve applicable dans le cadre d'une demande d'approbation sous le régime de l'art. 192. De ce croisement a découlé la conclusion que la société ne s'était pas acquittée de son obligation de démontrer qu'il n'était pas possible de répondre aux attentes raisonnables des détenteurs de débentures. L'application de l'art. 241, qui impose au plaignant l'obligation de prouver l'abus, n'aurait pas pu produire un tel résultat. En combinant les éléments substantiels de l'art. 241 au fardeau de preuve inversé prévu à l'art. 192, la Cour d'appel est parvenue à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier.

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VI. Conclusion

[166] We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

[167] For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada: Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Solicitors for the appellant/respondent on cross-appeals 6796508 Canada Inc.: Woods & Partners, Montréal.

Solicitors for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders: Fishman, Flanz, Meland, Paquin, Montréal.

Solicitors for the respondent/appellant on cross-appeals Group of 1997 Debentureholders: McMillan, Binch, Mendelsohn, Toronto.

Solicitors for the respondent Computershare Trust Company of Canada: Miller, Thomson, Pouliot, Montréal.

Solicitor for the intervener Catalyst Asset Management Inc.: Christian S. Tacit, Kanata.

Solicitors for the intervener Matthew Stewart: Langlois, Kronström, Desjardins, Montréal.

VI. Conclusion

[166] La Cour est d'avis que les détenteurs de débentures n'ont établi ni qu'il y avait eu abus au sens de l'art. 241 de la *LCSA* ni que le juge de première instance a commis une erreur en approuvant l'arrangement sous le régime de l'art. 192 de la *LCSA*.

[167] Pour ces motifs, les pourvois sont accueillis, la décision de la Cour d'appel est annulée et l'approbation du plan d'arrangement par le juge de première instance est rétablie, avec dépens devant toutes les cours. Les pourvois incidents sont rejetés avec dépens devant toutes les cours.

Pourvois principaux accueillis avec dépens. Pourvois incidents rejetés avec dépens.

Procureurs des appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada : Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Procureurs de l'appelante/intimée aux pourvois incidents 6796508 Canada Inc. : Woods & Partners, Montréal.

Procureurs des intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996 : Fishman, Flanz, Meland, Paquin, Montréal.

Procureurs de l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997 : McMillan, Binch, Mendelsohn, Toronto.

Procureurs de l'intimée la Société de fiducie Computershare du Canada : Miller, Thomson, Pouliot, Montréal.

Procureur de l'intervenante Catalyst Asset Management Inc. : Christian S. Tacit, Kanata.

Procureurs de l'intervenant Matthew Stewart : Langlois, Kronström, Desjardins, Montréal.

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TAB OO

IN THE MATTER OF the Bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc.

Caron Bélanger Ernst & Young Inc., in its capacity as Trustee to the bankruptcy of Peoples Department Stores Inc./Magasins à rayons Peoples inc. *Appellant*

v.

Lionel Wise, Ralph Wise and Harold Wise *Respondents*

and

Chubb Insurance Company of Canada *Respondent*

INDEXED AS: PEOPLES DEPARTMENT STORES INC. (TRUSTEE OF) *v.* WISE

Neutral citation: 2004 SCC 68.

File No.: 29682.

2004: May 11; 2004: October 29.

Present: Iacobucci,* Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Corporations — Directors and officers — Fiduciary duty and duty of care — Directors of bankrupt corporation being sued by trustee — Trustee claiming that directors breached fiduciary duty and duty of care — Whether directors owe fiduciary duty or duty of care to corporation's creditors — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1).

Bankruptcy and insolvability — Reviewable transactions — Transfer of assets between wholly-owned subsidiary and parent corporation — Wholly-owned subsidiary and parent corporation declaring bankruptcy — Parent corporation's directors sued by trustee of wholly-owned subsidiary — Trustee claiming that certain transactions were reviewable — Whether consideration for impugned

* Iacobucci J. took no part in the judgment.

DANS L'AFFAIRE DE la faillite de Peoples Department Stores Inc./Magasins à rayons Peoples inc.

Caron Bélanger Ernst & Young Inc., en sa qualité de syndic de la faillite de Peoples Department Stores Inc./Magasins à rayons Peoples inc. *Appelante*

c.

Lionel Wise, Ralph Wise et Harold Wise *Intimés*

et

Chubb du Canada, Compagnie d'assurance *Intimée*

RÉPERTORIÉ : MAGASINS À RAYONS PEOPLES INC. (SYNDIC DE) *c.* WISE

Référence neutre : 2004 CSC 68.

N° du greffe : 29682.

2004 : 11 mai; 2004 : 29 octobre.

Présents : Les juges Iacobucci*, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Sociétés — Administrateurs et dirigeants — Obligation de fiduciaire et obligation de diligence — Administrateurs d'une société faillie poursuivis par le syndic — Administrateurs accusés par le syndic de manquement à leur obligation de fiduciaire et à leur obligation de diligence — Les administrateurs ont-ils une obligation de fiduciaire et une obligation de diligence envers les créanciers de la société? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1).

Faillite et insolvabilité — Transactions révisables — Transfert d'actifs entre la filiale à part entière et la société mère — Faillite de la filiale à part entière et de la société mère — Administrateurs de la société mère poursuivis par le syndic de la filiale à part entière — Allégation par le syndic que certaines transactions sont révisables — La contrepartie reçue dans les transactions

* Le juge Iacobucci n'a pas pris part au jugement.

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transactions conspicuously less than fair market value — Whether directors "privy" to transactions — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 100.

Wise Stores Inc. ("Wise") acquired Peoples Department Stores Inc. ("Peoples") from Marks and Spencer Canada Inc. ("M & S"). L.W., R.W. and H.W. (the "Wise brothers") were majority shareholders, officers and directors of Wise, and the only directors of Peoples. Because of covenants imposed by M & S, Peoples could not be merged with Wise until the purchase price had been paid. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Parallel bookkeeping, combined with shared warehousing arrangements, caused serious problems for both companies. As a result, their inventory records were increasingly incorrect. The situation, already unsustainable, was worsening. L.W. consulted the vice-president of administration and finance of both Wise and Peoples in an attempt to find a solution. On his recommendation, the Wise brothers agreed to implement a joint inventory procurement policy whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. Before the end of the year, both Wise and Peoples declared bankruptcy. Peoples' trustee filed a petition against the Wise brothers. The trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the *Canada Business Corporations Act* ("CBCA"). In the alternative, the trustee claimed that the Wise brothers had in the year preceding the bankruptcy been privy to transactions in which Peoples' assets had been transferred to Wise for conspicuously less than fair market value within the meaning of s. 100 of the *Bankruptcy and Insolvency Act* ("BIA"). The trial judge found the Wise brothers liable on both grounds. The Court of Appeal set aside the trial judge's decision.

Held: The appeal should be dismissed. The Wise brothers did not breach their duties under s. 122(1) of the CBCA, nor were the impugned transactions in violation of s. 100 of the BIA.

attaquées est-elle manifestement inférieure à la juste valeur du marché? — Les administrateurs étaient-ils des parties intéressées dans les transactions? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 100.

Wise Stores Inc. (« Wise ») a acquis de Marks & Spencer Canada Inc. (« M & S ») les Magasins à rayons Peoples Inc. (« Peoples »). L.W., R.W. et H.W. (les « frères Wise ») étaient actionnaires majoritaires, dirigeants et administrateurs de Wise, et les seuls administrateurs de Peoples. En raison des conditions imposées par M & S, Peoples ne pouvait fusionner avec Wise avant le paiement intégral du prix d'achat. Presque dès le début, l'exploitation en commun de Wise et de Peoples s'est avérée difficile. La tenue d'une comptabilité parallèle, conjuguée à l'entreposage en commun des marchandises, a causé de graves problèmes aux deux sociétés. En conséquence, les fiches de stocks des deux sociétés sont devenues de plus en plus inexactes. La situation, déjà intolérable, a empiré. L.W. a consulté le vice-président à l'administration et aux finances de Wise et Peoples pour tenter de trouver une solution. Sur sa recommandation, les frères Wise ont accepté de mettre en œuvre une politique d'approvisionnement commun en vertu de laquelle les deux entreprises se partageraient la responsabilité des achats. Peoples s'occuperait de tous les achats auprès de fournisseurs en Amérique du Nord et Wise, pour sa part, se chargerait de tous les achats faits outre-mer. Peoples transférerait ensuite à Wise les marchandises achetées pour Wise et lui en réclamerait le prix, et vice versa. La nouvelle politique est entrée en vigueur le 1er février 1994. Avant la fin de l'année, Wise et Peoples ont été déclarées en faillite. Le syndic de Peoples a présenté contre les frères Wise une requête dans laquelle il a prétendu que ces derniers avaient privilégié les intérêts de Wise plutôt que ceux de Peoples au détriment des créanciers de Peoples, en contravention des obligations que le par. 122(1) de la *Loi canadienne sur les sociétés par actions* (« LCSA ») leur imposait en tant qu'administrateurs. Le syndic a soutenu aussi que, au cours de l'année ayant précédé la faillite, les frères Wise étaient des parties intéressées aux transactions en vertu desquelles des biens de Peoples avaient été transférés à Wise pour une contrepartie manifestement inférieure à la juste valeur du marché au sens de l'art. 100 de la *Loi sur la faillite et l'insolvabilité* (« LFI »). En première instance, le juge a conclu que les frères Wise étaient responsables en regard des deux moyens invoqués. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est rejeté. Les frères Wise n'ont pas manqué aux obligations que leur imposait le par. 122(1) de la LCSA, et les transactions attaquées n'étaient pas contraires à l'art. 100 de la LFI.

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The fiduciary duty under s. 122(1)(*a*) of the CBCA requires directors and officers to act in good faith and honestly *vis-à-vis* the corporation. Here, the trial judge found that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise. The Wise brothers considered the serious inventory management problem and implemented a joint inventory procurement policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, the directors did not breach their fiduciary duty under s. 122(1)(*a*). An honest and good faith attempt to redress a corporation's financial problems does not, if unsuccessful, qualify as such a breach. The fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". At all times, they owe their fiduciary obligations to the corporation, and the corporations' interests are not to be confused with the interests of the creditors or those of any other stakeholder. There is no need to read the interests of creditors into the fiduciary duty set out in s. 122(1)(*a*) in light of the availability under the CBCA both of the oppression remedy (s. 241(2)(*c*)) and of an action based on the duty of care (s. 122(1)(*b*)).

L'obligation fiduciaire prévue à l'al. 122(1)*a*) de la LCSA impose aux administrateurs et aux dirigeants le devoir d'agir avec intégrité et de bonne foi aux mieux des intérêts de la société. En l'espèce, le juge de première instance a conclu qu'il n'y a eu ni fraude ni malhonnêteté de la part des frères Wise lorsqu'ils ont tenté de régler les problèmes d'approvisionnement de plus en plus graves de Peoples et de Wise. Les frères Wise ont examiné le grave problème de gestion des stocks et ont mis en application une politique d'approvisionnement commun qui, espéraient-ils, permettrait de le régler. En l'absence d'éléments de preuve de l'existence d'un intérêt personnel ou d'une fin illégitime de la nouvelle politique, et compte tenu de la preuve d'une volonté de faire de Wise et de Peoples de « meilleures » entreprises, les administrateurs n'ont pas manqué à leur obligation fiduciaire énoncée à l'al. 122(1)*a*). On ne peut conclure à un tel manquement en cas d'échec d'une tentative faite avec intégrité et de bonne foi pour redresser la situation financière d'une société. L'obligation fiduciaire reste la même lorsqu'une société se trouve dans la situation que décrit l'expression nébuleuse « au bord de l'insolvabilité ». Ils ont en tout temps leur obligation fiduciaire envers la société, et les intérêts de la société ne doivent pas se confondre avec ceux des actionnaires, avec ceux des créanciers ni avec ceux de toute autre partie intéressée. Il n'est pas nécessaire d'interpréter les intérêts des créanciers comme étant visés par l'obligation prévue à l'al. 122(1)*a*) compte tenu de la possibilité, en vertu de la LCSA, d'un recours en cas d'abus de droit (al. 241(2)*c*)), en plus de l'action fondée sur l'obligation de diligence (al. 122(1)*b*)).

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The standard of care is an objective one. The decisions of directors and officers must be reasonable business decisions in light of all the circumstances, including the prevailing socio-economic conditions, about which they knew or ought to have known. While courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are often involved in corporate decision-making, they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision. In this case, in adopting the joint inventory procurement policy, the directors did not breach their duty of care in respect of Peoples' creditors. The implementation of the new policy was a reasonable business decision made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually

On ne considérera pas que les administrateurs et les dirigeants ont manqué à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA s'ils ont agi avec prudence et en s'appuyant sur les renseignements dont ils disposaient. La norme de diligence est une norme objective. Les décisions des administrateurs et des dirigeants doivent constituer des décisions d'affaires raisonnables compte tenu de toutes les circonstances, notamment les conditions socio-économiques existantes, qu'ils connaissaient ou auraient dû connaître. Si les tribunaux ne doivent pas substituer leur opinion à celle des administrateurs qui ont utilisé leur expertise commerciale pour évaluer les considérations qui entrent dans la prise de décisions des sociétés, ils sont toutefois en mesure d'établir, à partir des faits de chaque cas, si l'on a exercé le degré de prudence et de diligence nécessaire pour en arriver à ce qu'on prétend être une décision d'affaires raisonnable au moment où elle a été prise. En l'espèce, en adoptant la politique d'approvisionnement commun, les administrateurs n'ont pas contrevenu à leur obligation de diligence à l'égard des créanciers de Peoples. L'instauration de la nouvelle politique était une décision d'affaires raisonnable qui a été prise en vue de corriger un problème d'ordre commercial

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incorrect and constituted a palpable and overriding error. Many factors other than the new policy contributed more directly to Peoples' bankruptcy.

grave et urgent dans un cas où il n'existait peut-être aucune solution. En concluant que la nouvelle politique avait inexorablement entraîné le déclin et la faillite de Peoples, le juge de première instance a mal interprété les faits et a commis une erreur manifeste et dominante. De nombreux facteurs, outre la nouvelle politique, ont contribué plus directement à la faillite de Peoples.

Section 44(2) of the CBCA as it then read (the provision has since been repealed) cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation. Nor can the Wise brothers successfully invoke good faith reliance on the opinion of the vice-president of administration and finance under s. 123(4)(*b*) of the CBCA. As a non-professional employee, the vice-president did not belong to any of the professional groups named in s. 123(4)(*b*). He was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence.

Le paragraphe 44(2) de la LCSA qui s'appliquait à l'époque (abrogé depuis) ne permet pas de soustraire les administrateurs et les dirigeants à leur responsabilité éventuelle en vertu du par. 122(1) pour toute aide financière fournie par une filiale à sa société mère. Les frères Wise ne peuvent non plus faire valoir avec succès qu'ils s'appuyaient de bonne foi sur l'opinion du vice-président aux finances comme le prévoit l'al. 123(4)*b*) de la LCSA. Le vice-président était un employé non professionnel et n'était membre d'aucun des groupes de professionnels désignés à l'al. 123(4)*b*). Il n'était pas un comptable, ses activités n'étaient pas réglementées par une organisation professionnelle et il n'avait pas lui-même souscrit d'assurance-responsabilité professionnelle.

The trustee's claim under s. 100 of the BIA must fail. The relevant transactions are those spanning the period from February to December 1994 when the new procurement policy was in effect. With regard to all the circumstances of this case, a disparity of slightly more than six percent between fair market value and the consideration received does not constitute a conspicuous difference.

La réclamation du syndic fondée sur l'art. 100 de la LFI doit échouer. Les transactions en cause sont celles qui ont été effectuées au cours de la période de février à décembre 1994 pendant laquelle la nouvelle politique d'approvisionnement était appliquée. Compte tenu de toutes les circonstances de la présente espèce, un écart d'un peu plus de 6 pour 100 entre la juste valeur du marché et la contrepartie reçue ne constitue pas une différence manifeste.

While, in light of this conclusion, there is no need to consider whether the Wise brothers would have been "privy" to the transactions, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following comments. Since the provision's remedial purpose is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person, the word "privy" should be given a broad reading to include those who benefit directly or indirectly from, and have knowledge of, a transaction occurring for less than fair market value. This rationale is particularly apt when those who benefit are the controlling minds behind the transaction.

Si, compte tenu de cette conclusion, il est inutile d'examiner si les frères Wise auraient eu un « intérêt » à la transaction, le désaccord entre le juge de première instance et la Cour d'appel sur l'interprétation des mots « ayant intérêt » au par. 100(2) de la LFI justifie les observations qui suivent. Puisque l'objet réparateur de cette disposition est d'annuler les effets d'une transaction qui a diminué la valeur des actifs d'un failli, il convient de donner aux termes « ayant intérêt » un sens large afin qu'ils s'appliquent aux personnes qui tirent un avantage direct ou indirect d'une transaction tout en sachant que la contrepartie est inférieure à la juste valeur du marché. Ce raisonnement est particulièrement pertinent lorsque les personnes qui touchent un avantage sont les instigatrices de la transaction.

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APPEAL from a judgment of the Quebec Court of Appeal, [2003] R.J.Q. 796, 224 D.L.R. (4th) 509, 41 C.B.R. (4th) 225, [2003] Q.J. No. 505 (QL), setting aside a decision of the Superior Court (1998), 23 C.B.R. (4th) 200, [1998] Q.J. No. 3571 (QL). Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel du Québec, [2003] R.J.Q. 796, 224 D.L.R. (4th) 509, 41 C.B.R. (4th) 225, [2003] J.Q. n° 505 (QL), qui a infirmé une décision de la Cour supérieure (1998), 23 C.B.R. (4th) 200, [1998] J.Q. n° 3571 (QL). Pourvoi rejeté.

Gerald F. Kandestin, *Gordon Kugler* and *Gordon Levine*, for the appellant.

Gerald F. Kandestin, *Gordon Kugler* et *Gordon Levine*, pour l'appelante.

Éric Lalanne and *Martin Tétreault*, for the respondents Lionel Wise, Ralph Wise and Harold Wise.

Éric Lalanne et *Martin Tétreault*, pour les intimés Lionel Wise, Ralph Wise et Harold Wise.

Ian Rose and *Odette Jobin-Laberge*, for the respondent Chubb Insurance Company of Canada.

Ian Rose et *Odette Jobin-Laberge*, pour l'intimée Chubb du Canada, Compagnie d'assurance.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

MAJOR AND DESCHAMPS JJ. —

LES JUGES MAJOR ET DESCHAMPS —

I. Introduction

1 The principal question raised by this appeal is whether directors of a corporation owe a fiduciary duty to the corporation's creditors comparable to the statutory duty owed to the corporation. For the reasons that follow, we conclude that directors owe a duty of care to creditors, but that duty does not rise to a fiduciary duty. We agree with the disposition of

I. Introduction

La principale question soulevée par le présent pourvoi est de savoir si les administrateurs d'une société ont, envers les créanciers de la société, une obligation fiduciaire comparable à l'obligation que leur impose la loi à l'égard de la société. Pour les motifs qui suivent, nous concluons que les administrateurs ont envers les créanciers une obligation

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the Quebec Court of Appeal. The appeal is therefore dismissed.

de diligence, mais cette obligation ne s'élève pas au niveau d'une obligation fiduciaire. Nous souscrivons au dispositif de la Cour d'appel du Québec. Le pourvoi est donc rejeté.

2

As a result of the demise in the mid-1990s of two major retail chains in eastern Canada, Wise Stores Inc. ("Wise") and its wholly-owned subsidiary, Peoples Department Stores Inc. ("Peoples"), the indebtedness of a number of Peoples' creditors went unsatisfied. In the wake of the failure of the two chains, Caron Bélanger Ernst & Young Inc., Peoples' trustee in bankruptcy ("trustee"), brought an action against the directors of Peoples. To address the trustee's claims, the extent of the duties imposed by s. 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), upon directors with respect to creditors must be determined; we must also identify the purpose and reach of s. 100 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

En raison de la faillite, au milieu des années 1990, de deux importantes chaînes de magasins de détail de l'Est du Canada, Wise Stores Inc. (« Wise ») et sa filiale à part entière, les Magasins à rayons Peoples Inc. (« Peoples »), de nombreuses créances de Peoples sont demeurées insatisfaites. Caron Bélanger Ernst & Young Inc., le syndic à la faillite de Peoples (« syndic »), a intenté une action contre les administrateurs de Peoples. Pour statuer sur les réclamations du syndic, il convient de déterminer l'étendue des obligations envers les créanciers qu'impose aux administrateurs le par. 122(1) de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« LCSA »). Nous devons également préciser l'objet et la portée de l'art. 100 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« LFI »).

3

In our view, it has not been established that the directors of Peoples violated either the fiduciary duty or the duty of care imposed by s. 122(1) of the CBCA. As for the trustee's submission regarding s. 100 of the BIA, we agree with the Court of Appeal that the consideration received in the impugned transactions was not "conspicuously" less than fair market value. The BIA claim fails on that basis.

À notre avis, il n'a pas été démontré que les administrateurs de Peoples ont manqué à l'obligation fiduciaire ou à l'obligation de diligence qu'impose le par. 122(1) de la LCSA. Pour ce qui est de l'argument du syndic concernant l'art. 100 de la LFI, nous concluons comme la Cour d'appel que la contrepartie reçue dans le cadre des transactions contestées n'était pas « manifestement » inférieure à la juste valeur du marché. La réclamation fondée sur la LFI est rejetée pour ce motif.

II. Background

II. Contexte

4

Wise was founded by Alex Wise in 1930 as a small clothing store on St-Hubert Street in Montreal. By 1992, through expansion effected by a mix of internal growth and acquisitions, it had become an enterprise operating at 50 locations with annual sales of approximately $100 million, and it had been listed on the Montreal Stock Exchange in 1986. The stores were, for the most part, located in urban areas in Quebec. The founder's three sons, Lionel, Ralph and Harold Wise ("Wise brothers"), were majority shareholders, officers, and directors of Wise. Together, they controlled 75 percent of the firm's equity.

Wise a été fondée en 1930 par Alex Wise et était à l'origine un petit magasin de vêtements sur la rue St-Hubert, à Montréal. En 1992, l'entreprise avait élargi ses activités par sa croissance interne et des acquisitions. Elle exploitait 50 magasins dont les ventes annuelles s'élevaient à environ 100 millions de dollars et elle avait été inscrite à la Bourse de Montréal en 1986. Ses magasins se trouvaient pour la plupart dans des régions urbaines du Québec. Les trois fils du fondateur, Lionel, Ralph et Harold Wise (« frères Wise »), étaient actionnaires majoritaires, dirigeants et administrateurs de Wise. Ensemble, ils contrôlaient 75 pour 100 des actions ordinaires de l'entreprise.

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5 In 1992, Peoples had been in business continuously in one form or another for 78 years. It had operated as an unincorporated division of Marks & Spencer Canada Inc. ("M & S") until 1991, when it was incorporated as a separate company. M & S itself was wholly owned by the large British firm, Marks & Spencer plc. ("M & S plc."). Peoples' 81 stores were generally located in rural areas, from Ontario to Newfoundland. Peoples had annual sales of about $160 million, but was struggling financially. Its annual losses were in the neighbourhood of $10 million.

En 1992, Peoples poursuivait déjà ses activités commerciales, sous une forme ou une autre, depuis 78 ans sans interruption. Elle était une division non constituée en société de Marks & Spencer Canada Inc. (« M & S ») jusqu'en 1991, année de sa constitution en société distincte. M & S était elle-même une filiale à part entière de la grande société britannique Marks & Spencer plc. (« M & S plc. »). Les 81 magasins de Peoples se trouvaient plutôt dans des régions rurales, de l'Ontario à Terre-Neuve. Les ventes annuelles de Peoples s'élevaient à environ 160 millions de dollars, mais avec des pertes annuelles d'environ 10 millions de dollars, l'entreprise se trouvait en difficulté financière.

6 Wise and Peoples competed with other chains such as Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco and Zellers. Retail competition in eastern Canada was intense in the early 1990s. In 1992, M-Stores went bankrupt. In 1994, Greenberg and Metropolitan Stores followed M-Stores into bankruptcy. The 1994 entry of Wal-Mart into the Canadian market, with its acquisition of over 100 Woolco stores from Woolworth Canada Inc., exerted significant additional competitive pressure on retail stores.

Wise et Peoples étaient en concurrence avec d'autres chaînes comme Canadian Tire, Greenberg, Hart, K-Mart, M-Stores, Metropolitan Stores, Rossy, Woolco et Zellers. Au début des années 1990, la concurrence dans le secteur de la vente au détail dans l'Est du Canada était féroce. En 1992, M-Stores a fait faillite. En 1994, Greenberg et Metropolitan Stores ont fait faillite à leur tour. En 1994, l'arrivée sur le marché canadien de Wal-Mart, qui a acquis de Woolworth Canada Inc. plus de 100 magasins du détaillant Woolco au Canada, a soumis les commerces de vente au détail à une concurrence encore plus forte.

7 Lionel Wise, the eldest of the three brothers and Wise's executive vice-president, had expressed an interest in acquiring the ailing Peoples chain from M & S as early as 1988. Initially, M & S did not share Wise's interest for the sale, but by late 1991, M & S plc., the British parent company of M & S, had decided to divest itself of all its Canadian operations. At this point, M & S incorporated each of its three Canadian divisions to facilitate the anticipated divestiture thereof.

Dès 1988, Lionel Wise, l'aîné des trois frères et le vice-président exécutif de Wise, s'était montré intéressé à acheter de M & S la chaîne Peoples dont les activités étaient en déclin. Au départ, M & S ne partageait pas l'intérêt de Wise pour la vente, mais à la fin de 1991, M & S plc., la société mère britannique de M & S, avait décidé de mettre fin à toutes ses activités commerciales au Canada. M & S a alors constitué ses trois divisions canadiennes en sociétés distinctes pour en faciliter la vente.

8 The new-found desire to sell coincided with Wise's previously expressed interest in acquiring its larger rival. Although M & S had initially hoped to sell Peoples for cash to a large firm in a solid financial condition, it was unable to do so. Consequently, negotiations got underway with representatives of Wise. A formal share purchase agreement was

Cette nouvelle volonté de vendre coïncide avec le désir manifesté auparavant par Wise d'acquérir sa grande rivale. Même si elle avait d'abord espéré vendre Peoples au comptant à une large entreprise jouissant d'une solide situation financière, M & S en est incapable. Par conséquent, elle amorce des négociations avec des représentants de Wise. Une

drawn up in early 1992 and executed in June 1992, with July 16, 1992 as its closing date.

convention formelle d'achat d'actions est rédigée au début de 1992 et signée en juin 1992, la date limite d'exécution étant fixée au 16 juillet 1992.

Wise incorporated a company, 2798832 Canada Inc., for the purpose of acquiring all of the issued and outstanding shares of Peoples from M & S. The $27-million share acquisition proceeded as a fully leveraged buyout. The portion of the purchase price attributable to inventory was discounted by 30 percent. The discount was designed to inject equity into Peoples in the fiscal year following the sale and to make use of some of the tax losses that had accumulated in prior years.

9

Afin d'acheter de M & S toutes les actions émises et en circulation de Peoples, Wise constitue la société 2798832 Canada Inc. L'acquisition des actions, pour une somme de 27 millions de dollars, est faite entièrement par emprunt. Une réduction de 30 pour 100 est accordée à l'égard de la partie du prix d'achat attribuable au coût des stocks. La réduction a pour but de permettre l'injection de capitaux dans Peoples au cours de l'exercice financier suivant la vente et d'utiliser certaines des pertes fiscales accumulées au cours des années précédentes.

The amount of the down payment due to M & S at closing, $5 million, was borrowed from the Toronto Dominion Bank ("TD Bank"). According to the terms of the share purchase agreement, the $22-million balance of the purchase price would be carried by M & S and would be repaid over a period of eight years. Wise guaranteed all of 2798832 Canada Inc.'s obligations pursuant to the terms of the share purchase agreement.

10

Le versement initial dû à M & S à la signature, soit 5 millions de dollars, est emprunté à la Banque Toronto Dominion (« Banque TD »). Suivant les modalités de la convention d'achat d'actions, le reliquat de 22 millions de dollars du prix d'achat est dû à M & S et son remboursement échelonné sur une période de huit ans. Aux termes de la convention d'achat d'actions, Wise garantit solidairement toutes les obligations de 2798832 Canada Inc.

To protect its interests, M & S took the assets of Peoples as security (subject to a priority in favour of the TD Bank) and negotiated strict covenants concerning the financial management and operation of the company. Among other requirements, 2798832 Canada Inc. and Wise were obligated to maintain specific financial ratios, and Peoples was not permitted to provide financial assistance to Wise. In addition, the agreement provided that Peoples could not be amalgamated with Wise until the purchase price had been paid. This prohibition was presumably intended to induce Wise to refinance and pay the remainder of the purchase price as early as possible in order to overcome the strict conditions imposed upon it under the share purchase agreement.

11

Afin de protéger ses intérêts, M & S prend les actifs de Peoples en garantie (sous réserve d'une priorité de rang en faveur de la Banque TD) et négocie des conditions strictes concernant la gestion financière et l'exploitation de la société. Notamment, 2798832 Canada Inc. et Wise ont l'obligation de maintenir des ratios financiers précis et Peoples n'est pas autorisée à fournir d'aide financière à Wise. De plus, la convention prévoit que Peoples ne peut fusionner avec Wise avant le paiement intégral du prix d'achat. Cette interdiction a vraisemblablement pour but d'inciter Wise à se refinancer et à payer le plus tôt possible le reliquat du prix d'achat afin d'écarter les conditions strictes qui lui sont imposées dans la convention d'achat d'actions.

On January 31, 1993, 2798832 Canada Inc. was amalgamated with Peoples. The new entity retained Peoples' corporate name. Since 2798832 Canada Inc. had been a wholly-owned subsidiary of Wise, upon amalgamation the new Peoples became a subsidiary directly owned and controlled by Wise.

12

Le 31 janvier 1993, 2798832 Canada Inc. est fusionnée avec Peoples. La nouvelle entité conserve la dénomination sociale de Peoples. Comme 2798832 Canada Inc. était une filiale à part entière de Wise au moment de la fusion, la nouvelle entité Peoples devient une filiale de Wise qui en a aussi le

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The three Wise brothers were Peoples' only directors.

contrôle. Les trois frères Wise sont les seuls administrateurs de Peoples.

13 Following the acquisition, Wise had attempted to rationalize its operations by consolidating the overlapping corporate functions of Wise and Peoples, and operating as a group. The consolidation of the administration, accounting, advertising and purchasing departments of the two corporations was completed by the fall of 1993. As a consequence of the changes, many of Wise's employees worked for both firms but were paid solely by Wise. The evidence at trial was that because of the tax losses carried-forward by Peoples, it was advantageous for the group to have more expenses incurred by Wise, which, if the group was profitable as a whole, would increase its after-tax profits. Almost from the outset, the joint operation of Wise and Peoples did not function smoothly. Instead of the expected synergies, the consolidation resulted in dissonance.

Après l'acquisition, Wise avait tenté de rationaliser ses opérations en regroupant les diverses opérations de Wise et de Peoples qui se chevauchaient et en exploitant les deux entreprises comme un seul groupe. Le regroupement des services de la gestion, de la comptabilité, de la publicité et des achats des deux sociétés a été achevé à l'automne 1993. En raison de ces changements, de nombreux employés de Wise travaillaient pour les deux entreprises mais étaient payés par Wise uniquement. La preuve en première instance a démontré qu'en raison des pertes fiscales reportées de Peoples, il était avantageux pour le groupe que Wise engage davantage de dépenses, ce qui permettrait, si le groupe était rentable dans l'ensemble, d'augmenter ses bénéfices après impôt. Presque dès le début, l'exploitation en commun de Wise et de Peoples s'est avérée difficile. Au lieu de la synergie attendue, la consolidation a engendré la confusion.

14 After the acquisition, the total number of buyers for the two companies was nearly halved. The procurement policy at that point required buyers to deal simultaneously with suppliers on behalf of both Peoples and Wise. For the buyers, this nearly doubled their administrative work. Separate invoices were required for purchases made on behalf of Wise and Peoples. These invoices had to be separately entered into the system, tracked and paid.

Après l'acquisition, le nombre total d'acheteurs des deux sociétés est diminué d'environ la moitié. La politique d'approvisionnement oblige alors les acheteurs à traiter simultanément avec les fournisseurs pour le compte de Peoples et de Wise, ce qui double presque leurs tâches administratives. Des factures distinctes sont nécessaires pour les achats faits au nom de Wise et ceux faits au nom de Peoples. Ces factures doivent être inscrites séparément et faire l'objet d'un suivi et d'un paiement distincts.

15 Inventory, too, was separately recorded and tracked in the system. However, the inventory of each company was handled and stored, often unsegregated, in shared warehouse facilities. The main warehouse for Peoples, on Cousens Street in Ville St-Laurent, was maintained for and used by both firms. The Cousens warehouse saw considerable activity, as it was the central distribution hub for both chains. The facility was open 18 hours a day and employed 150 people on two shifts who handled a total of approximately 30,000 cartons daily through 20 loading docks. It was abuzz with activity.

Les stocks font aussi l'objet d'une inscription et d'un suivi distincts dans le système. Toutefois, les stocks de chacune des sociétés sont manipulés et entreposés, souvent sans être séparés, dans des entrepôts communs. L'entrepôt principal de Peoples, situé rue Cousens à Ville St-Laurent, a été conservé et utilisé par les deux entreprises. Il y a beaucoup d'activité à l'entrepôt Cousens parce qu'il s'agit du principal centre de distribution par les deux chaînes. L'entrepôt est ouvert 18 heures par jour et 150 personnes, y travaillant sur deux quarts, s'occupent de la manutention d'environ 30 000 boîtes quotidiennement sur 20 quais de chargement. L'activité y est intense.

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Before long, the parallel bookkeeping combined with the shared warehousing arrangements caused serious problems for both Wise and Peoples. The actual situation in the warehouse often did not mirror the reported state of the inventory in the system. The goods of one company were often inextricably commingled and confused with the goods of the other. As a result, the inventory records of both companies were increasingly incorrect. A physical inventory count was conducted to try to rectify the situation, to little avail. Both Wise and Peoples stores experienced numerous shipping disruptions and delays. The situation, already unsustainable, was worsening.

16 Rapidement, la tenue d'une comptabilité parallèle, conjuguée à l'entreposage en commun des marchandises, crée de graves problèmes tant pour Wise que pour Peoples. L'emplacement des marchandises dans l'entrepôt ne reflète pas toujours l'état des stocks indiqué dans le système. Les marchandises d'une société sont souvent mêlées aux marchandises de l'autre et confondues avec celle-ci. En conséquence, les fiches de stocks des deux sociétés sont de plus en plus inexactes. Un inventaire manuel des marchandises est effectué pour essayer de corriger la situation, sans grand succès. Les livraisons aux magasins de Wise et de Peoples sont souvent perturbées et en retard. La situation, déjà intolérable, empire.

In October 1993, Lionel Wise consulted David Clément, Wise's (and, after the acquisition, Peoples') vice-president of administration and finance, in an attempt to find a solution. In January 1994, Clément recommended and the three Wise brothers agreed that they would implement a joint inventory procurement policy ("new policy") whereby the two firms would divide responsibility for purchasing. Peoples would make all purchases from North American suppliers and Wise would, in turn, make all purchases from overseas suppliers. Peoples would then transfer to Wise what it had purchased for Wise, charging Wise accordingly, and vice versa. The new policy was implemented on February 1, 1994. It was this arrangement that was later criticized by certain creditors and by the trial judge.

17 En octobre 1993, Lionel Wise consulte David Clément, vice-président à l'administration et aux finances de Wise (et, après l'acquisition, de Peoples) pour tenter de trouver une solution. Au mois de janvier 1994, Clément recommande aux trois frères Wise, qui acceptent, de mettre en œuvre une politique d'approvisionnement commun (« nouvelle politique ») en vertu de laquelle les deux entreprises se partageront la responsabilité des achats. Peoples s'occupera de tous les achats auprès de fournisseurs en Amérique du Nord et Wise, pour sa part, se chargera de tous les achats faits outre-mer. Peoples transférera ensuite à Wise les marchandises achetées pour Wise et lui en réclamera le prix, et vice versa. La nouvelle politique entre en vigueur le 1er février 1994. C'est cet arrangement qui fera plus tard l'objet de critiques de la part de certains créanciers et du juge de première instance.

Approximately 82 percent of the total inventory of Wise and Peoples was purchased from North American suppliers, which inevitably meant that Peoples would be extending a significant trade credit to Wise. The new policy was known to the directors, but was neither formally implemented in writing nor approved by a board meeting or resolution.

18 Environ 82 pour 100 de la totalité des marchandises de Wise et de Peoples sont achetées auprès de fournisseurs nord-américains, de sorte qu'inévitablement, Peoples doit consentir à Wise un important crédit commercial. La nouvelle politique est connue des administrateurs, mais elle n'est pas formellement consignée par écrit ni approuvée lors d'une réunion du conseil d'administration ou par une résolution de celui-ci.

On April 27, 1994, Lionel Wise outlined the details of the new policy at a meeting of Wise's audit committee. A partner of Coopers & Lybrand was

19 Le 27 avril 1994, Lionel Wise expose en détail la nouvelle politique lors d'une réunion du comité de vérification de Wise. Un associé principal de

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M & S's representative on Wise's board of directors and a member of the audit committee. He attended the April 27th meeting and raised no objection to the new policy when it was introduced.

Coopers & Lybrand représente M & S au conseil d'administration de Wise et est aussi membre du comité de vérification. Il est présent à la réunion du 27 avril et ne s'oppose pas à la nouvelle politique lorsqu'elle est présentée.

20 By June 1994, financial statements prepared to reflect the financial position of Peoples as of April 30, 1994 revealed that Wise owed more than $18 million to Peoples. Approximately $14 million of this amount resulted from a notional transfer of inventory that was cancelled following the period's end. M & S was concerned about the situation and started an investigation, as a result of which M & S insisted that the new procurement policy be rescinded. Wise agreed to M & S's demand but took the position that the former procurement policy could not be reinstated immediately. An agreement was executed on September 27, 1994, effective July 21, 1994, and it provided that the new policy would be abandoned as of January 31, 1995. The agreement also specified that the inventory and records of the two companies would be kept separate, and that the amount owed to Peoples by Wise would not exceed $3 million.

En juin 1994, les états financiers préparés pour indiquer la situation financière de Peoples le 30 avril 1994 révèlent que Wise doit plus de 18 millions de dollars à Peoples. De cette somme, un montant d'environ 14 millions de dollars résulte d'un transfert fictif des stocks qui ont été retournés après la fin de la période. Inquiète de la situation, M & S amorce une enquête à l'issue de laquelle elle exige l'abandon de la nouvelle politique d'approvisionnement. Wise accepte de se plier à l'exigence de M & S, mais elle indique que l'ancienne politique d'approvisionnement ne peut pas être rétablie immédiatement. Une entente prévoyant que la nouvelle politique sera abandonnée le 31 janvier 1995 est signée le 27 septembre 1994, avec effet rétroactif au 21 juillet 1994. L'entente prévoit aussi que les stocks et les registres des deux sociétés seront séparés et que la somme due à Peoples par Wise ne dépassera pas 3 millions de dollars.

21 Another result of the negotiations was that M & S accepted an increase in the amount of the TD Bank's priority to $15 million and a new repayment schedule for the balance of the purchase price owed to M & S. The parties agreed to revise the schedule to provide for 37 monthly payments beginning in July 1995. Each of the Wise brothers also provided a personal guarantee of $500,000 in favour of M & S.

À l'issue des négociations, M & S accepte aussi que la somme à laquelle la Banque TD a droit en priorité soit portée à 15 millions de dollars et qu'un nouvel échéancier de remboursement du reliquat du prix d'achat dû à M & S soit établi. Les parties acceptent de revoir l'échéancier de façon à prévoir 37 versements mensuels à partir de juillet 1995. Chacun des frères Wise fournit aussi à M & S une garantie personnelle de 500 000 $.

22 In September 1994, in light of the fragile financial condition of the companies and the competitiveness of the retail market, the TD Bank announced its intention to cease doing business with Wise and Peoples as of the end of December 1994. Following negotiations, however, the bank extended its financial support until the end of July 1995. The Wise brothers promised to extend personal guarantees in favour of the TD Bank, but this did not occur.

En septembre 1994, constatant la situation financière précaire des sociétés et la compétitivité dans le secteur de la vente au détail, la Banque TD annonce son intention de cesser de faire affaire avec Wise et Peoples à la fin de décembre 1994. Toutefois, à la suite de négociations, elle prolonge son soutien financier jusqu'à la fin de juillet 1995. Les frères Wise s'engagent à fournir des garanties personnelles en faveur de la Banque TD, mais ils ne donnent pas suite à cet engagement.

23 In December 1994, three days after the Wise brothers presented financial statements showing

En décembre 1994, trois jours après la présentation par les frères Wise d'états financiers indiquant

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disappointing results for Peoples in its third fiscal quarter, M & S initiated bankruptcy proceedings against both Wise and Peoples. A notice of intention to make a proposal was filed on behalf of Peoples the same day. Nonetheless, Peoples later consented to the petition by M & S, and both Wise and Peoples were declared bankrupt on January 13, 1995, effective December 9, 1994. The same day, M & S released each of the Wise brothers from their personal guarantees. M & S apparently preferred to proceed with an uncontested petition in bankruptcy rather than attempting to collect on the personal guarantees.

des résultats décevants pour le troisième trimestre de Peoples, M & S engage des procédures de faillite contre Wise et Peoples. Un avis d'intention de faire une proposition est déposé au nom de Peoples le même jour. Peoples accepte néanmoins plus tard la requête présentée par M & S, et Wise et Peoples sont déclarées en faillite le 13 janvier 1995, avec effet rétroactif au 9 décembre 1994. Le même jour, M & S accorde à chacun des frères Wise mainlevée de leurs garanties personnelles. Au lieu de tenter de réaliser les garanties personnelles, il semble que M & S préférait que la requête en faillite ne soit pas contestée.

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24

The assets of Wise and Peoples were sufficient to cover in full the outstanding debt owed to the TD Bank, satisfy the entire balance of the purchase price owed to M & S, and discharge almost all the landlords' lease claims. The bulk of the unsatisfied claims were those of trade creditors.

Les biens de Wise et de Peoples sont suffisants pour rembourser entièrement la Banque TD, pour payer le reliquat du prix de vente dû à M & S et pour payer la presque totalité des créances des locateurs. La grande majorité des créances impayées sont celles de fournisseurs.

25

Following the bankruptcy, Peoples' trustee filed a petition against the Wise brothers. In the petition, the trustee claimed that they had favoured the interests of Wise over Peoples to the detriment of Peoples' creditors, in breach of their duties as directors under s. 122(1) of the CBCA. The trustee also claimed that the Wise brothers had, in the year preceding the bankruptcy, been privy to transactions in which property had been transferred for conspicuously less than fair market value within the meaning of s. 100 of the BIA.

Après la faillite, le syndic de Peoples présente contre les frères Wise une requête dans laquelle il prétend que ces derniers ont privilégié les intérêts de Wise plutôt que ceux de Peoples au détriment des créanciers de Peoples, en contravention des obligations que le par. 122(1) de la LCSA leur imposait en tant qu'administrateurs. Le syndic soutient aussi que, au cours de l'année ayant précédé la faillite, les frères Wise étaient des parties intéressées aux transactions en vertu desquelles des biens avaient été transférés pour une contrepartie manifestement inférieure à la juste valeur du marché au sens de l'art. 100 de la LFI.

26

Pursuant to art. 2501 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), the trustee named Chubb Insurance Company of Canada ("Chubb"), which had provided directors' insurance to Wise and its subsidiaries, as a defendant in addition to the Wise brothers.

Se fondant sur l'art. 2501 du *Code civil du Québec*, L.Q. 1991, ch. 64 (« C.c.Q. »), le syndic désigne la Compagnie d'assurance Chubb du Canada (« Chubb »), qui avait assuré les administrateurs de Wise et de ses filiales, à titre de codéfenderesse des frères Wise.

27

The trial judge, Greenberg J., relying on decisions from the United Kingdom, Australia and New Zealand, held that the fiduciary duty and the duty of care under s. 122(1) of the CBCA extend to a company's creditors when a company is insolvent or in the vicinity of insolvency. Greenberg J. found that the implementation, by the Wise brothers *qua*

Invoquant des décisions rendues au Royaume-Uni, en Australie et en Nouvelle-Zélande, le juge Greenberg statue en première instance que l'obligation fiduciaire et l'obligation de diligence énoncées au par. 122(1) de la LCSA s'imposaient aussi à l'égard des créanciers d'une société lorsque celle-ci est insolvable ou au bord de l'insolvabilité. Il

directors of Peoples, of a corporate policy that affected both companies, had occurred while the corporation was in the vicinity of insolvency and was detrimental to the interests of the creditors of Peoples. The Wise brothers were therefore found liable and the trustee was awarded $4.44 million in damages. As Chubb had provided insurance coverage for directors, it was also held liable. Greenberg J. also considered the alternative grounds under the BIA advanced by the trustee and found the Wise brothers liable for the same $4.44 million amount on that ground as well. All the parties appealed.

conclut que c'est au moment où l'entreprise était au bord de l'insolvabilité que les frères Wise, en leur qualité d'administrateurs de Peoples, ont appliqué une politique corporative qui touchait les deux sociétés et qui était préjudiciable aux intérêts des créanciers de Peoples. Les frères Wise sont donc jugés responsables et des dommages-intérêts de 4,44 millions de dollars sont accordés au syndic. Comme elle avait assuré les administrateurs, Chubb est elle aussi jugée responsable. Le juge Greenberg examine également les moyens subsidiaires fondés sur la LFI qu'avait avancés le syndic et il conclut que les frères Wise doivent être tenus responsables du paiement de la somme de 4,44 millions de dollars sur le fondement de ces mêmes moyens. Toutes les parties interjettent appel.

28

The Quebec Court of Appeal, *per* Pelletier J.A., with Robert C.J.Q. and Nuss J.A. concurring, allowed the appeals by Chubb and the Wise brothers: [2003] R.J.Q. 796, [2003] Q.J. No. 505 (QL). The Court of Appeal expressed reluctance to follow Greenberg J. in equating the interests of creditors with the best interests of the corporation when the corporation was insolvent or in the vicinity of insolvency, stating that an innovation in the law such as this is a policy matter more appropriately dealt with by Parliament than the courts. In considering the trustee's claim under s. 100 of the BIA, Pelletier J.A. held that the trial judge had committed a palpable and overriding error in concluding that the amounts owed by Wise to Peoples in respect of inventory "were neither collected nor collectible" (para. 125 QL). He found that the consideration received for the transactions had been approximately 94 percent of fair market value, and he was not convinced that this disparity could be characterized as being "conspicuously" less than fair market value. Moreover, he did not accept the broad meaning the trial judge gave to the word "privy". Pelletier J.A. declined to exercise his discretion under s. 100(2) of the BIA to make an order in favour of the trustee. In view of his conclusion that the Wise brothers were not liable, Pelletier J.A. allowed the appeal with respect to Chubb.

La Cour d'appel du Québec, par la décision du juge Pelletier avec l'accord du juge en chef Robert et du juge Nuss, accueille les appels de Chubb et des frères Wise : [2003] R.J.Q. 796. La cour exprime sa réticence à assimiler, comme l'a fait le juge Greenberg, les intérêts des créanciers aux intérêts supérieurs de la société lorsque celle-ci est insolvable ou est au bord de l'insolvabilité, précisant que l'opportunité d'une telle innovation en droit est une question de politique générale qui doit être laissée à l'appréciation du législateur plutôt qu'à celle des tribunaux. Examinant la réclamation faite par le syndic en vertu de l'art. 100 de la LFI, le juge Pelletier statue que le juge de première instance a commis une erreur manifeste et dominante en concluant que les sommes dues par Wise à Peoples à l'égard des marchandises [TRADUCTION] « n'ont pas été recouvrées et n'étaient pas recouvrables » (par. 126). Il juge que la contrepartie des transactions effectuées représentait environ 94 pour 100 de la juste valeur du marché et il n'est pas convaincu que l'on puisse affirmer que cet écart était « manifestement » inférieur à la juste valeur du marché. De plus, il n'accepte pas le sens large donné par le juge de première instance aux termes « ayant intérêt ». Le juge Pelletier refuse d'exercer le pouvoir discrétionnaire que lui confère le par. 100(2) de la LFI et d'accorder un jugement favorable au syndic. Concluant que la responsabilité des frères Wise n'est pas engagée, il accueille l'appel en ce qui a trait à Chubb.

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III. Analysis

At the outset, it should be acknowledged that according to art. 300 C.C.Q. and s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the civil law serves as a supplementary source of law to federal legislation such as the CBCA. Since the CBCA does not entitle creditors to sue directors directly for breach of their duties, it is appropriate to have recourse to the C.C.Q. to determine how rights grounded in a federal statute should be addressed in Quebec, and more specifically how s. 122(1) of the CBCA can be harmonized with the principles of civil liability: see R. Crête and S. Rousseau, *Droit des sociétés par actions: principes fondamentaux* (2002), at p. 58.

This case came before our Court on the issue of whether directors owe a duty to creditors. The creditors did not bring a derivative action or an oppression remedy application under the CBCA. Instead, the trustee, representing the interests of the creditors, sued the directors for an alleged breach of the duties imposed by s. 122(1) of the CBCA. The standing of the trustee to sue was not questioned.

The primary role of directors is described in s. 102(1) of the CBCA:

102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

As for officers, s. 121 of the CBCA provides that their powers are delegated to them by the directors:

121. Subject to the articles, the by-laws or any unanimous shareholder agreement,

(*a*) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3);

III. Analyse

29 Il convient tout d'abord de reconnaître que, suivant l'art. 300 C.c.Q. et l'art. 8.1 de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, le droit civil constitue une source de droit complétant les lois fédérales comme la LCSA. Comme la LCSA n'autorise pas les créanciers à poursuivre directement les administrateurs pour manquement à leurs obligations, il faut se reporter au C.c.Q. pour déterminer la façon de mettre en œuvre au Québec les droits trouvant leur fondement dans une loi fédérale et, plus spécifiquement, la façon d'harmoniser le par. 122(1) de la LCSA et les principes de la responsabilité civile : voir R. Crête et S. Rousseau, *Droit des sociétés par actions : principes fondamentaux* (2002), p. 58.

30 En l'espèce, notre Cour est appelée à trancher la question de savoir si les administrateurs ont des obligations envers les créanciers. Les créanciers n'ont pas exercé leurs droits par voie d'une action oblique ni par voie d'une demande de redressement pour abus de droit fondée sur la LCSA. Le syndic, représentant les intérêts des créanciers, a plutôt poursuivi les administrateurs en alléguant un manquement aux obligations que leur impose le par. 122(1) de la LCSA. La qualité du syndic d'engager les poursuites n'a pas été remise en question.

31 La principale fonction des administrateurs est indiquée au par. 102(1) de la LCSA :

102. (1) Sous réserve de toute convention unanime des actionnaires, les administrateurs gèrent les affaires commerciales et les affaires internes de la société ou en surveillent la gestion.

Pour ce qui est des dirigeants, l'art. 121 de la LCSA prévoit que leurs pouvoirs leurs sont délégués par les administrateurs :

121. Sous réserve des statuts, des règlements administratifs ou de toute convention unanime des actionnaires, il est possible, au sein de la société :

a) pour les administrateurs, de créer des postes de dirigeants, d'y nommer des personnes pleinement capables, de préciser leurs fonctions et de leur déléguer le pouvoir de gérer les activités commerciales et les affaires internes de la société, sauf les exceptions prévues au paragraphe 115(3);

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(*b*) a director may be appointed to any office of the corporation; and

(*c*) two or more offices of the corporation may be held by the same person.

Although the shareholders are commonly said to own the corporation, in the absence of a unanimous shareholder agreement to the contrary, s. 102 of the CBCA provides that it is not the shareholders, but the directors elected by the shareholders, who are responsible for managing it. This clear demarcation between the respective roles of shareholders and directors long predates the 1975 enactment of the CBCA: see *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34 (C.A.); see also art. 311 C.C.Q.

b) de nommer un administrateur à n'importe quel poste;

c) pour la même personne, d'occuper plusieurs postes.

Bien que l'on dise souvent que les actionnaires sont propriétaires de l'entreprise, l'art. 102 de la LCSA prévoit que, sous réserve d'une convention unanime des actionnaires, ce ne sont pas les actionnaires mais les administrateurs élus par les actionnaires qui sont chargés de sa gestion. Cette nette démarcation entre les rôles respectifs des actionnaires et des administrateurs est bien antérieure à l'adoption de la LCSA en 1975 : voir *Automatic Self-Cleansing Filter Syndicate Co. c. Cuninghame*, [1906] 2 Ch. 34 (C.A.); voir aussi l'art. 311 C.c.Q.

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32 Section 122(1) of the CBCA establishes two distinct duties to be discharged by directors and officers in managing, or supervising the management of, the corporation:

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(*a*) act honestly and in good faith with a view to the best interests of the corporation; and

(*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best interests of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.

Le paragraphe 122(1) de la LCSA impose deux obligations distinctes aux administrateurs et aux dirigeants dans la gestion ou la surveillance de la gestion de l'entreprise :

122. (1) Les administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir :

a) avec intégrité et de bonne foi au mieux des intérêts de la société;

b) avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente.

La première obligation a été, en l'espèce, appelée « obligation fiduciaire », une notion que décrit mieux l'expression « devoir de loyauté ». Pour éviter toute confusion, nous utiliserons parfois l'expression « obligation fiduciaire prévue par la loi » pour désigner l'obligation prévue à la LCSA. Cette obligation impose aux administrateurs et aux dirigeants le devoir d'agir avec intégrité et de bonne foi au mieux des intérêts de la société. La deuxième obligation est communément appelée « obligation de diligence ». De manière générale, elle impose aux administrateurs et aux dirigeants l'obligation légale de faire preuve de diligence dans la gestion et la surveillance de la gestion des affaires de la société.

33 The trial judge did not apply or consider separately the two duties imposed on directors by s. 122(1). As the Court of Appeal observed, the trial

Le juge de première instance n'a ni appliqué ni examiné séparément les deux obligations imposées aux administrateurs par le par. 122(1). Comme l'a

judge appears to have confused the two duties. They are, in fact, distinct and are designed to secure different ends. For that reason, they will be addressed separately in these reasons.

fait remarquer la Cour d'appel, le juge de première instance semble avoir confondu ces deux obligations. Il s'agit en réalité de deux obligations distinctes visant des fins différentes. C'est pourquoi nous les examinerons séparément dans les présents motifs.

A. *The Statutory Fiduciary Duty: Section 122(1)(a) of the CBCA*

A. *L'obligation fiduciaire prévue par la loi : l'al. 122(1)a) de la LCSA*

34

Considerable power over the deployment and management of financial, human, and material resources is vested in the directors and officers of corporations. For the directors of CBCA corporations, this power originates in s. 102 of the Act. For officers, this power comes from the powers delegated to them by the directors. In deciding to invest in, lend to or otherwise deal with a corporation, shareholders and creditors transfer control over their assets to the corporation, and hence to the directors and officers, in the expectation that the directors and officers will use the corporation's resources to make reasonable business decisions that are to the corporation's advantage.

Les administrateurs et les dirigeants des sociétés sont investis d'un pouvoir considérable en matière de déploiement et de gestion des ressources financières, humaines et matérielles. Dans le cas des administrateurs de sociétés constituées en vertu de la LCSA, ce pouvoir trouve sa source à l'art. 102 de la Loi. Dans le cas des dirigeants, il s'agit des pouvoirs qui leur sont délégués par les administrateurs. Lorsqu'ils décident d'investir dans une société, de lui consentir un prêt ou de faire autrement affaire avec celle-ci, les actionnaires et les créanciers cèdent le contrôle de leurs actifs à la société et, par conséquent, à ses administrateurs et à ses dirigeants et s'attendent à ce qu'ils utilisent les ressources de la société pour prendre des décisions d'affaires raisonnables qui profiteront à la société.

35

The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.

En vertu de l'obligation fiduciaire prévue par la loi, les administrateurs et les dirigeants doivent agir avec intégrité et de bonne foi au mieux des intérêts de la société. Ils doivent respecter la confiance qui leur a été accordée et gérer les actifs qui leur sont confiés de manière à réaliser les objectifs de la société. Ils doivent éviter les conflits d'intérêts avec la société. Ils ne doivent pas profiter du poste qu'ils occupent pour tirer un avantage personnel. Ils doivent préserver la confidentialité des renseignements auxquels leurs fonctions leur donnent accès. Les administrateurs et les dirigeants doivent servir la société de manière désintéressée et avec loyauté et intégrité : voir K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), p. 715.

36

The common law concept of fiduciary duty was considered in *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51. In that case, which involved the relationship between the government and foster children, a majority of this Court agreed

La notion d'obligation fiduciaire de la common law a été examinée dans l'arrêt *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51. Dans cet arrêt concernant la relation entre l'État et des enfants en foyer d'accueil, notre Cour à la

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with McLachlin C.J. who stated, at paras. 40-41 and 49:

Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests. . . .

What . . . might the content of the fiduciary duty be if it is understood . . . as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646). . . .

. . .

. . . concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.)*, *supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. . . . The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense. [Emphasis added.]

majorité a souscrit aux motifs de la juge en chef McLachlin qui a affirmé ce qui suit aux par. 40-41 et 49 :

Les obligations fiduciaires prennent naissance dans divers contextes, notamment dans le contexte des fiducies expresses, dans celui des relations caractérisées par un pouvoir discrétionnaire et par un lien de confiance, ainsi que dans celui des responsabilités particulières qui incombent à l'État concernant les droits des Autochtones. . .

Quel serait [. . .] le contenu de l'obligation fiduciaire si on devait [. . .] l'interpréter comme une obligation de droit privé découlant simplement de la relation entre le surintendant et les enfants en foyer d'accueil, caractérisée par un pouvoir discrétionnaire et par un lien de confiance? Dans l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, le juge La Forest a souligné aux p. 646-647 que certains éléments communs se dégageaient des obligations fiduciaires issues des relations caractérisées par un pouvoir discrétionnaire et par un lien de confiance, notamment la loyauté et « l'obligation d'éviter les conflits de devoirs ou d'intérêts et celle de ne pas faire de profits aux dépens du bénéficiaire ». Il a cependant fait remarquer que « [l]a nature particulière de cette obligation peut varier selon les rapports concernés » (p. 646). . .

. . .

Le souci de promouvoir l'intérêt supérieur de l'enfant se trouve à la base de la relation fiduciaire des parents, comme l'a souligné le juge La Forest dans *M. (K.) c. M. (H.)*, précité, p. 65. Mais l'obligation qui leur incombe est celle d'agir en toute loyauté et de ne pas faire passer leurs propres intérêts ou ceux d'autres personnes avant ceux de l'enfant, en abusant de sa confiance. [. . .] Le parent qui, recherchant son propre profit, abuse de son influence sur l'enfant relativement à des questions financières fait passer ses intérêts avant ceux de l'enfant, en abusant de sa confiance. Cela vaut également pour le parent qui exploite un enfant afin d'assouvir ses désirs sexuels ou pour celui qui, voulant préserver sa tranquillité et celle de la famille, ferme les yeux sur les abus commis par son conjoint. Comme la Cour d'appel l'a dit en l'espèce, il n'est pas nécessaire que le parent soit motivé consciemment par le désir de réaliser un bénéfice ou de tirer un avantage personnel; il n'est pas non plus nécessaire qu'il préfère ses intérêts, plutôt que ceux d'un tiers, à ceux de l'enfant. Il s'agit plutôt d'un manque de loyauté — de faire passer les intérêts d'autres personnes avant ceux de l'enfant, en abusant de sa confiance. La négligence, même grave, ne saurait engager la responsabilité fiduciaire des parents si elle n'implique pas d'abus de confiance en ce sens. [Nous soulignons.]

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37

The issue to be considered here is the "specific substance" of the fiduciary duty based on the relationship of directors to corporations under the CBCA.

L'élément qu'il convient d'examiner en l'espèce est la « nature particulière » de l'obligation fiduciaire découlant des rapports entre les administrateurs et les sociétés en vertu de la LCSA.

38

It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at pp. 609-10, *per* Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]

A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking:

Il est bien établi en droit que l'obligation fiduciaire à laquelle sont tenus les administrateurs et les dirigeants leur impose des obligations strictes : voir *Canadian Aero Service Ltd. c. O'Malley*, [1974] R.C.S. 592, p. 609-610, le juge Laskin (plus tard Juge en chef), où il a été décidé que les administrateurs et les dirigeants peuvent même être tenus de rendre compte à la société des profits qu'ils ont réalisés sans que ce soit aux dépens de la société :

> Le fait qu'une personne retire un profit aux dépens d'une compagnie alors qu'elle en est un administrateur, constitue de toute évidence un motif valable sur lequel fonder une obligation de rendre compte. Et pourtant, il peut exister des situations où un profit doit être restitué, bien qu'il n'ait pas été acquis aux dépens de la compagnie, pour le motif qu'un administrateur ne doit pas avoir le droit de se servir de sa position comme telle aux fins de faire un profit, même si la compagnie n'avait pas la faculté, à cause, par exemple, d'une incapacité légale, de participer à l'opération. Une situation analogue, qui toutefois ne mettait pas en cause un administrateur, se retrouve à toutes fins utiles dans l'arrêt *Phipps v. Boardman* [[1967] 2 A.C. 46], où on a aussi souscrit à l'avis que l'obligation de rendre compte n'est pas subordonnée à la preuve d'un conflit réel d'intérêts et d'obligations. L'arrêt *Industrial Development Consultants Ltd. v. Cooley* [[1972] 2 All E.R. 162], un jugement émanant d'une cour de première instance, est un autre exemple assez récent d'une obligation de rendre compte lorsque la compagnie elle-même n'a pas réussi à obtenir un contrat d'affaires et ne pouvait donc pas être considérée comme ayant été privée d'une occasion d'affaires. Dans cette dernière affaire, l'administrateur délégué à l'exécutif, à qui on avait permis de démissionner parce qu'il s'était faussement déclaré malade, a par la suite obtenu le contrat en son nom personnel. Cette affaire-là met aussi en évidence la situation où un administrateur donne sa démission après avoir décidé de s'approprier le contrat d'affaires refusé à sa compagnie et où il fait effectivement accepter sa démission sans révéler son intention. [Nous soulignons.]

Dans « The Propriety of Profitmaking : Fiduciary Duty and Unjust Enrichment » (2000), 58 *R.D.U.T.* 185, p. 204-205, J. Brock présente des raisons convaincantes d'exiger que les administrateurs rendent

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Fiduciary Duty and Unjust Enrichment" (2000), 58 *U.T. Fac. L. Rev.* 185, at pp. 204-5.

compte des profits qu'ils réalisent grâce au poste qu'ils occupent, même si ces profits n'ont pas été réalisés aux dépens de la société.

39

However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case, their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.

Cependant, il n'est pas obligatoire que les administrateurs et les dirigeants évitent dans tous les cas les gains personnels résultant directement ou indirectement de la surveillance ou de la gestion intègre et de bonne foi de la société. Dans bien des cas, les intérêts des administrateurs et des dirigeants coïncident par hasard mais légitimement avec ceux de la société. Si les administrateurs et les dirigeants sont aussi actionnaires, comme c'est souvent le cas, leur situation s'améliorera automatiquement en même temps que la situation financière de la société. Il en sera de même de la rémunération que les sociétés versent à leurs administrateurs et dirigeants. S'il est raisonnable, cet avantage, même s'il est versé par la société, n'entraîne habituellement pas la violation de leur obligation fiduciaire. Par conséquent, toutes les circonstances peuvent faire l'objet d'un examen minutieux pour déterminer si les administrateurs et les dirigeants ont agi avec intégrité et de bonne foi au mieux des intérêts de la société.

40

In our opinion, the trial judge's determination that there was no fraud or dishonesty in the Wise brothers' attempts to solve the mounting inventory problems of Peoples and Wise stands in the way of a finding that they breached their fiduciary duty. Greenberg J. stated:

À notre avis, le juge de première instance ayant conclu qu'il n'y a eu ni fraude ni malhonnêteté de la part des frères Wise lorsqu'ils ont tenté de régler les problèmes d'approvisionnement de plus en plus graves de Peoples et de Wise, il est impossible de conclure qu'ils ont manqué à leur obligation fiduciaire. Le juge Greenberg a dit ce qui suit :

> We hasten to add that in the present case, the Wise Brothers derived no direct personal benefit from the new domestic inventory procurement policy, albeit that, as the controlling shareholders of Wise Stores, there was an indirect benefit to them. Moreover, as was conceded by the other parties herein, in deciding to implement the new domestic inventory procurement policy, there was no dishonesty or fraud on their part.

((1998), 23 C.B.R. (4th) 200, at para. 183)

> [TRADUCTION] Nous nous empressons d'ajouter qu'en l'espèce, les frères Wise n'ont tiré aucun avantage personnel direct de la nouvelle politique d'approvisionnement commun même si, en tant qu'actionnaires majoritaires de Wise Stores, ils en ont tiré un avantage indirect. De plus, comme l'ont reconnu les autres parties à l'instance, il n'y a eu ni malhonnêteté ni fraude de leur part lorsqu'ils ont décidé d'appliquer la nouvelle politique d'approvisionnement.

((1998), 23 C.B.R. (4th) 200, par. 183)

The Court of Appeal relied heavily on this finding by the trial judge, as do we. At para. 83 QL, Pelletier J.A. stated that:

La Cour d'appel s'est fortement appuyée sur cette conclusion du juge de première instance, tout comme nous d'ailleurs. Au paragraphe 84, le juge Pelletier a dit ce qui suit :

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[TRANSLATION] In regard to fiduciary duty, I would like to point out that the brothers were driven solely by the wish to resolve the problem of inventory procurement affecting both the operations of Peoples Inc. and those of Wise. [This is a] motivation that is in line with the pursuit of the interests of the corporation within the meaning of paragraph 122(1)(a) C.B.C.A. and that does not expose them to any justified criticism.

À l'égard du devoir de loyauté, je rappelle que les frères n'étaient animés que du désir de solutionner le problème de gestion des inventaires, qui affectait tout autant les opérations de Peoples Inc. que celles de Wise. Voilà donc une motivation qui s'inscrit dans la poursuite des intérêts de la société au sens de l'article 122(1)*a*) L.C.S.A. et qui ne prête le flanc à aucun reproche justifié.

41

As explained above, there is no doubt that both Peoples and Wise were struggling with a serious inventory management problem. The Wise brothers considered the problem and implemented a policy they hoped would solve it. In the absence of evidence of a personal interest or improper purpose in the new policy, and in light of the evidence of a desire to make both Wise and Peoples "better" corporations, we find that the directors did not breach their fiduciary duty under s. 122(1)(*a*) of the CBCA. See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (Ont. Ct. (Gen. Div.)) (aff'd (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)), in which Farley J., at p. 171, correctly observes that in resolving a conflict between majority and minority shareholders, it is safe for directors and officers to act to make the corporation a "better corporation".

Comme nous l'avons expliqué précédemment, il est indubitable que Peoples et Wise étaient aux prises avec un grave problème de gestion des stocks. Les frères Wise ont examiné le problème et ont mis en application une politique qui, espéraient-ils, permettrait de le régler. En l'absence d'éléments de preuve de l'existence d'un intérêt personnel ou d'une fin illégitime de la nouvelle politique, et compte tenu de la preuve d'une volonté de faire de Wise et de Peoples de « meilleures » entreprises, nous concluons que les administrateurs n'ont pas manqué à leur obligation fiduciaire énoncée à l'al. 122(1)*a*) de la LCSA. Voir la décision *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 123 (C. Ont. (Div. gén.)) (conf. par (1991), 3 B.L.R. (2d) 113 (C. div. Ont.)), dans laquelle le juge Farley a fait remarquer à juste titre, à la p. 171, qu'en réglant un différend entre actionnaires majoritaires et actionnaires minoritaires, il est prudent pour les administrateurs et les dirigeants d'agir de manière à faire de la société une [TRADUCTION] « meilleure entreprise ».

42

This appeal does not relate to the non-statutory duty directors owe to shareholders. It is concerned only with the statutory duties owed under the CBCA. Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 *Can. Bus. L.J.* 398, at pp. 400-1. However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation. For example, in *Teck Corp. v. Millar*

Le présent pourvoi ne porte pas sur l'obligation non prévue par la loi qui incombe aux administrateurs à l'égard des actionnaires. Il concerne uniquement les obligations légales que leur impose la LCSA. Pour ce qui est de l'obligation fiduciaire prévue par la loi, il est évident qu'il ne faut pas interpréter l'expression « au mieux des intérêts de la société » comme si elle signifiait simplement « au mieux des intérêts des actionnaires ». D'un point de vue économique, l'expression « au mieux des intérêts de la société» s'entend de la maximisation de la valeur de l'entreprise : voir E. M. Iacobucci, « Directors' Duties in Insolvency : Clarifying What Is at Stake » (2003), 39 *Rev. can. dr. comm.* 398, p. 400-401. Les tribunaux reconnaissent toutefois depuis longtemps que divers autres facteurs peuvent servir à déterminer les

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(1972), 33 D.L.R. (3d) 288 (B.C.S.C.), Berger J. stated, at p. 314:

A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered *bona fide* the interests of the shareholders.

I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees: *Parke v. Daily News Ltd.*, [1962] Ch. 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.

The case of *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (Div. Ct.), approved, at p. 271, the decision in *Teck*, *supra*. We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

43 The various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not, however, affect the content of the fiduciary duty under s. 122(1)(*a*) of the CBCA. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be

éléments dont les administrateurs devraient tenir compte dans une gestion judicieuse au mieux des intérêts de la société. Par exemple, dans l'affaire *Teck Corp. c. Millar* (1972), 33 D.L.R. (3d) 288 (C.S.C.-B.), le juge Berger a dit ce qui suit à la p. 314 :

[TRADUCTION] Une théorie classique auparavant incontestable doit être abandonnée devant l'évidence des faits de la vie moderne. C'est effectivement ce qui s'est passé. Si, aujourd'hui, les administrateurs d'une société devaient tenir compte des intérêts de ses employés, nul n'alléguerait que, ce faisant, ils n'ont pas agi de bonne foi dans l'intérêt de la société elle-même. De même, si les administrateurs devaient tenir compte des répercussions pour la collectivité d'une politique que l'entreprise a l'intention d'appliquer et ne pouvaient, en conséquence, s'en tenir à cette politique, on ne saurait dire qu'ils n'ont pas tenu compte de bonne foi des intérêts des actionnaires.

Je suis conscient que les administrateurs manqueraient à leur devoir s'ils faisaient totalement abstraction des intérêts des actionnaires d'une société afin de conférer un avantage à ses employés : *Parke c. Daily News Ltd.*, [1962] Ch. 927. Cependant, s'ils tiennent dûment compte des autres intérêts qui ne sont pas strictement ceux des actionnaires de la société, il ne sera pas possible, à mon avis, de les accuser d'avoir manqué à leur obligation fiduciaire envers la société.

Dans la décision *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.* (1986), 59 O.R. (2d) 254 (C. div.), la cour a approuvé à la p. 271 la décision *Teck*, précitée. Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

Les changements qui se produisent naturellement dans les intérêts en cause en fonction des succès et des échecs d'une entreprise n'ont cependant aucune incidence sur le contenu de l'obligation fiduciaire énoncée à l'al. 122(1)*a*) de la LCSA. Les administrateurs et les dirigeants ont en tout temps leur

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confused with the interests of the creditors or those of any other stakeholders.

obligation fiduciaire envers la société. Les intérêts de la société ne doivent pas se confondre avec ceux des actionnaires, avec ceux des créanciers ni avec ceux de toute autre partie intéressée.

44

The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.

Les intérêts des actionnaires, ceux des créanciers et ceux de la société peuvent concorder et vont concorder si l'entreprise est rentable, dispose de capitaux suffisants et a de bonnes perspectives de croissance. La situation pourra toutefois être différente si la société commence à avoir des difficultés financières. Les droits résiduels des actionnaires perdront généralement toute valeur si une société est déclarée en faillite. Au moment de la faillite, les administrateurs de la société en cèdent le contrôle à un syndic qui gère les actifs de la société au profit des créanciers.

45

Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.

En l'absence de faillite comme telle, lorsque la société approche ce qu'on appelle le « bord de l'insolvabilité », les droits résiduels des actionnaires seront presque épuisés. Alors que les actionnaires pourraient préférer que les administrateurs cherchent des solutions de rechange à risque et à potentiel de rendement très élevés afin de maximiser leurs droits résiduels éventuels, les créanciers, en de telles circonstances, pourraient préférer que les administrateurs adoptent une stratégie plus prudente afin de maximiser la valeur de leurs créances par rapport aux actifs de la société.

46

The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty.

L'obligation fiduciaire des administrateurs reste la même lorsqu'une société se trouve dans la situation que décrit l'expression nébuleuse « au bord de l'insolvabilité ». Cette expression n'a pas été définie; elle ne peut être définie et n'a aucune signification en droit. Elle vise manifestement à illustrer une détérioration de la stabilité financière de la société. Dans l'évaluation des mesures prises par les administrateurs, il est évident que toute tentative faite avec intégrité et de bonne foi pour redresser la situation financière de la société aura, si elle réussit, conservé une valeur pour les actionnaires tout en améliorant la situation des créanciers. En cas d'échec, on ne pourra y voir un manquement à l'obligation fiduciaire prévue par la loi.

47

For a discussion of the shifting interests and incentives of shareholders and creditors, see W. D. Gray,

Pour une analyse des intérêts et de la motivation variables des actionnaires et des créanciers,

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"*Peoples v. Wise* and *Dylex*: Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism?" (2003), 39 *Can. Bus. L.J.* 242, at p. 257; E. M. Iacobucci and K. E. Davis, "Reconciling Derivative Claims and the Oppression Remedy" (2000), 12 *S.C.L.R.* (2d) 87, at p. 114. In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders. If the stakeholders cannot avail themselves of the statutory fiduciary duty (the duty of loyalty, *supra*) to sue the directors for failing to take care of their interests, they have other means at their disposal.

voir W. D. Gray, « *Peoples v. Wise* and *Dylex* : Identifying Stakeholder Interests upon or near Corporate Insolvency — Stasis or Pragmatism? » (2003), 39 *Rev. can. dr. comm.* 242, p. 257; E. M. Iacobucci et K. E. Davis, « Reconciling Derivative Claims and the Oppression Remedy » (2000), 12 *S.C.L.R.* (2d) 87, p. 114. Pour concilier ces intérêts opposés, il incombe aux administrateurs d'agir avec intégrité et de bonne foi au mieux des intérêts de la société. En utilisant leurs compétences au profit de la société lorsqu'elle a des difficultés financières, les administrateurs doivent essayer d'agir au mieux des intérêts de la société en créant une « meilleure » société, et éviter de favoriser les intérêts d'un groupe d'intéressés en particulier. Si les intéressés ne peuvent invoquer l'obligation fiduciaire prévue par la loi (le devoir de loyauté déjà mentionné) pour poursuivre les administrateurs qui auraient négligé leurs intérêts, d'autres moyens s'offrent à eux.

48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(*c*) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 *U.T. Fac. L. Rev.* 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S. M. Beck, "Minority Shareholders' Rights in the 1980s", in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.

Le régime juridique applicable au Canada aux parties intéressées est unique en son genre. Les créanciers ne constituent qu'une catégorie de parties intéressées, mais leurs intérêts sont protégés de nombreuses manières. Certaines mesures sont particulières, par exemple en cas de fusion : art. 185 de la LCSA. D'autres visent un large éventail de situations. Le redressement prévu en cas d'abus de droit à l'al. 241(2)*c*) de la LCSA et les dispositions similaires des lois provinciales sur les sociétés accordent aux créanciers les droits les plus étendus dans tous les ressorts de common law : voir D. Thomson, « Directors, Creditors and Insolvency : A Fiduciary Duty or a Duty Not to Oppress? » (2000), 58 *R.D.U.T.* 31, p. 48. Un auteur considère que le recours en cas d'abus de droit est [TRADUCTION] « le recours le plus général, le plus complet et le plus vaste de tous les pays de common law qui soit offert aux actionnaires » : S. M. Beck, « Minority Shareholders' Rights in the 1980s », dans *Corporate Law in the 80s* (1982), 311, p. 312. Beck traitait alors des recours offerts aux actionnaires, mais ses observations s'appliquent également aux recours offerts aux créanciers.

49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion

Le fait que les intérêts des créanciers deviennent de plus en plus importants au fur et à mesure que les finances de la société se détériorent peut être

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by a court in granting standing to a party as a "complainant" under s. 238(*d*) of the CBCA as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the CBCA, or to bring an oppression remedy claim under s. 241 of the CBCA.

50 Section 241(2)(*c*) authorizes a court to grant a remedy if

> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

A person applying for the oppression remedy must, in the court's opinion, fall within the definition of "complainant" found in s. 238 of the CBCA:

> (*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (*c*) the Director, or
>
> (*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

Creditors, who are not security holders within the meaning of para. (*a*), may therefore apply for the oppression remedy under para. (*d*) by asking a court to exercise its discretion and grant them status as a "complainant".

51 Section 241 of the CBCA provides a possible mechanism for creditors to protect their interests from the prejudicial conduct of directors. In our view, the availability of such a broad oppression

valable et pertinent, par exemple, lorsqu'un tribunal exerce son pouvoir discrétionnaire d'accorder à une partie la qualité de « plaignant » en vertu de l'al. 238*d*) de la LCSA parce qu'elle est la personne qui « a qualité » pour présenter une action oblique au nom d'une société en vertu des art. 239 et 240 de la LCSA, ou pour présenter une demande de redressement pour abus de droit en vertu de l'art. 241 de la LCSA.

L'alinéa 241(2)*c*) autorise un tribunal à accorder un redressement si

> . . . la société ou l'une des personnes morales de son groupe [. . .] abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :
>
> . . .
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

La personne qui demande un redressement en cas d'abus de droit doit, de l'avis du tribunal, être visée par la définition de « plaignant » que l'on trouve à l'art. 238 de la LCSA :

> *a*) Le détenteur inscrit ou le véritable propriétaire, ancien ou actuel, de valeurs mobilières d'une société ou de personnes morales du même groupe;
>
> *b*) tout administrateur ou dirigeant, ancien ou actuel, d'une société ou de personnes morales du même groupe;
>
> *c*) le directeur;
>
> *d*) toute autre personne qui, d'après un tribunal, a qualité pour présenter les demandes visées à la présente partie.

Les créanciers qui ne sont pas détenteurs de valeurs mobilières au sens de l'al. *a*) peuvent donc solliciter un redressement en cas d'abus de droit en vertu de l'al. *d*) en demandant au tribunal d'exercer son pouvoir discrétionnaire pour leur conférer la qualité de « plaignant ».

L'article 241 de la LCSA prévoit un mécanisme qui permet aux créanciers d'obtenir la protection de leurs intérêts en cas de conduite préjudiciable des administrateurs. À notre avis, l'existence d'un

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remedy undermines any perceived need to extend the fiduciary duty imposed on directors by s. 122(1)(*a*) of the CBCA to include creditors.

recours aussi général en cas d'abus de droit remet en cause l'utilité apparente d'étendre aux créanciers l'obligation fiduciaire imposée aux administrateurs par l'al. 122(1)*a*) de la LCSA.

52 The Court of Appeal, at paras. 98-99 QL, referred to *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, [2002] 4 S.C.R. 312, 2002 SCC 81, as an indication by this Court that the interests of creditors do not have any bearing on the assessment of the conduct of directors. However, the receiver in that case was representing the corporation's rights and not the creditors' rights; therefore, the case has no application in this appeal. *373409 Alberta* involved an action taken by the receiver on behalf of the corporation against a bank for the tort of conversion. The sole shareholder, director and officer of 373409 Alberta Ltd., who was also the sole shareholder, director and officer of another corporation, Legacy Holdings Ltd., had deposited a cheque payable to 373409 Alberta Ltd. into the account of Legacy. While it was recognized, at para. 22, that the diversion of money from 373409 Alberta Ltd. to Legacy "may very well have been wrongful *vis-à-vis* [373409 Alberta Ltd.]'s creditors" (none of whom were involved in the action), no fraud had been committed against the corporation itself and the bank, acting on proper authority, had not wrongfully interfered with the cheque by carrying out the deposit instructions. The statutory duties of the directors were not at issue, nor were they considered, and no assessment of the creditors' rights was made. With respect, Pelletier J.A.'s broad reading of *373409 Alberta* was misplaced.

La Cour d'appel a indiqué, aux par. 99 et 100, que selon l'arrêt *373409 Alberta Ltd. (Séquestre de) c. Banque de Montréal*, [2002] 4 R.C.S. 312, 2002 CSC 81, notre Cour considère que les intérêts des créanciers n'ont aucune incidence sur l'appréciation de la conduite des administrateurs. Cependant, dans cette affaire, le séquestre faisait valoir les droits de la société et non ceux des créanciers; par conséquent, cette décision ne s'applique pas au présent pourvoi. L'arrêt *373409 Alberta* concernait une action intentée par le séquestre au nom de la société contre une banque pour délit de détournement. L'unique actionnaire, administrateur et directeur de 373409 Alberta Ltd., qui était aussi l'unique actionnaire, administrateur et directeur d'une autre société, Legacy Holdings Ltd., avait déposé un chèque payable à l'ordre de 373409 Alberta Ltd. au compte de Legacy. Même s'il a été reconnu, au par. 22, que le détournement des fonds de 373409 Alberta Ltd. au bénéfice de Legacy « peut fort bien avoir été préjudiciable aux créanciers de [373409 Alberta Ltd.] » (dont aucun n'était partie à l'action), aucune fraude n'avait été commise envers la société elle-même et la banque, qui avait été dûment autorisée, n'avait pas détourné injustement le chèque en se conformant aux instructions données quant au dépôt. Les obligations que la loi impose aux administrateurs n'étaient pas en litige et n'ont pas été examinées, et aucune évaluation des droits des créanciers n'a été faite. Avec égards, l'interprétation large qu'a donnée le juge Pelletier à l'arrêt *373409 Alberta* n'était pas fondée.

53 In light of the availability both of the oppression remedy and of an action based on the duty of care, which will be discussed below, stakeholders have viable remedies at their disposal. There is no need to read the interests of creditors into the duty set out in s. 122(1)(*a*) of the CBCA. Moreover, in the circumstances of this case, the Wise brothers did not breach the statutory fiduciary duty owed to the corporation.

Compte tenu de la possibilité d'un recours en cas d'abus de droit, en plus de l'action fondée sur l'obligation de diligence, qui est analysée ci-après, les parties intéressées peuvent exercer des recours efficaces. Il n'est pas nécessaire d'interpréter les intérêts des créanciers comme étant visés par l'obligation prévue à l'al. 122(1)*a*) de la LCSA. En outre, dans les circonstances du présent pourvoi, les frères Wise n'ont pas manqué à l'obligation fiduciaire que leur impose la loi envers la société.

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B. *The Statutory Duty of Care: Section 122(1)(b) of the CBCA*

As mentioned above, the CBCA does not provide for a direct remedy for creditors against directors for breach of their duties and the C.C.Q. is used as suppletive law.

In Quebec, directors have been held liable to creditors in respect of either contractual or extra-contractual obligations. Contractual liability arises where the director personally guarantees a contractual obligation of the company. Liability also arises where the director personally acts in a manner that triggers his or her extra-contractual liability. See P. Martel, "Le 'voile corporatif' — l'attitude des tribunaux face à l'article 317 du Code civil du Québec" (1998), 58 *R. du B.* 95, at pp. 135-36; *Brasserie Labatt ltée v. Lanoue*, [1999] Q.J. No. 1108 (QL) (C.A.), *per* Forget J.A., at para. 29. It is clear that the Wise brothers cannot be held contractually liable as they did not guarantee the debts at issue here. Extra-contractual liability is the remaining possibility.

To determine the applicability of extra-contractual liability in this appeal, it is necessary to refer to art. 1457 C.C.Q.:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [Emphasis added.]

Three elements of art. 1457 C.C.Q. are relevant to the integration of the director's duty of care into the principles of extra-contractual liability: who has the duty ("every person"), to whom is the duty owed ("another") and what breach will trigger liability ("rules of conduct"). It is clear that directors and officers come within the expression "every

B. *L'obligation de diligence prévue par la loi : l'al. 122(1)b) de la LCSA*

54 Tel qu'indiqué précédemment, la LCSA n'offre aux créanciers aucun recours exprès contre les administrateurs pour manquement à leurs obligations, et le C.c.Q. est employé à titre de droit supplétif.

55 Au Québec, les administrateurs sont tenus responsables envers les créanciers de leurs obligations contractuelles ou extracontractuelles. Il y a responsabilité contractuelle lorsque l'administrateur garantit personnellement une obligation contractuelle de la société. Sa responsabilité est aussi retenue lorsque l'administrateur agit personnellement de manière à engager sa responsabilité extracontractuelle. Voir P. Martel, « Le "voile corporatif" — l'attitude des tribunaux face à l'article 317 du Code civil du Québec » (1998), 58 *R. du B.* 95, p. 135-136; *Brasserie Labatt ltée c. Lanoue*, [1999] J.Q. n° 1108 (QL) (C.A.), le juge Forget, par. 29. Il est évident que les frères Wise ne peuvent être tenus responsables contractuellement puisqu'ils n'ont pas garanti les dettes en litige en l'espèce. Il reste à examiner la responsabilité extracontractuelle.

56 Pour déterminer s'il y a responsabilité extracontactuelle dans le présent pourvoi, il faut se reporter à l'art. 1457 C.c.Q. :

> Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
>
> Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
>
> Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde. [Nous soulignons.]

Trois éléments de l'art. 1457 C.c.Q. sont pertinents à l'intégration, dans les principes de la responsabilité extracontractuelle, de l'obligation de diligence de l'administrateur : la personne à qui incombe l'obligation (« [t]oute personne »), le bénéficiaire de l'obligation (« autrui ») et le manquement qui engage la responsabilité (« règles de conduite »).

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person". It is equally clear that the word "another" can include the creditors. The reach of art. 1457 C.C.Q. is broad and it has been given an open and inclusive meaning. See *Regent Taxi & Transport Co. v. Congrégation des Petits Frères de Marie*, [1929] S.C.R. 650, *per* Anglin C.J., at p. 655 (rev'd on other grounds, [1932] 2 D.L.R. 70 (P.C.)):

> . . . to narrow the *prima facie* scope of art. 1053 C.C. [now art. 1457] is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy.

This liberal interpretation was also affirmed and treated as settled by this Court in *Lister v. McAnulty*, [1944] S.C.R. 317, and *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605.

57 This interpretation can be harmoniously integrated with the wording of the CBCA. Indeed, unlike the statement of the fiduciary duty in s. 122(1)(*a*) of the CBCA, which specifies that directors and officers must act with a view to the best interests of the corporation, the statement of the duty of care in s. 122(1)(*b*) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "[e]very director and officer of a corporation in exercising their powers and discharging their duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Thus, the identity of the beneficiary of the duty of care is much more open-ended, and it appears obvious that it must include creditors. This result is clearly consistent with the civil law interpretation of the word "another". Therefore, if breach of the standard of care, causation and damages are established, creditors can resort to art. 1457 to have their rights vindicated. The only issue thus remaining is the determination of the "rules of conduct" likely to trigger extracontractual liability. On this issue, art. 1457 is explicit.

L'expression « [t]oute personne » englobe manifestement les administrateurs et les dirigeants. De même, le mot « autrui » peut comprendre les créanciers. L'article 1457 C.c.Q. a une portée étendue et on lui a donné un sens large et inclusif. Voir l'arrêt *Regent Taxi & Transport Co. c. Congrégation des Petits Frères de Marie*, [1929] R.C.S. 650, le juge en chef Anglin, p. 655 (infirmé pour d'autres motifs, [1932] 2 D.L.R. 70 (C.P.)) :

> [TRADUCTION] . . . il est très dangereux de restreindre la portée apparente de l'art. 1053 du C.c. [maintenant l'art. 1457] car cela pourrait inévitablement entraîner le rejet des demandes les mieux fondées; nombreux seraient les actes répréhensibles pour lesquels il n'existerait pas de recours.

Dans les arrêts *Lister c. McAnulty*, [1944] R.C.S. 317, et *Hôpital Notre-Dame de l'Espérance c. Laurent*, [1978] 1 R.C.S. 605, notre Cour a aussi confirmé cette interprétation large et a considéré qu'elle était constante.

Il est possible d'intégrer harmonieusement cette interprétation au texte de la LCSA. En fait, contrairement à l'énoncé de l'obligation fiduciaire prévue par l'al. 122(1)*a*) de la LCSA, qui précise que les administrateurs et les dirigeants doivent agir au mieux des intérêts de la société, l'énoncé de l'obligation de diligence figurant à l'al. 122(1)*b*) de la LCSA ne précise pas une personne identifiable qui serait bénéficiaire de l'obligation. L'alinéa prévoit plutôt que « [l]es administrateurs et les dirigeants doivent, dans l'exercice de leurs fonctions, agir [. . .] avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente. » Ainsi, le bénéficiaire de l'obligation de diligence est identifié de façon beaucoup plus générale et il semble évident qu'il faut y inclure les créanciers. Cette solution est clairement conforme à l'interprétation que le droit civil donne au mot « autrui ». Par conséquent, si un bris de l'obligation de diligence, le lien de causalité et les dommages sont établis, les créanciers peuvent avoir recours à l'art. 1457 pour faire valoir leurs droits. La seule question qu'il reste maintenant à examiner est donc celle des « règles de conduite » susceptibles de mettre en cause la responsabilité extracontractuelle. Sur ce point, l'art. 1457 est clair.

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58

The first paragraph of art. 1457 does not set the standard of conduct. Instead, it incorporates by reference s. 122(1)(*b*) of the CBCA. The statutory duty of care is a "duty to abide by [a] rul[e] of conduct which lie[s] upon [them], according to the . . . law, so as not to cause injury to another". Thus, for the purpose of determining whether the Wise brothers can be held liable, only the CBCA is relevant. It is therefore necessary to outline the requirements of the duty of care embodied in s. 122(1)(*b*) of the CBCA.

Le premier paragraphe de l'art. 1457 n'énonce pas la norme de conduite. Il incorpore plutôt par renvoi l'al. 122(1)*b*) de la LCSA. L'obligation de diligence prévue par la loi est un « devoir de respecter [une] règl[e] de conduite qui, suivant [. . .] la loi, s'impos[e] à [eux], de manière à ne pas causer de préjudice à autrui ». Ainsi, pour déterminer si les frères Wise peuvent être tenus responsables, seule la LCSA est pertinente. Il est donc nécessaire de rappeler les exigences de l'obligation de diligence prévue à l'al. 122(1)*b*) de la LCSA.

59

That directors must satisfy a duty of care is a long-standing principle of the common law, although the duty of care has been reinforced by statute to become more demanding. Among the earliest English cases establishing the duty of care were *Dovey v. Cory*, [1901] A.C. 477 (H.L.); *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425; and *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407 (C.A.). In substance, these cases held that the standard of care was a reasonably relaxed, subjective standard. The common law required directors to avoid being grossly negligent with respect to the affairs of the corporation and judged them according to their own personal skills, knowledge, abilities and capacities. See McGuinness, *supra*, at p. 776: "Given the history of the case law in this area, and the prevailing standards of competence displayed in commerce generally, it is quite clear that directors were not expected at common law to have any particular business skill or judgment."

La common law reconnaît depuis longtemps le principe suivant lequel les administrateurs sont tenus à une obligation de diligence. Cette obligation est cependant plus exigeante depuis qu'elle est accentuée par la loi. Les arrêts *Dovey c. Cory*, [1901] A.C. 477 (H.L.), *In re Brazilian Rubber Plantations and Estates, Ltd.*, [1911] 1 Ch. 425, et *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407 (C.A.), comptent parmi les décisions anglaises les plus anciennes à l'origine de l'obligation de diligence. Essentiellement, selon ces décisions, la norme de diligence était une norme subjective plutôt souple. La common law exigeait que les administrateurs évitent les fautes grossières eu égard aux affaires de la société et prévoyait qu'ils devaient être jugés suivant leurs compétences, leurs connaissances et leurs aptitudes personnelles. Selon McGuinness, *op. cit.*, p. 776, [TRADUCTION] « [c]ompte tenu de la jurisprudence dans ce domaine et des principales normes de compétence dans le commerce en général, il est assez évident que la common law n'exigeait pas que les administrateurs possèdent des compétences spéciales en affaires ou un sens particulier des affaires. »

60

The 1971 report entitled *Proposals for a New Business Corporations Law for Canada* (1971) ("Dickerson Report") culminated the work of a committee headed by R. W. V. Dickerson which had been appointed by the federal government to study the need for new federal business corporations legislation. This report preceded the enactment of the CBCA by four years and influenced the eventual structure of the CBCA.

Le rapport de 1971 intitulé *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971) (« Rapport Dickerson ») fut l'aboutissement des travaux d'un comité présidé par R. W. V. Dickerson qui fut chargé, par le gouvernement fédéral, d'examiner s'il était nécessaire d'adopter une nouvelle loi fédérale sur les sociétés par actions. Ce rapport a précédé de quatre ans l'adoption de la LCSA et il a influencé la forme que celle-ci a finalement prise.

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The standard recommended by the Dickerson Report was objective, requiring directors and officers to meet the standard of a "reasonably prudent person" (vol. II, at p. 74):

9.19

(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

. . .

(b) exercise the care, diligence and skill of a reasonably prudent person.

The report described how this proposed duty of care differed from the prevailing common law duty of care (vol. I, at p. 83):

242. The formulation of the duty of care, diligence and skill owed by directors represents an attempt to upgrade the standard presently required of them. The principal change here is that whereas at present the law seems to be that a director is only required to demonstrate the degree of care, skill and diligence that could reasonably be expected from him, having regard to his knowledge and experience — *Re City Equitable Fire Insurance Co.*, [1925] Ch. 425 — under s. 9.19(1)(b) he is required to conform to the standard of a reasonably prudent man. Recent experience has demonstrated how low the prevailing legal standard of care for directors is, and we have sought to raise it significantly. We are aware of the argument that raising the standard of conduct for directors may deter people from accepting directorships. The truth of that argument has not been demonstrated and we think it is specious. The duty of care imposed by s. 9.19(1)(b) is exactly the same as that which the common law imposes on every professional person, for example, and there is no evidence that this has dried up the supply of lawyers, accountants, architects, surgeons or anyone else. It is in any event cold comfort to a shareholder to know that there is a steady supply of marginally competent people available under present law to manage his investment. [Emphasis added.]

62

The statutory duty of care in s. 122(1)(*b*) of the CBCA emulates but does not replicate the language proposed by the Dickerson Report. The main difference is that the enacted version includes the words "in comparable circumstances", which modifies the

La norme recommandée dans le Rapport Dickerson était objective, obligeant les administrateurs et les dirigeants à se conformer à la norme de la « personne raisonnablement prudente » (vol. II, p. 81) :

9.19

(1) Dans l'exercice de ses pouvoirs et l'accomplissement de ses obligations tout administrateur et tout fonctionnaire d'une corporation doit

. . .

b) exercer le soin, la diligence et de l'habileté d'une personne raisonnablement prudente.

Le rapport expliquait la distinction entre l'obligation de diligence proposée et l'obligation de diligence reconnue par la common law (vol. I, p. 92) :

242. La formulation de l'obligation de soin, de diligence et d'habileté à laquelle les administrateurs sont tenus, représente une tentative de hausser le standard de conduite présentement exigé d'eux. Le changement principal modifie la loi actuelle qui semble exiger que l'administrateur fasse preuve du degré de soin, de diligence et d'habileté auquel on pourrait raisonnablement s'attendre de lui, eu égard à sa connaissance et à son expérience (*Re City Equitable Fire Insurance Co.* (1925) Ch. 425). L'article 9.19(1)b) lui impose l'obligation de se comporter en homme raisonnablement prudent. L'expérience récente ayant démontré que le standard de conduite généralement reconnu par la loi pour des administrateurs est fort bas, nous avons songé à le rehausser considérablement. Nous sommes conscients du fait que hausser ces standards peut faire hésiter certaines personnes à accepter un poste d'administrateur. La justesse de cet argument n'a pas été démontrée et nous le croyons spécieux. L'obligation imposée par l'article 9.19(1)b) est exactement la même que celle imposée par la *common law* à tout professionnel. Il n'y a pourtant pas de signes que cela a tari la source des avocats, comptables, architectes, chirurgiens ou autres. De plus c'est de toute façon un bien piètre réconfort pour un actionnaire de savoir qu'il existe un vaste réservoir de personnes de compétence très moyenne qui, d'après la loi actuelle, ont la charge de gérer son investissement. [Nous soulignons.]

Le texte de l'al. 122(1)*b*) de la LCSA qui énonce l'obligation de diligence reprend presque mot à mot celui que propose le Rapport Dickerson. La principale différence réside dans le fait que la version qui a été adoptée comprend les mots « en pareilles

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statutory standard by requiring the context in which a given decision was made to be taken into account. This is not the introduction of a subjective element relating to the competence of the director, but rather the introduction of a contextual element into the statutory standard of care. It is clear that s. 122(1)(*b*) requires more of directors and officers than the traditional common law duty of care outlined in, for example, *Re City Equitable Fire Insurance*, *supra*.

circonstances », ce qui modifie la norme légale en exigeant qu'il soit tenu compte du contexte dans lequel une décision donnée a été prise. Le législateur n'a pas introduit un élément subjectif relatif à la compétence de l'administrateur, mais plutôt un élément contextuel dans la norme de diligence prévue par la loi. Il est clair que l'al. 122(1)*b*) est plus exigeant à l'égard des administrateurs et des dirigeants que la norme traditionnelle de diligence prévue par la common law et expliquée, par exemple, dans la décision *Re City Equitable Fire Insurance*, précitée.

63

The standard of care embodied in s. 122(1)(*b*) of the CBCA was described by Robertson J.A. of the Federal Court of Appeal in *Soper v. Canada*, [1998] 1 F.C. 124, at para. 41, as being "objective subjective". Although that case concerned the interpretation of a provision of the *Income Tax Act*, it is relevant here because the language of the provision establishing the standard of care was identical to that of s. 122(1)(*b*) of the CBCA. With respect, we feel that Robertson J.A.'s characterization of the standard as an "objective subjective" one could lead to confusion. We prefer to describe it as an objective standard. To say that the standard is objective makes it clear that the factual aspects of the circumstances surrounding the actions of the director or officer are important in the case of the s. 122(1)(*b*) duty of care, as opposed to the subjective motivation of the director or officer, which is the central focus of the statutory fiduciary duty of s. 122(1)(*a*) of the CBCA.

Dans l'arrêt *Soper c. Canada*, [1998] 1 C.F. 124, par. 41, le juge Robertson de la Cour d'appel fédérale a décrit la norme de diligence énoncée à l'al. 122(1)*b*) de la LCSA comme étant une norme « objective subjective ». Même s'il portait sur l'interprétation d'une disposition de la *Loi de l'impôt sur le revenu*, cet arrêt est pertinent en l'espèce parce que le libellé de la disposition établissant la norme de diligence est identique à celui de l'al. 122(1)*b*) de la LCSA. Nous estimons pour notre part que le fait, pour le juge Robertson, de qualifier la norme par l'expression « objective subjective » peut semer la confusion. Nous préférons la décrire comme une norme objective. Ainsi, il devient évident que dans le cas de l'obligation de diligence prévue à l'al. 122(1)*b*), ce sont les éléments factuels du contexte dans lequel agissent l'administrateur ou le dirigeant qui sont importants, plutôt que les motifs subjectifs de ces derniers, qui sont l'objet essentiel de l'obligation fiduciaire prévue à l'al. 122(1)*a*) de la LCSA.

64

The contextual approach dictated by s.122(1)(*b*) of the CBCA not only emphasizes the primary facts but also permits prevailing socio-economic conditions to be taken into consideration. The emergence of stricter standards puts pressure on corporations to improve the quality of board decisions. The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders. Canadian courts, like their counterparts in the United States, the United Kingdom, Australia and New Zealand, have tended

La méthode contextuelle dictée par l'al. 122(1)*b*) de la LCSA fait ressortir non seulement les faits primaires mais elle permet aussi qu'il soit tenu compte des conditions socio-économiques existantes. L'apparition de normes plus strictes force les sociétés à améliorer la qualité des décisions des conseils d'administration. L'établissement de règles de régie d'entreprise devrait servir de bouclier protégeant les administrateurs contre les allégations de manquement à leur obligation de diligence. Toutefois, même en présence de règles de régie d'entreprise, les décisions des administrateurs peuvent parfois prêter le flanc aux critiques de tiers. En ce qui concerne les mesures prises pour

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to take an approach with respect to the enforcement of the duty of care that respects the fact that directors and officers often have business expertise that courts do not. Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available *ex post facto*. Because of this risk of hindsight bias, Canadian courts have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

assurer le respect de l'obligation de diligence, les tribunaux canadiens, tout comme ceux des États-Unis, du Royaume-Uni, de l'Australie et de la Nouvelle-Zélande, ont eu tendance à tenir compte du fait que les administrateurs et les dirigeants ont souvent, en matière commerciale, des connaissances que ne possèdent pas les tribunaux. De nombreuses décisions prises dans le cours des activités d'une entreprise sont raisonnables et justifiables au moment où elles sont prises, même si elles ont éventuellement conduit à un échec. Les décisions d'affaires doivent parfois être prises dans un contexte où les renseignements sont incomplets, les enjeux sont élevés et la situation est pressante. On pourrait être tenté de considérer à la lumière de renseignements qui deviennent disponibles ultérieurement que des décisions d'affaires qui n'ont pas abouti étaient déraisonnables ou imprudentes. En raison de ce risque d'examen a posteriori, les tribunaux canadiens ont élaboré à l'égard des décisions d'affaires une règle de retenue appelée, suivant la terminologie employée aux États-Unis, la « règle de l'appréciation commerciale ».

65 In *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177, Weiler J.A. stated, at p. 192:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction. [Emphasis added; italics in original; references omitted.]

Dans l'arrêt *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177, la juge Weiler de la Cour d'appel de l'Ontario a dit ce qui suit, à la p. 192 :

> [TRADUCTION] Tels qu'ils ont évolué, le droit applicable en Ontario et celui applicable au Delaware ont une exigence commune, savoir que le tribunal doit être convaincu que les administrateurs ont agi de façon raisonnable et équitable. Le tribunal examine si les administrateurs ont pris une décision *raisonnable* et non pas *la meilleure* décision. Dès lors que la décision prise conserve un caractère raisonnable, le tribunal ne devrait pas substituer son avis à celui du conseil, même si les événements ultérieurs peuvent avoir jeté le doute sur la décision du conseil. Dans la mesure où les administrateurs ont choisi l'une des diverses solutions raisonnables qui s'offraient, la retenue est de mise à l'égard de la décision du conseil. Cette retenue à l'égard de la décision du conseil est ce qu'on appelle la « règle de l'appréciation commerciale ». Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie. [Nous soulignons; italiques dans l'original; renvois omis.]

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66

In order for a plaintiff to succeed in challenging a business decision he or she has to establish that the directors acted (i) in breach of the duty of care and (ii) in a way that caused injury to the plaintiff: W. T. Allen, J. B. Jacobs and L. E. Strine, Jr., "Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law" (2001), 26 *Del. J. Corp. L.* 859, at p. 892.

Pour obtenir gain de cause lorsqu'il conteste une décision d'affaires, le demandeur doit établir que les administrateurs ont manqué à leur obligation de diligence et ce, d'une manière qui lui a causé un préjudice : W. T. Allen, J. B. Jacobs et L. E. Strine, Jr., « Function Over Form : A Reassessment of Standards of Review in Delaware Corporation Law » (2001), 26 *Del. J. Corp. L.* 859, p. 892.

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67

Directors and officers will not be held to be in breach of the duty of care under s. 122(1)(*b*) of the CBCA if they act prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.

On ne considérera pas que les administrateurs et les dirigeants ont manqué à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA s'ils ont agi avec prudence et en s'appuyant sur les renseignements dont ils disposaient. Les décisions prises doivent constituer des décisions d'affaires raisonnables compte tenu de ce qu'ils savaient ou auraient dû savoir. Lorsqu'il s'agit de déterminer si les administrateurs ont manqué à leur obligation de diligence, il convient de répéter que l'on n'exige pas d'eux la perfection. Les tribunaux ne doivent pas substituer leur opinion à celle des administrateurs qui ont utilisé leur expertise commerciale pour évaluer les considérations qui entrent dans la prise de décisions des sociétés. Ils sont toutefois en mesure d'établir, à partir des faits de chaque cas, si l'on a exercé le degré de prudence et de diligence nécessaire pour en arriver à ce qu'on prétend être une décision d'affaires raisonnable au moment où elle a été prise.

68

The trustee alleges that the Wise brothers breached their duty of care under s. 122(1)(*b*) of the CBCA by implementing the new procurement policy to the detriment of Peoples' creditors. After considering all the evidence, we agree with the Court of Appeal that the implementation of the new policy was a reasonable business decision that was made with a view to rectifying a serious and urgent business problem in circumstances in which no solution may have been possible. The trial judge's conclusion that the new policy led inexorably to Peoples' failure and bankruptcy was factually incorrect and constituted a palpable and overriding error.

Le syndic prétend que les frères Wise ont manqué à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la LCSA en instaurant la nouvelle politique d'approvisionnement au détriment des créanciers de Peoples. Après avoir examiné l'ensemble de la preuve, nous convenons avec la Cour d'appel que l'instauration de la nouvelle politique était une décision d'affaires raisonnable qui a été prise en vue de corriger un problème d'ordre commercial grave et urgent dans un cas où il n'existait peut-être aucune solution. En concluant que la nouvelle politique avait inexorablement entraîné le déclin et la faillite de Peoples, le juge de première instance a mal interprété les faits et a commis une erreur manifeste et dominante.

69

In fact, as noted by Pelletier J.A., there were many factors other than the new policy that

Comme l'a fait remarquer le juge Pelletier, de nombreux facteurs, outre la nouvelle politique, ont

contributed more directly to Peoples' bankruptcy. Peoples had lost $10 million annually while being operated by M & S. Wise, which was only marginally profitable and solvent with annual sales of $100 million (versus $160 million for Peoples), had hoped to improve the performance of its new acquisition. Given that the transaction was a fully leveraged buyout, for Wise and Peoples to succeed, Peoples' performance needed to improve dramatically. Unfortunately for both Wise and Peoples, the retail market in eastern Canada had become very competitive in the early 1990s, and this trend continued with the arrival of Wal-Mart in 1994. At paras. 152 and 154 QL, Pelletier J.A. stated:

[TRANSLATION] In reality, it was that particularly unfavourable financial situation in which the two corporations found themselves that caused their downfall, and it was M. & S. that, to protect its own interests, sounded the charge in December, rightly or wrongly judging that Peoples Inc.'s situation would only worsen over time. It is crystal-clear that the bankruptcy occurred at the most propitious time for M. & S.'s interests, when inventories were high and suppliers were unpaid. In fact, M. & S. recovered the entire balance due on the selling price and almost all of the other debts it was owed.

. . .

. . . the trial judge did not take into account the fact that the brothers derived no direct benefit from the transaction impugned, that they acted in good faith and that their true intention was to find a solution to the serious inventory management problem that each of the two corporations was facing. Because of an assessment error, he also ignored the fact that Peoples Inc. received a sizable consideration for the goods it delivered to Wise. Lastly, I note that the act for which the brothers were found liable, i.e. <u>the adoption of a new joint inventory procurement policy, is not as serious as the trial judge made it out to be and that, in opposition to his view, the act was also not the true cause of the bankruptcy of Peoples Inc.</u> [Emphasis added.]

70 The Wise brothers treated the implementation of the new policy as a decision made in the

contribué plus directement à la faillite de Peoples. Les pertes annuelles de Peoples, pendant qu'elle était exploitée par M & S, s'élevaient à 10 millions de dollars. Wise, qui était à peine rentable et à peine solvable avec des ventes annuelles de 100 millions de dollars (contre 160 millions de dollars pour Peoples), avait espéré accroître la rentabilité de sa nouvelle acquisition. Étant donné qu'il s'agissait d'une acquisition réalisée entièrement par emprunt, si Wise et Peoples voulaient que leurs efforts soient couronnés de succès, il devait y avoir une amélioration considérable de la rentabilité de Peoples. Malheureusement pour Wise et Peoples, la concurrence dans le marché de la vente au détail dans l'Est du Canada était devenue féroce au début des années 1990, une tendance qui s'est poursuivie avec l'arrivée de Wal-Mart en 1994. Aux paragraphes 153 et 155, le juge Pelletier a dit ce qui suit :

En réalité, c'est la présence de cette conjoncture financière particulièrement défavorable aux deux sociétés qui a provoqué leur chute et c'est M. & S. qui, pour la protection de ses intérêts propres, a sonné la charge en décembre, jugeant à tort ou à raison que la situation de Peoples Inc. ne pouvait qu'empirer avec le temps. Il saute aux yeux que la faillite est survenue au moment le plus propice aux intérêts de M. & S., lorsque les inventaires étaient élevés et les fournisseurs impayés. M. & S. a d'ailleurs récupéré la totalité du reliquat dû sur le prix de vente de même que la presque totalité de ses autres créances.

. . .

. . . le premier juge ne tient pas compte du fait que les frères n'ont retiré aucun avantage direct de la transaction attaquée, qu'ils étaient de bonne foi et que leur intention véritable consistait à rechercher une solution au sérieux problème de gestion d'inventaire auquel chacune des deux sociétés était confrontée. En raison d'une erreur d'appréciation, il ignore aussi que Peoples Inc. a reçu une contrepartie importante pour les biens qu'elle a livrés à Wise. Je note enfin que le geste à l'origine de la condamnation, <u>en l'occurrence, l'adoption du nouveau système d'approvisionnement commun, n'a pas le caractère de gravité que lui attribue le premier juge et que, contrairement à la perception qu'il exprime, ce geste n'a pas non plus été la véritable cause de la faillite de Peoples Inc.</u> [Nous soulignons.]

Les frères Wise ont traité la mise en œuvre de la nouvelle politique comme une décision prise

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ordinary course of business and, while no formal agreement evidenced the arrangement, a monthly record was made of the inventory transfers. Although this may appear to be a loose business practice, by the autumn of 1993, Wise had already consolidated several aspects of the operations of the two companies. Legally they were two separate entities. However, the financial fate of the two companies had become intertwined. In these circumstances, there was little or no economic incentive for the Wise brothers to jeopardize the interests of Peoples in favour of the interests of Wise. In fact, given the tax losses that Peoples had carried forward, the companies had every incentive to keep Peoples profitable in order to reduce their combined tax liabilities.

dans le cours normal des activités de l'entreprise et, même si aucune entente formelle ne constatait l'arrangement, les transferts des stocks étaient consignés mensuellement. Bien qu'on puisse penser qu'il s'agit d'une pratique commerciale peu rigoureuse, dès l'automne 1993, Wise avait déjà, en pratique, intégré plusieurs des services des deux sociétés. Légalement, il s'agissait de deux entités distinctes. Toutefois, l'avenir financier des deux sociétés était inextricablement lié. Dans les circonstances, les frères Wise n'avaient, au plan financier, aucun avantage à privilégier les intérêts de Wise au détriment de ceux de Peoples. En fait, vu les pertes fiscales que Peoples avait reportées, les deux sociétés avaient toutes les raisons de s'assurer de la rentabilité de Peoples afin de réduire leurs dettes fiscales combinées.

71

Arguably, the Wise brothers could have been more precise in pursuing a resolution to the intractable inventory management problems, having regard to all the troublesome circumstances involved at the time the new policy was implemented. But we, like the Court of Appeal, are not satisfied that the adoption of the new policy breached the duty of care under s. 122(1)(*b*) of the CBCA. The directors cannot be held liable for a breach of their duty of care in respect of the creditors of Peoples.

Les frères Wise auraient peut-être, compte tenu de la situation difficile à l'époque de l'instauration de la nouvelle politique, pu être plus minutieux dans leur recherche d'une solution aux épineux problèmes de gestion des stocks. Mais, comme la Cour d'appel, nous ne sommes pas convaincus que l'adoption de la nouvelle politique ait contrevenu à l'obligation de diligence énoncée à l'al. 122(1)*b*) de la LCSA. Les administrateurs ne peuvent pas être tenus responsables pour manquement à leur obligation de diligence à l'égard des créanciers de Peoples.

72

The Court of Appeal relied on two additional provisions of the CBCA that in its view could rescue the Wise brothers from a finding that they breached the duty of care: ss. 44(2) and 123(4).

La Cour d'appel s'est appuyée sur deux autres dispositions de la LCSA qui, selon elle, pourraient empêcher de conclure que les frères Wise ont manqué à leur obligation de diligence; il s'agit du par. 44(2) et du par. 123(4).

73

Section 44 of the CBCA, which was in force at the time of the impugned transactions but has since been repealed, permitted a wholly-owned subsidiary to give financial assistance to its holding body corporate:

44. (1) Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

. . .

L'article 44 de la LCSA, qui était en vigueur à l'époque des transactions contestées mais qui a été abrogé depuis, autorisait une filiale à part entière à fournir une aide financière à sa société mère :

44. (1) Sauf dans les limites prévues au paragraphe (2), il est interdit à la société ou aux sociétés de son groupe de fournir une aide financière même indirecte, notamment sous forme de prêt ou de caution :

. . .

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(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

. . .

(*c*) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

(2) La société peut accorder une aide financière, notamment sous forme de prêt ou de caution :

. . .

c) à sa société mère, si elle lui appartient en toute propriété;

74 While s. 44(2) as it then read qualified the prohibition under s. 44(1), it did not serve to supplant the duties of the directors under s. 122(1) of the CBCA. The Court of Appeal erred in concluding that s. 44(2) served as a blanket legitimization of financial assistance given by wholly-owned subsidiaries to parent corporations. In our opinion, it is incumbent upon directors and officers to exercise their powers in conformity with the duties of s. 122(1).

Même s'il restreignait la portée de l'interdiction prévue au par. 44(1), l'ancien par. 44(2) ne faisait pas disparaître les obligations imposées aux administrateurs par le par. 122(1) de la LCSA. La Cour d'appel a conclu à tort que le par. 44(2) servait à légitimer de façon générale l'aide financière fournie par une filiale à part entière à sa société mère. À notre avis, il incombe aux administrateurs et aux dirigeants d'exercer leurs pouvoirs conformément aux obligations qu'impose le par. 122(1).

75 Although s. 44(2) authorized certain forms of financial assistance between corporations, this cannot exempt directors and officers from potential liability under s. 122(1) for any financial assistance given by subsidiaries to the parent corporation.

Bien qu'il autorisait certaines formules d'aide financière entre sociétés, le par. 44(2) ne permet pas de soustraire les administrateurs et les dirigeants à leur responsabilité éventuelle en vertu du par. 122(1) pour toute aide financière fournie par une filiale à sa société mère.

76 When faced with the serious inventory management problem, the Wise brothers sought the advice of the vice-president of finance, David Clément. The Wise brothers claimed as an additional argument that in adopting the solution proposed by Clément, they were relying in good faith on the judgment of a person whose profession lent credibility to his statement, in accordance with the defence provided for in s. 123(4)(*b*) (now s. 123(5)) of the CBCA. The Court of Appeal accepted the argument. We disagree.

Face au grave problème de gestion des stocks, les frères Wise ont demandé conseil au vice-président aux finances, David Clément. Ils ont fait valoir comme argument additionnel qu'en retenant la solution proposée par M. Clément, ils se sont fiés de bonne foi au jugement d'une personne dont la profession permettait d'accorder foi à sa déclaration, conformément au moyen de défense prévu à l'al. 123(4)*b*) (maintenant le par. 123(5)) de la LCSA. La Cour d'appel a retenu cet argument. Nous ne sommes pas d'accord avec celle-ci.

77 The reality that directors cannot be experts in all aspects of the corporations they manage or supervise shows the relevancy of a provision such as s. 123(4)(*b*). At the relevant time, the text of s. 123(4) read:

123. . . .

. . .

(4) A director is not liable under section 118, 119 or 122 if he relies in good faith on

L'utilité d'une disposition telle que l'al. 123(4)*b*) tient à ce que les administrateurs ne peuvent connaître à fond toutes les facettes des entreprises qu'ils gèrent ou dont ils surveillent la gestion. À l'époque pertinente, le par. 123(4) prévoyait ce qui suit :

123. . . .

. . .

(4) N'est pas engagée, en vertu des articles 118, 119 ou 122, la responsabilité de l'administrateur qui s'appuie de bonne foi sur :

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(*a*) financial statements of the corporation represented to him by an officer of the corporation or in a written report of the auditor of the corporation fairly to reflect the financial condition of the corporation; or

(*b*) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

Although Clément did have a bachelor's degree in commerce and 15 years of experience in administration and finance with Wise, this experience does not correspond to the level of professionalism required to allow the directors to rely on his advice as a bar to a suit under the duty of care. The named professional groups in s. 123(4)(*b*) were lawyers, accountants, engineers, and appraisers. Clément was not an accountant, was not subject to the regulatory overview of any professional organization and did not carry independent insurance coverage for professional negligence. The title of vice-president of finance should not automatically lead to a conclusion that Clément was a person "whose profession lends credibility to a statement made by him". It is noteworthy that the word "profession" is used, not "position". Clément was simply a non-professional employee of Wise. His judgment on the appropriateness of the solution to the inventory management problem must be regarded in that light. Although we might accept for the sake of argument that Clément was better equipped and positioned than the Wise brothers to devise a plan to solve the inventory management problems, this is not enough. Therefore, in our opinion, the Wise brothers cannot successfully invoke the defence provided by s. 123(4)(*b*) of the CBCA but must rely on the other defences raised.

C. *The Claim Under Section 100 of the BIA*

The trustee also claimed against the Wise brothers under s. 100 of the BIA. That section reads:

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on

a) des états financiers de la société reflétant équitablement sa situation, d'après l'un de ses dirigeants ou d'après le rapport écrit du vérificateur;

b) les rapports des personnes dont la profession permet d'accorder foi à leurs déclarations, notamment les avocats, comptables, ingénieurs ou estimateurs.

78

Même si M. Clément était titulaire d'un baccalauréat en commerce et qu'il avait 15 ans d'expérience en administration et en finance chez Wise, cette expérience ne correspond pas au degré de professionnalisme requis pour que les administrateurs puissent invoquer les conseils reçus de lui pour faire échec à une poursuite fondée sur l'obligation de diligence. Les groupes de professionnels désignés à l'al. 123(4)*b*) sont les avocats, les comptables, les ingénieurs et les estimateurs. Monsieur Clément n'était pas comptable, ses activités n'étaient pas réglementées par une organisation professionnelle et il n'avait pas lui-même souscrit à une police d'assurance-responsabilité professionnelle. On ne saurait conclure qu'en raison de son titre de vice-président aux finances, M. Clément était une personne « dont la profession permet d'accorder foi à [ses] déclarations ». Il convient de signaler que c'est le mot « profession » et non le mot « poste » qui est utilisé. Monsieur Clément était un simple employé non professionnel de Wise. C'est à la lumière de ces faits qu'il convient d'analyser son appréciation de l'opportunité de la solution proposée aux problèmes de gestion des stocks. Même si nous admettions, pour les fins de la discussion, que M. Clément était mieux en mesure que les frères Wise d'élaborer un plan destiné à régler les problèmes de gestion des stocks, cela ne suffirait pas. Par conséquent, nous estimons que les frères Wise ne peuvent faire valoir avec succès le moyen de défense prévu à l'al. 123(4)*b*) de la LCSA mais doivent s'appuyer sur les autres moyens de défense invoqués.

C. *La réclamation fondée sur l'art. 100 de la LFI*

79

Le syndic a également fondé sur l'art. 100 de la LFI sa réclamation contre les frères Wise. Selon cet article :

100. (1) Le tribunal peut, sur demande du syndic, enquêter pour déterminer si le failli qui a vendu, acheté, loué, engagé, fourni ou reçu des biens ou services au

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the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

moyen d'une transaction révisable, au cours de la période allant du premier jour de l'année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, a donné ou reçu, selon le cas, une juste valeur du marché en contrepartie des biens ou services.

(2) Lorsque le tribunal, dans des instances en vertu du présent article, constate que la contrepartie donnée ou reçue par le failli dans la transaction révisable était manifestement supérieure ou inférieure à la juste valeur du marché des biens ou services sur lesquels portait la transaction, il peut accorder au syndic un jugement contre l'autre partie à la transaction ou contre toute autre personne ayant intérêt à la transaction avec le failli ou contre toutes ces personnes, pour la différence entre la contrepartie réellement donnée ou reçue par le failli et la juste valeur du marché, telle qu'elle est déterminée par le tribunal, des biens ou services sur lesquels porte la transaction.

80 The provision has two principal elements. First, subs. (1) requires the transaction to have been conducted within the year preceding the date of bankruptcy. Second, subs. (2) requires that the consideration given or received by the bankrupt be "conspicuously greater or less" than the fair market value of the property concerned.

Cette disposition comporte deux éléments principaux. Premièrement, le par. (1) exige que la transaction soit effectuée au cours de l'année précédant la date de la faillite. Deuxièmement, le par. (2) exige que la contrepartie donnée ou reçue par le failli soit « manifestement supérieure ou inférieure » à la juste valeur marchande des biens en cause.

81 The word "may" is found in both ss. 100(1) and 100(2) of the BIA with respect to the jurisdiction of the court. In *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1, a majority of the Ontario Court of Appeal held that, even if the necessary preconditions are present, the exercise of jurisdiction under s. 100(1) to inquire into the transaction, and under s. 100(2) to grant judgment, is discretionary. Equitable principles guide the exercise of discretion. We agree.

Le mot « peut » est utilisé tant au par. 100(1) qu'au par. 100(2) de la LFI relativement à la compétence du tribunal. Dans *Standard Trustco Ltd. (Trustee of) c. Standard Trust Co.* (1995), 26 O.R. (3d) 1, la Cour d'appel de l'Ontario a statué à la majorité que, même si les conditions préalables nécessaires sont remplies, l'exercice du pouvoir d'enquêter sur la transaction prévu au par. 100(1) et du pouvoir d'accorder un jugement prévu au par. 100(2) est discrétionnaire. Les principes d'équité encadrent l'exercice de ce pouvoir discrétionnaire. Nous souscrivons à cette décision.

82 Referring to s. 100(2) of the BIA, in *Standard Trustco*, *supra*, at p. 23, Weiler J.A. explained that:

When a contextual approach is adopted it is apparent that although the conditions of the section have been satisfied the court is not obliged to grant judgment. The court has a residual discretion to exercise. The contextual approach indicates that the good faith of the parties, the intention with which the transaction took place, and

Au sujet du par. 100(2) de la LFI, dans *Standard Trustco*, précité, p. 23, la juge Weiler a donné les explications suivantes :

[TRADUCTION] Lorsque la méthode contextuelle est retenue, il est évident que, même si les conditions prévues par l'article sont remplies, le tribunal n'est pas tenu d'accorder un jugement. Le tribunal exerce un pouvoir discrétionnaire résiduel. Suivant la méthode contextuelle, la bonne foi des parties, le but de la transaction et l'échange

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whether fair value was given and received in the transaction are important considerations as to whether that discretion should be exercised.

We agree with Weiler J.A. and adopt her position; however, this appeal does not turn on the discretion to ultimately impose liability. In our view, the Court of Appeal did not interfere with the trial judge's exercise of discretion in reviewing the facts and finding a palpable and overriding error.

Within the year preceding the date of bankruptcy, Peoples had transferred inventory to Wise for which the trustee claimed Peoples had not received fair market value in consideration. The relevant transactions involved, for the most part, transfers completed in anticipation of the busy holiday season. Given the non-arm's length relationship between Wise and its wholly-owned subsidiary Peoples, there is no question that these inventory transfers could have constituted reviewable transactions.

We share the view of the Court of Appeal that it is not only the final transfers that should be considered. In fairness, the inventory transactions should be considered over the entire period from February to December 1994, which was the period when the new policy was in effect.

In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach. In that case, a difference of $1.18 million between fair market value and the consideration received by the bankrupt was seen as conspicuous, where the fair market value was $6.6 million, leaving a discrepancy of more than 17 percent. While there is no particular percentage that definitively sets the threshold for a conspicuous difference, the percentage difference is a factor.

d'une contrepartie représentant la juste valeur du marché sont des éléments importants pour déterminer s'il y a lieu d'exercer ce pouvoir discrétionnaire.

Nous sommes d'accord avec la juge Weiler et nous adoptons sa position; toutefois, le présent pourvoi ne porte pas sur le pouvoir discrétionnaire d'imposer ultimement une responsabilité. À notre avis, la Cour d'appel ne s'est pas ingérée dans l'exercice du pouvoir discrétionnaire du juge de première instance en examinant les faits et en concluant à l'existence d'une erreur manifeste et dominante.

83

Au cours de l'année qui a précédé la faillite, Peoples a transféré à Wise des marchandises pour lesquelles, selon le syndic, Peoples n'a pas reçu de contrepartie représentant la juste valeur du marché. Les transactions en cause concernaient principalement les transferts effectués en prévision de la période occupée que constitue le temps des Fêtes. Vu le lien de dépendance entre Wise et Peoples, sa filiale à part entière, il n'y a aucun doute que ces transferts de stocks auraient pu constituer des transactions révisables.

84

Nous estimons comme la Cour d'appel qu'il ne faut pas se contenter d'examiner les derniers transferts. En toute équité, il convient d'analyser les transactions effectuées au cours de toute la période de février à décembre 1994, soit la période pendant laquelle la nouvelle politique était appliquée.

85

Selon l'arrêt *Skalbania (Trustee of) c. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (C.A.), le critère permettant de déterminer si la différence entre la contrepartie et sa juste valeur marchande est « manifestement supérieure ou inférieure » n'est pas de savoir si la différence est manifeste pour les parties au moment de la transaction, mais plutôt si elle l'est pour le tribunal eu égard à tous les facteurs pertinents. Il s'agit d'une méthode judicieuse. Dans cette affaire, une différence de 1,18 million de dollars entre la juste valeur du marché et la contrepartie reçue par le failli a été jugée manifeste, la juste valeur du marché étant de 6,6 millions de dollars, ce qui laissait un écart de plus de 17 pour 100. Bien qu'aucun pourcentage particulier ne soit fixé pour déterminer ce qui constitue une différence manifeste, le pourcentage de différence constitue un facteur.

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86 As for the factors that would be relevant to this determination, the court might consider, *inter alia*: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L. W. Houlden and G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.

Pour ce qui est des autres facteurs qui seraient pertinents à cette décision, le tribunal peut examiner notamment les facteurs suivants : la preuve de la marge d'erreur dans l'évaluation du type de biens en cause; les évaluations qui ont été faites des biens en cause et la preuve de la croyance sincère des parties en ce qui a trait à la valeur de ces biens; les autres éléments présentés en preuve par les parties pour expliquer la différence entre la contrepartie obtenue et la juste valeur du marché : voir L. W. Houlden et G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3e éd. (feuilles mobiles)), vol. 2, p. 4-114.1.

87 Over the lifespan of the new policy, Peoples transferred to Wise inventory valued at $71.54 million. As of the date of bankruptcy, it had received $59.50 million in property or money from Wise. As explained earlier, the trial judge adjusted the outstanding difference down to a balance of $4.44 million after taking into account, *inter alia*, the reallocation of general and administrative expenses, and adjustments necessitated by imported inventory transferred from Wise to Peoples. Neither party disputed these figures before this Court. We agree with the Court of Appeal's observation that these findings directly conflict with the trial judge's assertion that Peoples had received no consideration for the inventory transfers on the basis that the outstanding accounts were "neither collected nor collectible" from Wise. Like Pelletier J.A., we conclude that the trial judge's finding in this regard was a palpable and overriding error, and we adopt the view of the Court of Appeal.

Pendant la période d'application de la nouvelle politique, Peoples a transféré à Wise des stocks d'une valeur de 71,54 millions de dollars. À la date de la faillite, elle avait reçu de Wise des biens ou des sommes s'élevant à 59,5 millions de dollars. Comme nous l'avons expliqué précédemment, le juge de première instance a ramené la différence à un solde de 4,44 millions de dollars après avoir tenu compte, notamment, de la nouvelle répartition des frais généraux et administratifs et des rajustements nécessaires découlant des transferts par Wise à Peoples des stocks importés. Aucune des parties n'a contesté ces chiffres devant notre Cour. Nous sommes d'accord avec la Cour d'appel qui a fait remarquer que ces conclusions contredisent directement ce qu'a dit le juge de première instance, savoir que Peoples n'avait reçu aucune contrepartie pour les transferts de stocks puisque les comptes recevables [TRADUCTION] « n'ont pas été recouvrés et n'étaient pas recouvrables » de Wise. Comme le juge Pelletier, nous estimons que la conclusion du juge de première instance à cet égard était une erreur manifeste et dominante et nous souscrivons au point de vue de la Cour d'appel.

88 We are not satisfied that, with regard to all the circumstances of this case, a disparity of slightly more than 6 percent between fair market value and the consideration received constitutes a "conspicuous" difference within the meaning of s. 100(2) of the BIA. Accordingly, we hold that the trustee's claim under the BIA also fails.

Nous ne sommes pas convaincus que, compte tenu de toutes les circonstances de la présente espèce, un écart d'un peu plus de 6 pour 100 entre la juste valeur du marché et la contrepartie reçue constitue une différence « manifeste » au sens du par. 100(2) de la LFI. Par conséquent, nous statuons que la réclamation du syndic fondée sur la LFI échoue également.

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In addition to permitting the court to give judgment against the other party to the transaction, s. 100(2) of the BIA also permits it to give judgment against someone who was not a party but was "privy" to the transaction. Given our finding that the consideration for the impugned transactions was not "conspicuously less" than fair market value, there is no need to consider whether the Wise brothers would have been "privy" to the transaction for the purpose of holding them liable under s. 100(2). Nonetheless, the disagreement between the trial judge and the Court of Appeal on the interpretation of "privy" in s. 100(2) of the BIA warrants the following observations.

Le paragraphe 100(2) de la LFI autorise le tribunal à accorder un jugement non seulement contre l'autre partie à la transaction, mais aussi contre une partie non contractante « ayant intérêt » à la transaction. Comme nous avons conclu que la contrepartie reçue dans les transactions contestées n'était pas « manifestement inférieure » à la juste valeur du marché, il est inutile d'examiner si les frères Wise auraient eu un « intérêt » à la transaction qui permettrait de conclure à leur responsabilité en vertu du par. 100(2). Quoi qu'il en soit, le désaccord entre le juge de première instance et la Cour d'appel sur l'interprétation des mots « ayant intérêt » au par. 100(2) de la LFI justifie les observations suivantes.

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The trial judge in this appeal had little difficulty finding that the Wise brothers were privy to the transaction within the meaning of s. 100(2). Pelletier J.A., however, preferred a narrow construction in finding that the Wise brothers were not privy to the transactions. He held, at para. 135 QL, that:

[TRANSLATION] . . . the legislator wanted to provide for the case in which a person other than the co-contracting party of the bankrupt actually received all or part of the benefit resulting from the lack of equality between the respective considerations.

To support this direct benefit requirement, Pelletier J.A. also referred to the French version which uses the term *ayant intérêt*. While he conceded that the respondent brothers received an indirect benefit from the inventory transfers as shareholders of Wise, Pelletier J.A. found this too remote to be considered "privy" to the transactions (paras. 139-40 QL).

En l'espèce, le juge de première instance n'a pas hésité à conclure que les frères Wise avaient un intérêt à la transaction au sens du par. 100(2). Cependant, le juge Pelletier a privilégié une interprétation stricte en concluant que les frères Wise n'avaient pas intérêt aux transactions. Il a dit ce qui suit au par. 136 :

Le législateur me semble avoir voulu prévoir le cas où c'est une personne autre que le cocontractant du failli qui, en réalité, encaisse tout ou partie du bénéfice résultant de l'absence d'équivalence entre les contreparties respectives.

Pour justifier cette exigence d'un avantage direct, le juge Pelletier a mentionné le texte français où l'on utilise l'expression « ayant intérêt ». Même s'il a admis que les frères intimés ont, en leur qualité d'actionnaires de Wise, tiré un avantage indirect des transferts de stocks, le juge Pelletier a conclu que cet avantage était trop éloigné pour qu'ils aient eu un « intérêt » aux transactions (par. 140-141).

91

The primary purpose of s. 100 of the BIA is to reverse the effects of a transaction that stripped value from the estate of a bankrupt person. It makes sense to adopt a more inclusive understanding of the word "privy" to prevent someone who might receive indirect benefits to the detriment of a bankrupt's unsatisfied creditors from frustrating the provision's remedial purpose. The word "privy" should be given a broad reading to include those who benefit directly or indirectly from and have knowledge of a transaction occurring for less than fair market value. In our opinion, this rationale is particularly apt when

L'article 100 de la LFI a principalement pour objet d'annuler les effets d'une transaction qui a diminué la valeur des actifs d'un failli. Il est logique d'adopter une conception plus large des termes « ayant intérêt » pour éviter qu'une personne qui pourrait tirer un avantage indirect au détriment des créanciers du failli puisse contrecarrer l'objet réparateur de cette disposition. Il convient de donner aux termes « ayant intérêt » un sens large afin qu'ils s'appliquent aux personnes qui tirent un avantage direct ou indirect d'une transaction tout en sachant que la contrepartie est inférieure à la juste valeur du

those who benefit are the controlling minds behind the transaction.

92 A finding that a person was "privy" to a reviewable transaction does not of course necessarily mean that the court will exercise its discretion to make a remedial order against that person. For liability to be imposed, it must be established that the transaction occurred: (a) within the past year; (b) for consideration conspicuously greater or less than fair market value; (c) with the person's knowledge; and (d) in a way that directly or indirectly benefited the person. In addition, after having considered the context and all the above factors, the judge must conclude that the case is a proper one for holding the person liable. In light of these conditions and of the discretion exercised by the judge, we find that a broad reading of "privy" is appropriate.

IV. Disposition

93 For the foregoing reasons, we would dismiss the appeal with costs to the respondents.

Appeal dismissed with costs.

Solicitors for the appellant: Kugler Kandestin, Montréal.

Solicitors for the respondents Lionel Wise, Ralph Wise and Harold Wise: de Grandpré Chait, Montréal.

Solicitors for the respondent Chubb Insurance Company of Canada: Lavery, de Billy, Montréal.

marché. À notre avis, ce raisonnement est particulièrement pertinent lorsque les personnes qui touchent un avantage sont les instigatrices de la transaction.

Conclure qu'une personne a « intérêt » à la transaction révisable ne signifie évidemment pas que le tribunal exercera son pouvoir discrétionnaire pour rendre une ordonnance réparatrice contre cette personne. Pour conclure à la responsabilité de cette personne, il doit être démontré que la transaction est effectuée a) au cours de l'année précédente, b) en échange d'une contrepartie manifestement supérieure ou inférieure à la juste valeur du marché, c) au su de la personne en cause, et d) d'une manière qui a permis à la personne de tirer un avantage direct ou indirect. De plus, après avoir examiné le contexte et tous les facteurs ci-dessus, le juge doit conclure qu'il y a lieu dans ce cas d'imposer une responsabilité à la personne. Compte tenu de ces conditions et du pouvoir discrétionnaire exercé par le juge, nous concluons qu'une interprétation large des termes « ayant intérêt » s'impose.

IV. Dispositif

Pour les motifs qui précèdent, nous sommes d'avis de rejeter le pourvoi avec dépens en faveur des intimés.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Kugler Kandestin, Montréal.

Procureurs des intimés Lionel Wise, Ralph Wise et Harold Wise : de Grandpré Chait, Montréal.

Procureurs de l'intimée Chubb du Canada, Compagnie d'assurance : Lavery, de Billy, Montréal.

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TAB PP

Maple Leaf Foods Inc. et al. v. Schneider Corporation et al.

Pente Investment Management Ltd. et al. v. Schneider Corporation et al.

[Indexed as: Maple Leaf Foods Inc. v. Schneider Corp.]

42 O.R. (3d) 177
[1998] O.J. No. 4142
Docket Nos. C29945 and C29923

Court of Appeal for Ontario
Osborne, Weiler and Feldman JJ.A.
October 20, 1998

Corporations -- Take-over bid -- Directors not having obligation to conduct auction of company's shares where company is for sale -- Public statements by members of family which controlled company not giving rise to reasonable expectations in non-family shareholders that auction would be held -- Trial judge not erring in holding that offer for shares not "exclusionary" so as to trigger coattail provisions in target company's articles of incorporation.

M Inc. announced its intention to make an unsolicited take-over bid for S Co. (a competitor of M Inc. which was controlled by the S family) at $19 a share. The Board of Directors of S Co. established a special committee consisting of independent non-family directors to review the M Inc. offer and to consider other alternatives. Subsequently, M Inc. made an offer of $22 a share, but this offer was rejected by the family. Ultimately, the family told the special committee that the only offer it would accept was an offer made by SF Inc. that, at the time, was equal to $25 a share. In order for the family to accept the SF Inc. offer, which would have had the

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effect of enabling SF Inc. to "lock-up" control of S Co., the Board had to take certain steps which, on the advice of the special committee, it took. Despite this, M Inc. made a further offer of $29 a share to S Co.'s common and Class A shareholders. While M Inc. offered the same premium to the Class A non-voting shareholders as it did to the holders of comm on voting shares, it claimed that its bid triggered the coattail provisions in S Co.'s articles of incorporation because the conditions attached to its bid for the non-voting shares was not identical to the condition attached to its bid for the common shares. As a result, M Inc. claimed that the effect of its bid was to convert the non-voting Class A shares into common voting shares. Supported by two small shareholders of S Co., M Inc. attacked the actions of the special committee on the basis that it was not in fact independent and that the advice it gave to the Board was not in the best interests of S Co. and its shareholders. M Inc. took the position that public statements made by the family created an expectation that an auction for the family shares would be held and that those shares would be sold to the highest bidder.

M Inc. brought an action seeking to have the agreement between the family and SF Inc. invalidated. The action was dismissed. M Inc. appealed.

Held, the appeal should be dismissed.

The trial judge did not err in finding that the special committee and the directors exercised their powers and discharged their duties honestly and in good faith with a view to the best interests of S Co. and that they exercised the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances in relation to dealing with the take-over bid situation. He also did not err in finding that because S Co. was known to be controlled by the family which could decide whether or not to sell its shares, the company was never truly in play and no public expectation was created that an auction would be held. In Ontario, an auction need not be held every time there is a change in control of a company. An auction is merely one way to prevent the conflicts of interest that may arise when there is a change

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of control by requiring that directors act in a neutral manner towards a number of bidders. The family did not seek to sell its controlling interest in S Co. The Board received a n offer from M Inc. that it felt was inadequate but, in the final analysis, the best way to judge its adequacy was to determine if higher bids could be elicited through a market canvass. The fact that a market canvass was conducted did not mean that the family would agree to sell its stake. Having undertaken a market canvass, there was no obligation on the special committee to turn this canvass into an auction, particularly because to do so was to assume the risk that the competing offers that the market canvass had generated might be withdrawn.

The trial judge did not err in his interpretation of the coattail provisions. Coattail provisions are designed to ensure that if the common voting shareholders wish to accept an offer that will lead to a change in control and if the price or terms offered to the common voting shareholders are more favourable than those offered to the holders of non-voting shares, the non-voting shareholders get an opportunity to participate in any change of control premium. If the holders of restricted shares, such as non-voting shares, are excluded from participating in the common voting share takeover bid, they will then be given a right of conversion of their restricted or non-voting shares into common voting shares. Coattail provisions are intended to encourage non-exclusionary bids. The trial judge found that to the extent that M Inc.'s bid did not exclude the Class A shareholders from the premium being offered for the family's shares, the coattail provisions were not triggered. Read literally, the coattail provision i n question provided that if even a single common share was tendered to the offer for the common shares, the company making the offer would have to pay for all the Class A shares tendered whether or not any Class A shares were actually taken up and purchased or acquired. However, the wording of a coattail provision must be given an interpretation which accords with its object and the intention of the framers of the provision, and the interpretation of a coattail provision must be viewed objectively and as a reasonably prudent business person would view it. The purpose of adopting a coattail provision is to

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discourage exclusionary offers, whereas a literal reading of S Co.'s coattail provision gave the opposite effect. In this case, it appeared to the shareholders that the offers were the same because the amount to be paid to both classes of shareholders was the same. M Inc. understood how its offers would be perceived. If, instead, M Inc. was of the opinion that its offer was exclusionary, it could have said i n its offering circular that it intended to apply to the appropriate authorities to have the issue of whether or not the offer was exclusionary determined in court. The interpretation of M Inc.'s offers adopted by the trial judge was consistent with the way a reasonably prudent business person would construe the offer. The trial judge did not err in holding that the M Inc. offer for common shares was not an exclusionary offer and that the coattail provisions in the articles of incorporation had not been triggered.

Brant Investments Ltd. v. Keep Rite Inc. (1991), 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.), affg (1987), 60 O.R. (2d) 737, 42 D.L.R. (4th) 15, 37 B.L.R. 65 (H.C.J.), supp. reasons 61 O.R. (2d) 469, 43 D.L.R. (4th) 141 (H.C.J.); CW Shareholdings Inc. v. WIC Western International Communications Ltd. (1998), 39 O.R. (3d) 755, 160 D.L.R. (4th) 131, 38 B.L.R. (2d) 196 (Gen. Div.); Paramount Communications v. QVC Network Inc., 637 A.2d 34 (Del. 1934); Revlon v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), consd

Other cases referred to

347883 Alberta Ltd. v. Producers Pipelines Inc. (1991), 92 Sask. R. 81, 80 D.L.R. (4th) 359, [1991] 4 W.W.R. 577, 3 B.L.R. (2d) 237 (C.A.); 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), affg (1991), 3 B.L.R. (2d) 123 (Ont. Gen. Div.); Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, 77 B.C.L.R. (2d) 62, 102 D.L.R. (4th) 96, 150 N.R. 321, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1; Arthur v. Signum Communications Ltd., [1993] O.J. No. 1928 (Div. Ct.); Barkan v. Amsted Industries Inc., 567 A.2d 1279 (Del. 1989); Canadian

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Tire Corp. (Re) (1987), 35 B.L.R. 117 (Ont. Div. Ct.); Exco Corp. v. Nova Scotia Savings & Loan Co. (1987), 78 N.S.R. (2d) 91, 193 A.P.R. 91, 35 B.L.R. 149 (S.C.); First Boston, Inc. Shareholders Litigation (In re), [1990] Fed. Sec. L. Rep., para. 95, 322 (Del. 1990); Fort Howard Corp. Shareholders Litig. (In re), Del. Ch., C.A. No. 991, 1988 WL 83147; Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.); Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd. (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (Div. Ct.), affg (1986), 59 O.R. (2d) 255, 37 D.L.R. (4th) 194 (H.C.J.); Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 C.L.L.C. 210-006; Saunders v. Cathton Holdings Ltd. (1997), 43 B.C.L.R. (3d) 129, 88 B.C.A.C. 264, [1998] 5 W.W.R. 363, 36 B.L.R. (2d) 151; Slattery v. Slattery, [1945] O.R. 811 (C.A.); Teck Corp. v. Millar (1973), 33 D.L.R. (3d) 288 (B.C.S.C.); Themadel Foundation v. Third Canadian General Investment Trust Ltd. (1998), 38 O.R. (3d) 749 (C.A.); Westfair Foods Ltd. v. Watt (1991), 79 Alta. L.R. (2d) 363, 79 D.L.R. (4th) 48, [1991] 4 W.W.R. 695, 5 B.L.R. (2d) 160 (C.A.), affg (1990), 7 C3 Alta. L.R. (2d) 326, [1990] 4 W.W.R. 685, 48 B.L.R. 43 (Q.B.), leave to appeal to S.C.C. refused [1991] 3 S.C.R. viii

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 134, 248
Canadian Business Corporations Act, R.S.C. 1985, c. C-44

Authorities referred to

Dreidger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994), p. 131
Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969), p. 228
Morden, "The Partnership of Bench and Bar" (1982), 16 Law Soc. Gaz. 46, pp. 89-95

APPEAL from a judgment of Farley J. (1998), 40 B.L.R. (2d) 244 (Gen. Div.) dismissing an action to invalidate an agreement

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for the sale of shares.

Lyndon A.J. Barnes and David A. Stamp, for appellant, Maple Leaf Foods.

Harvey T. Strosberg, Q.C., G. Wesley Voorheis and Michael Woollcombe, for appellants, Pente Investment Management Ltd. and Cascade Holdings Ltd.

James D.G. Douglas and Freya J. Kristjanson, for respondents, J.M. Schneider Family Holdings.

Thomas G. Heintzman, Q.C., R. Paul Steep and Susan Rothfels, for respondent, Smithfield Foods, Inc.

Alan H. Mark, Jessica A. Kimmel and Nando De Luca, for respondents, Schneider Corporation, Douglas W. Dodds, Gerald A. Hooper, Frederick D. Morash, Larry J. Pearson, Brian J. Ruby, Ronald J. Simmons and Hugh W. Sloan.

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OVERVIEW

THE OPPRESSION CLAIMS, REASONABLE EXPECTATIONS AND THE DUTIES OF OFFICERS AND DIRECTORS

Facts

Determining Whether the Directors Have Acted in the Best Interests of the Corporation

The Special Committee

(i) Should expert evidence have been admitted on the question whether the special committee was independent, and on the process by which the agreement with Smithfield was reached?

(ii) Should members of Schneider's senior management, particularly Dodds, have been permitted to have a significant role in the sale negotiations with potential bidders?

Process Arguments

(i) Should the special committee have been created?

(ii) Should the special committee have created a data room?

(iii) Flawed committee process

(iv) Should the special committee have insisted that Maple Leaf and any other interested party be given an opportunity to make their best and final offer prior to

the board of directors of Schneider taking the steps that it did on December 17, 1997 to commit its shares to Smithfield?

Was there a duty to conduct an auction of the shares of Schneider?

Was there a public expectation created by the Family that an auction would be held?

Was the course of action and the advice given by the special committee in the best interests of Schneider and its shareholders? Should the special committee and the Board of Directors have refused to waive the standstill provisions in the confidentiality agreement with Smithfield?

THE COATTAIL PROVISIONS

Did Farley J. Interpret the Coattail Provisions Correctly?

(i) Facts re interpretation of coattail provisions

(ii) Findings of the trial judge

Discussion

THE ANTI-CONVERSION CERTIFICATES

Did Farley J. Err in his Conclusion that an Effective Anti-conversion Certificate Had Been Filed?

The Omission of Maple Leaf to State that its Offers Were Exclusionary in its Offering Circular and the Effect, if any, of such Omission

DISPOSITION

The judgment of the court was delivered by

WEILER J.A.: --

OVERVIEW

The appellants are Maple Leaf Foods Inc. ("Maple Leaf"), a bidder for the shares of Schneider Corporation ("Schneider"), and two small shareholders of Schneider who are supporting Maple Leaf. They raise two principal issues. The first concerns the duties of a special committee of the Board of Directors of Schneider Corporation and of the Board itself when dealing with

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a bid for change of control of the company. The second involves the interpretation of a provision in the articles of a company commonly known as the "coattail provision".

Schneider Corporation is an 108-year-old Ontario corporation that is controlled by members of the Schneider Family ("the Family") [See Note 1 at end of document.] through a holding company. The issued share capital of Schneider consists of common voting shares and Class A non-voting shares. Both classes of shares trade on the Toronto Stock Exchange, with the Class A shares representing most of the equity in the company. Although the Family only owns 17 per cent of the non-voting shares, the Family controls the company because it owns approximately 75 per cent of the common voting shares.

On November 5, 1997, Maple Leaf, a competitor of Schneider, announced its intention to make an unsolicited take-over bid for Schneider at $19 a share, through its holding company SCH. In response, the Board established a special committee consisting of the independent non-family directors to review the Maple Leaf offer and to consider other alternatives. Subsequently Maple Leaf itself made an offer of $22 a share, but this offer was rejected by the Family. Ultimately, the Family told the special committee that the only offer it would accept was an offer made by Smithfield Foods, an American company that, at the time, was equal to $25 a share. In order for the Family to accept the Smithfield offer, which would have had the effect of enabling Smithfield to "lock-up" control of Schneider, the Board had to take certain steps which, on the advice of the special committee, it took. Despite this, and after the Family had agreed to the Smithfield offer, on December 22, 1997, Maple Leaf made a further offer of $29 a share to Schneider's common and Class A shareholders.

The law as it relates to the general duties of the directors of a company is well known. The directors of a company have an obligation to act honestly and in good faith in the best interests of the corporation: s. 134(1)(a) Business Corporations Act, R.S.O. 1990, c. B.16 (the "OBCA"). Further, in discharging their obligations, the directors must exercise the care, diligence and skill that a reasonably prudent person

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would exercise in comparable circumstances: s. 134(1)(b). If the actions of the directors unfairly disregard the interests of a shareholder, unfairly prejudiced those interests, or are oppressive to them, s. 248 of the OBCA comes into play and allows the court to grant any remedy it thinks fit. [See Note 2 at end of document.]

The appellants attack the actions of the special committee on the basis, first, that it was not in fact independent, and second, that the advice given by the special committee to the Board was not in the best interests of Schneider and its shareholders. The appellants allege that the special committee did not act independently because it allowed Dodds, the Chief Executive Officer of Schneider, to negotiate on the Committee's behalf with potential bidders. Furthermore, the appellants submit that Dodds and the members of the special committee were unduly deferential to the wishes of the Family. The appellants' position is that public statements made by the Family created an expectation that an auction for the controlling block of shares of Schneider (the Family shares) would be held and that those shares would be sold to the highest bidder. The appellants say that, because Maple Leaf was not given a chance to bid after the Smithfield offer of $25 a share was received, the special committee, in acceding to the Family's request to accept the Smithfield offer, truncated the auction process. Maple Leaf and the other appellants seek to have this court invalidate the agreement between the Family and Smithfield on the basis that the process undertaken by the special committee and the Board, which led to the Family's agreement with Smithfield, unfairly disregarded the interests of the non-Family shareholders and unfairly prejudiced them.

The second issue involves the coattail provision in Schneider's articles. A typical coattail provision provides that if an offer is made for the voting shares of a corporation and the non-voting shareholders are excluded from that offer because an identical bid is not made for their shares, the non-voting shareholders have the right to convert their non-voting shares to common voting shares. They can then tender to the offer for the common shares.

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Maple Leaf offered the same premium to the Class A non-voting shareholders as it did to the holders of common voting shares. But Maple Leaf claims that its bid nonetheless triggered the coattail provision in Schneider's articles because the condition attached to its bid for the non-voting shares was not identical to the condition attached to its bid for the common shares. As a result, Maple Leaf says that the effect of its bid was to convert the non-voting Class A shares into common voting shares. If all Class A non-voting shares were converted into common voting shares the Family's percentage of common voting shares would be diluted to a level where the Family's support might not be necessary for Maple Leaf's bid to be successful. Maple Leaf might then be able to gain control of Schneider despite the Family's lock-up agreement with Smithfield.

Farley J. dismissed the appellants' actions [reported 40 B.L.R. (2d) 244]. In relation to the first issue, he concluded that the special committee and the directors "exercised their powers and discharged their duties honestly, and in good faith, with a view to the best interests of Schneider and that they exercised the care, diligence and skill that a reasonable and prudent person would exercise in comparable circumstances in relation to dealing with the take over bid situation." He also found that because Schneider was known to be controlled by the Family which could decide whether or not to sell its shares, the company was never truly in play and no public expectation was created that an auction would be held.

In relation to the second issue, Farley J. found that to the extent that Maple Leaf's bid did not exclude the Class A shareholders from the premium being offered for the Family's shares, the coattail provisions were not triggered. Even if Maple Leaf's offers were exclusionary, he held that the conversion rights did not arise because, pursuant to Schneider's articles, the Family had filed certificates undertaking not to accept an exclusionary offer without giving written notice to its transfer agent. For the reasons which follow, I am of the opinion that Farley J. was correct.

THE OPPRESSION CLAIMS, REASONABLE EXPECTATIONS AND THE DUTIES OF OFFICERS AND DIRECTORS

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Facts

I do not propose to repeat all of the facts outlined in the reasons of Farley J. and the facta of the parties, but some further information is essential to understand the issues which must be determined on this appeal.

The Board of Schneider consists of nine persons: two members of the Schneider Family (Eric Schneider and Anne Fontana), two members of senior management (Douglas Dodds, the chairman of the board and chief executive officer, and Gerald Hooper, the chief financial officer), and five outside directors who are all successful business persons with no connection to the Schneider Family. The Board established a special committee consisting of the five independent non-Family directors to review and consider the Maple Leaf offers and to make appropriate recommendations to the Board.

The special committee retained Nesbitt Burns Inc. as its financial advisor and Goodman, Phillips & Vineberg as its legal advisor.

The first SCH/Maple Leaf offers for Schneider were formally made on November 14, 1997 to both the common voting and Class A non-voting shareholders.

After the first SCH/Maple Leaf offers, the special committee through its financial and legal advisors, and the senior management of Schneider, commenced a process of contacting other parties that might be interested in acquiring Schneider. Schneider also established a data room containing confidential information to be provided to potential bidders. As a condition to being provided with access to the data room, potential bidders were required to sign a confidentiality agreement which contained a standstill provision that prevented them from acquiring or making any proposal to acquire shares of Schneider for two years without the written consent of the board of directors of Schneider. The form of confidentiality agreement used by Schneider provided that the only representatives of Schneider that potential bidders could contact were Dodds, the

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chairman and chief executive officer; Hooper, the chief financial officer; and Eric Schneider, the general counsel, secretary and a vice-president.

On November 23, 1997, the Board issued its directors' circular responding to the Maple Leaf offer and recommended that Schneider shareholders not tender to the Maple Leaf offer on the basis that, among other things, the Maple Leaf offer was not reflective of the fair value of the shares of Schneider and that the Family had no intention of accepting the Maple Leaf offer. Under the heading "Alternatives to the Offers" the directors' circular stated:

> The Board of Directors is committed to maximizing Shareholder value. In this connection, the Corporation and Nesbitt Burns have held discussions with several interested parties concerning possible transactions which would result in Shareholders receiving greater value for their Shares than under the Maple Leaf Offers. The Board of Directors and Nesbitt Burns are actively exploring alternatives to maximize Shareholder value. The Schneider family, which collectively beneficially owns or controls approximately 75% of the Common Shares and approximately 17% of the Class A shares on a fully-diluted basis, has advised the Board of Directors that it might consider accepting a financially more attractive offer for its Shares.

Also on November 23, 1997, the Family confirmed in writing to the Board that:

> The undersigned also confirm that they might consider alternative control transactions involving the Corporation and acknowledge that, on the basis of such confirmation, Nesbitt Burns Inc., financial advisor to the special committee of the Board of Directors constituted to consider the Offers, is pursuing alternatives to the Offers.

On December 2, 1997, Schneider adopted a temporary shareholder rights plan. A rights plan is a common interim measure intended to give a Board time to see if there are other bids for a company and to stall an unsolicited or hostile take-

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over bid. Here, the rights plan provided that if a purchaser acquired 10 per cent or more of the shares of Schneider, both classes of shareholders had the right to purchase Class A shares at 50 per cent of the market price as at November 4, 1997 ($13.25) following a special meeting of shareholders. The press release announcing the rights plan stated:

> In the midst of ongoing discussions with several parties who have expressed interest in the company, the Board of Directors of Schneider Corporation today announced that, on the recommendation of its Special Committee, the Corporation has adopted a temporary Shareholder Rights Plan. This measure has been enacted to ensure that the Board and its advisers have the opportunity to fully explore all options for maximizing shareholder value . . . "The Board adopted the Rights Plan to create a stable environment in which it will have the time and flexibility it needs to explore and evaluate the options for maximizing value for all Schneider's shareholders" said Douglas W. Dodds, Chairman and CEO.

On December 11, 1997, Dodds wrote to Maple Leaf and requested that it deliver enhanced offers by December 12, 1997, stating that:

> The process of shareholder value maximization in which our Board of Directors has been engaged since receipt of your offers is fast approaching its climax. Schneider Corporation will be receiving alternative offers to the Maple Leaf Foods offers from interested parties by this Friday December 12, 1997 . . . Accordingly, we invite you to deliver to us your enhanced offers by this Friday. We encourage you to put forward your enhanced offers on a basis that most appropriately and fairly reflects the inherent and strategic values to Maple Leaf Foods of Schneider Corporation. Please also advise how we may be in contact with you and your advisers over this weekend.

On December 12, 1997, Maple Leaf increased its offer for Schneider shares to $22 per share and allowed Schneider's shareholders to elect to receive part of this consideration in the form of shares of Maple Leaf Foods Inc. On the same day,

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Schneider received written proposals from each of Booth Creek Inc. and Smithfield to acquire all of the shares of Schneider. The proposal from Booth Creek contemplated a take-over bid for all of the outstanding shares of Schneider at a price per share of $24.50 cash, conditional upon 66 2/3 per cent of the common voting shares and non-voting shares being deposited under the offer. The proposal from Smithfield contemplated a take-over bid for all of the outstanding shares of Schneider, with Schneider shareholders receiving shares exchangeable into shares of Smithfield. Based on the closing price of Smithfield shares on December 12, 1997, and the relevant exchange rate on that date, the Smithfield proposal was worth approximately $23 per share.

Prior to the announcement of the unsolicited bid by Maple Leaf's subsidiary on November 5, 1997, the Family had no intention of selling its shares. By December 13, 1997, the Family had indicated a tentative preference to sell its shares to Smithfield and doubted that either Booth Creek or Maple Leaf would enhance their offers sufficiently that the Family would tender to them. However, the Family had made no decision to sell, and if they were to sell, to whom, or at what price. The criteria used by the Family to evaluate offers were first arrived at on December 13.

On December 14, 1997, at a meeting of the Board of Directors, management advised that it believed that Schneider was "too big to be small and too small to be big", and that a strategic merger was in the best long-term interests of Schneider. The Family stated that it shared this belief. The Family also advised the board of directors that it had reviewed the amended Maple Leaf offer as well as the proposals from Booth Creek and Smithfield in terms of three factors: financial value, continuity of Schneider in a manner consistent with the Family's desires, and the effect of any transaction on customers and suppliers. The Family told the Board that, while the Smithfield proposal did not meet its financial adequacy criteria, it did meet the Family's other two criteria and that, assuming that Smithfield could satisfy the Family's financial adequacy criteria, a strategic merger would be in the best interests of Schneider.

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Following this, a meeting was held by a working group that included Dodds and advisers from Nesbitt Burns and Goodman's. This group made the decision that Dodds should go to see Luter, the Chairman of the Board and Chief Executive Officer of Smithfield, and enter into negotiations with Booth Creek.

On December 15, Dodds conducted further negotiations with Booth Creek and on the morning of December 16, he met with representatives of Smithfield, including Luter. Dodds explained why Schneider was historically undervalued.

Around lunchtime, Smithfield increased the value of its offer to $25 per share on the basis of the price of Smithfield's shares and the relevant exchange rate on that date. In addition, Dodds obtained Smithfield's agreement that it would not sell Schneider for at least two years, and would allow the Schneider family to appoint a representative to Smithfield's board of directors. Luter told Dodds that this was his best, last offer and that if he had any suspicion Schneider was using Smithfield's offer to try to obtain higher offers from others, he would withdraw his offer and make a public announcement disclaiming any interest in the company. The Smithfield offer was open until 8 a.m. on December 18. That same day, Dodds reported this offer to the Family and Mida, the director of mergers and acquisitions at Nesbitt Burns and an adviser to the special committee.

After Dodd's meeting with Luter, the Board issued an amended directors' circular recommending that Schneider shareholders not tender to the revised Maple Leaf offers. The Board of Directors did not disclose that the Family would evaluate the offers using criteria additional to financial considerations. Under the heading "Alternative Transactions" the circular stated:

> The Board of Directors has been actively engaged in a process of identifying other transactions that might result in greater value to Shareholders than was offered under the Original Offers. On December 12, 1997, the Board of Directors received proposals for, and is in the process of negotiating,

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alternative transactions which might result in greater value to Shareholders than is being offered under the Amended Maple Leaf Offers.

At 5 p.m. on December 17, 1997, Booth Creek made a revised written proposal to Schneider increasing the value of its offer to $25.50 cash and stated that its offer was open until 8 p.m. that same evening. At $25.50 the Booth Creek proposal was less attractive financially to the Family than the Smithfield share exchange proposal, which would yield them a tax saving of $4 per share. Non-family shareholders, depending on their individual tax position, might or might not be in the same position. Booth Creek, a private company, could not offer a share exchange transaction.

At the meeting of the Board on December 17, 1997, the Family announced that it wanted to accept the revised offer from Smithfield. Among other things, the Family stated to the Board that:

> We also think that it is important to reiterate that we as a family did not seek to sell this company but that through the process of the last 6 weeks we have come to the conclusion that now is the time to sell the control of the company.

At a subsequent meeting of the special committee that night, Nesbitt Burns advised that while the Smithfield proposal was within the $25-29 fair price range, the risk associated with adverse share price movement and exchange rate movement during the short period until the offer could be formally accepted should be reflected by applying a 6 per cent discount to the offer so that its present value was $23.50. Nesbitt Burns also told the Special Committee that, in its view, if the Smithfield offer were permitted to expire and no other change of control transaction involving Schneider were consummated, the shares of Schneider would settle in a trading range between $18 and $20 a share.

The special committee then recessed and Dodds made inquiries of Smithfield as to whether it would raise its offer.

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Smithfield refused to pay more but Dodds was successful in negotiating a slight improvement in the exchange rate aspect of the offer.

The original proposal, as submitted by Smithfield, contemplated that the transaction would proceed by way of a plan of arrangement or merger. That is, the Board would approve of the Family entering into a lock-up agreement for its shares with Smithfield, then the merger proposal would be voted upon by all shareholders and approved by the court. Before asking the shareholders and the court to approve the merger the Board would have had to provide an opinion that the transaction was fair. In light of Nesbitt Burns' discounted valuation of the Smithfield proposal, the Board was unwilling to do so.

To avoid the Board having to issue an opinion that the proposed transaction was fair, Smithfield made offers by way of take-over bids to acquire any and all common voting shares and all Class A shares of Schneider on the condition that the Family agree to tender its shares. The shares of Schneider were to be exchanged for .5415 of a share in a newly incorporated, wholly-owned Canadian subsidiary of Smithfield. Each whole exchangeable share would then be exchangeable for one common share in Smithfield. The structure of this second transaction meant that Smithfield might not be able to acquire two-thirds of the Class A shares and, therefore, might not be able to take Schneider private.

In order for the Family to accept the offer from Smithfield, it was still necessary for the Board to waive the standstill provision in the confidentiality agreement Smithfield signed and to remove the rights plan. The Family asked the board to do this. Upon the recommendation of the special committee, the Board did so. On December 18, 1997, the Family entered into the lock-up agreement.

On December 22, 1997, Maple Leaf announced that, despite the Family's lock-up agreement with Smithfield, it was increasing its offer to $29 per share, cash, conditional on obtaining two-thirds of each class of share. Prior to this, Maple Leaf entered into deposit agreements with two funds to buy Maple

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Leaf's shares at $29, no matter what the outcome of its latest bid was. On December 30, 1997, five Class A shareholders, holding in aggregate 675,000 shares, representing more than 10 per cent of the total Class A shares outstanding, wrote a letter to Schneider's Board of Directors complaining that "the actions or inaction of the Special Committee, together with those of the Schneider family have in effect, contaminated the value maximization process outlined by the board in its directors' circular and in its public statements."

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Determining Whether the Directors Have Acted in the Best Interests of the Corporation

The mandate of the directors is to manage the company according to their best judgment; that judgment must be an informed judgment; it must have a reasonable basis. If there are no reasonable grounds to support an assertion by the directors that they have acted in the best interests of the company, a court will be justified in finding that the directors acted for an improper purpose: Teck Corp. v. Millar (1973), 33 D.L.R. (3d) 288 (B.C.S.C.) at pp. 315-16, adopted as the law in Ontario by Montgomery J. in Olympia & York Enterprises Ltd. v. Hiram Walker Resources Ltd. (1986), 59 O.R. (2d) 255, 37 D.L.R. (4th) 194 (H.C.J.), affirmed (1986), 59 O.R. (2d) 254, 37 D.L.R. (4th) 193 (Div. Ct.).

One way of determining whether the directors acted in the best interests of the company, according to Farley J., is to ask what was uppermost in the directors' minds after "a reasonable analysis of the situation.": 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 123 at p. 176 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); CW Shareholdings Inc. v. WIC Western International Communications Ltd., No. 98-CL-2821 (May 17, 1998), Toronto (Gen. Div.) [reported 39 O.R. (3d) 755, 160 D.L.R. (4th) 131]. It must be recognized that the directors are not the agents of the shareholders. The directors have absolute power to manage the affairs of the company even if their decisions contravene the express wishes of the majority shareholder: Teck Corp. Ltd. v. Millar, supra, at p. 307. However, acting in the best interests of the company does not necessarily mean that

the directors must act in the best interests of one of the groups protected u nder s. 234. There may be a conflict between the interests of individual groups of shareholders and the best interests of the company: Brant Investments Ltd. v. Keep Rite Inc. (1987), 60 O.R. (2d) 737, 42 D.L.R. (4th) 15 (H.C.J.), affirmed (1991), 3 O.R. (3d) 289 at p. 301, 3 O.R. (3d) 289 (C.A.). Provided that the directors have acted honestly and reasonably, the court ought not to substitute its own business judgment for that of the Board of Directors: Brant Investments v. Keep Rite Inc., supra, which deals with the analogous section of the Canadian Business Corporations Act, R.S.C. 1985, c. C-44. If the directors have unfairly disregarded the rights of a group of shareholders, the directors will not have acted reasonably in the best interests of the corporation and the court will intervene: 820099 Ontario Inc. v. Harold E. Ballard Ltd., supra.

The appellants have urged this court to consider the actions of the directors pursuant to a standard which is derived from statute law in the State of Delaware known as "enhanced scrutiny". The key features of the enhanced scrutiny test are a judicial determination of the adequacy of the decision-making process employed by the directors, and a judicial examination of the reasonableness of the directors' actions in light of the circumstances then existing: Paramount Communications v. QVC Network Inc., 637 A.2d 34 at p. 45 (Del. 1934). The directors have the onus of satisfying the court that they were adequately informed and acted reasonably. Some Canadian authorities such as Exco Corp. v. Nova Scotia Savings & Loan Co. (1987), 35 B.L.R. 149, 78 N.S.R. (2d) 91 (S.C.) and 347883 Alberta Ltd. v. Producers Pipelines Inc. (1991), 80 D.L.R. (4th) 359, 92 Sask. R. 81 (C.A.) have adopted a proper purpose test, which is similar to enhanced scrutiny in that it shifts the burden of proof to the directors to show that their acts are consistent only with the best interests of the company and inconsistent with any other interests. These cases recognize that there may be a conflict between the directors who manage the company and the interests of certain groups of shareholders, particularly those s. 248 is designed to protect, and have espoused shifting the burden of proof as a method of overcoming the potential conflict.

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The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision: Paramount, supra, at p. 45; Brant Investments, supra, at p. 320; Themadel Foundation v. Third Canadian General Investment Trust Ltd. (1998), 38 O.R. (3d) 749 at p. 754 (C.A.). This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrele vant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction: Brant Investments, supra, at pp. 314-15.

A common method used to alleviate concerns that a conflict of interest exists between directors, who may be major shareholders, and the interests of a minority or non-voting group of shareholders, is the creation of a special committee from among the independent members of a board who do not have a conflict. The purpose of a special committee is to advise the Directors and to make a recommendation as to what the Board should do. It appears that under the law of Delaware, where a Board acts on the recommendation of a special committee, the decision will be accorded respect under the business judgment rule, provided that the special committee has discharged its role independently, in good faith, and with the understanding that in a situation where a change of control transaction is contemplated, the special committee can only agree to a transaction that is fair in the sense of being the best available in the circumstances: In re First Boston, Inc. Shareholders Litigation, [1990] Fed. Sec. L. Rep., p ara. 95, 322 (Del. 1990).

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The duty of directors when dealing with a bid that will change control of a company is a rapidly developing area of law and, as I have indicated, Canadian authorities dealing with the question of the onus, or burden of proof, have not been uniform. In Brant Investments, supra, the issue whether the burden of proof is on the directors to justify their actions as being in the best interests of the company or on the shareholders challenging the actions of the company was also raised. McKinlay J.A., at pp. 311-12, found it unnecessary to decide the question because the trial judge had dealt with the issues on a substantive basis, and his decision did not turn on which party had the onus or burden of proof. [See Note 3 at end of document.] The same is true in the present case. [See Note 4 at end of document.] I would add, however, that it may be that the burden of proof may not always rest on the same party when a change of control transaction is challenged. The real question is whether the directors of the target company successfully took steps to avoid a conflict of interest. If so, the rationale for shifting the burden of proof to the directors may not exist. If a board of directors has acted on the advice of a committee composed of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies. The burden of proof is not an issue in such circumstances.

The members of the committee acted in good faith in the sense that they acted honestly. The committee's decision was also informed, in the sense that the committee was aware that any offer for Schneider's shares might be bettered by Maple Leaf, and that the Family would not sell to Maple Leaf. While the appellants have challenged Farley J.'s finding that the Family would not sell to Maple Leaf, there is ample evidence to support this finding. Even at $29 a share, when tax considerations were factored in, the Maple Leaf offer was only as advantageous as the Smithfield offer to the Family, not more advantageous. Apart from financial criteria, Maple Leaf did not meet the Family's expressed concern about the effect of a change of control on the continuity of employment for Schneider's employees, the welfare of suppliers, and the

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relationship with its customers, whereas Smithfield did. Once again, the real questions are whether the committee was independent and whether the process undertaken by the special commi ttee was in the best interests of Schneider and its shareholders in the circumstances. While Paramount, supra, indicates that non-financial considerations have a role to play in determining the best transaction available in the circumstances, here it was conceded that the court should only have regard to financial considerations.

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The Special Committee

(i) Should expert evidence have been admitted on the question whether the special committee was independent, and on the process by which the agreement with Smithfield was reached?

Farley J. declined to admit the proposed evidence of the expert witnesses, Messrs. Cameron and Beck. The appellants seek to overturn the finding of Farley J., that the directors and the Family did not act improperly. In part, they do so on the basis that he erred by refusing to admit the proposed evidence of the two expert witnesses.

The proposed evidence of Messrs. Cameron and Beck was contained in two reports. The report of Mr. Beck was essentially a statement of his views on the legal rights and obligations which arose under Ontario law from a set of facts communicated to him. The report of Mr. Cameron consisted largely of his conclusions based on a set of assumed facts given to him and his inferences from those facts on the appropriateness of senior management's participation in negotiations with potential bidders, the process conducted by the special committee, and the expectations created by public statements made by the Family.

Farley J. ruled that the qualifications of the experts related to corporations, their securities, takeover bids and directors' obligations. He declined to receive the experts' reports on three bases: (1) that the opinions expressed related to domestic law, a matter upon which a court ought not to

receive opinion evidence; (2) that there was no specialized and standardized body of conduct to study in this area; and (3) that he did not need the assistance of the experts in understanding the evidence or the concepts and principles involved.

For the reasons given by Farley J., I would not give effect to this ground of appeal.

(ii) Should members of Schneider's senior management, particularly Dodds, have been permitted to have a significant role in the sale negotiations with potential bidders?

The appellants submit that Dodds had a conflict of interest because he had an interest in continued employment with Schneider and a further conflict arising out of his loyalty to the Family.

A potential conflict of interest arises because as a director of a target company, the senior executive has a duty to act in the best interests of the shareholders, but as a member of senior management the executive retains an interest in continued employment. In actively negotiating with a potential bidder the executive is negotiating with his potential boss or executioner. The appellants rely on the decision of Blair J. in CW Shareholdings Inc., supra, for the proposition that no senior executive of a company being sold should be permitted to have a significant role in the sale process.

The raison d'tre of a special committee independent of management and the controlling shareholder is to protect the interests of minority shareholders and to bring a measure of objectivity to the assessment of bids. If, as was the case in CW Shareholdings, senior management in the target company is a member of the special committee, the purpose in setting up the special committee might be compromised and less reliance placed on its assessment of a particular bid than if the committee were truly independent. Blair J. recognized this and he was critical of the role played by senior management in CW Shareholdings. In the end, however, he concluded that the

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involvement of management in the special committee did not so taint its approval of the Shaw Communications bid as to undermine the transaction. He also found that the committee had conducted itself in a fashion that enabled the directors to carry out their objective of maximizing shareholder value. In that case, Blair J. upheld the Boar not accepted.

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A major distinction between the CW Shareholdings decision and this case is that senior management, including Dodds, was not part of the special committee that was set up, and consequently had no vote as to whether to recommend a bid. A potential conflict of interest still existed, however, because of the active role Dodds played in negotiating with the bidders.

Farley J. recognized that in allowing Dodds and, to a lesser extent, Hooper, the chief financial officer of Schneider, to deal with bidders directly, a potential conflict of interest existed but that this had to be balanced against the benefits to be obtained. He stated:

> It would be appropriate, however, to comment as well [th]at the use of the two management directors, Dodds and Hooper, in dealing with the bidders and advisors directly, would not seem inappropriate. Potentially there could be conflict, but that must be balanced against the reasonable benefits to be obtained. They knew the operations of the business -- what the bidders would be interested in and they were guided by the advisors. They reported to the special committee which could make the "final" decisions and give directions. Potential conflict was minimized by the bail-out packages granted them. From the material before me it would not appear that these management persons acted or behaved inappropriately overall. It would be undesirable to subject each step they took to isolated microscopic inspection. I note in passing that Dodds would have received approximately $1,000,000 in stock and options value extra if the Maple Leaf $29 offer had been accepted as opposed to the Smithfield one; of course no one b ut Maple Leaf knew how much it would have offered if it had been solicited on December 17.

Dodds' employment agreement entitled him to resign within two

years following a change of control transaction with 30 months' severance. In CW Shareholdings, Blair J. commented that a golden parachute did not eliminate the potential for conflict of interest that exists when a member of senior management negotiates directly with bidders. Here, however, Dodds was not given any assurances by Smithfield of continued employment, although he knew that Smithfield intended to leave Schneider's management in place and allow it to operate as an autonomous unit. On the other hand, Dodds was given some assurance of continued employment by Maple Leaf if Schneider was taken over by it. He was told that he would manage the integration of Schneider for two years, and be a candidate to head the meat operations of the two companies. He was also told that he would retain his salary and be issued additional options in Maple Leaf. In addition, at the time, Dodds held 250,000 options in Schneider with a strike price of $13 and it was believed that Maple Leaf would top any bid that was openly made for Schneider. It seems that if there was any financial bias arising out of Dodds' self interest in continued employment it would have been a bias in favour of Maple Leaf.

The appellants also submit that Dodds had a conflict of interest in conducting the negotiations because his loyalties were to the Schneider Family. But the Family did not ask Dodds to negotiate with potential bidders. After Nesbitt Burns suggested that Smithfield might be a potential bidder, Dodds' meetings with Smithfield were at the behest of the special committee, or its advisers, Nesbitt Burns and Goodman, Phillips & Vineberg. Farley J. found that the deadline for considering bids had been set by Mida, the vice-president of Nesbitt Burns and its director of mergers and acquisitions, as an appropriate deadline in order to prevent the process from stalling. He also found that it was appropriate for Dodds to keep the Family informed of the progress of the negotiations since they could veto any sale. Counsel for the appellants strenuously submitted that in as much as Dodds advised the Family of the result of his negotiations with Smithfield on December 16, and did not advise any member of the special commit tee of the negotiations, an inference should be drawn that Dodds' loyalties were to the Family and that this was illustrative of yet another conflict that Dodds had. The evidence indicates

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that although Dodds did not advise any members of the special committee directly on the 16th, he called Mida of Nesbitt Burns, the advisor to the special committee. It does not appear that Mida told anyone on the special committee of the Smithfield proposal, as the evidence indicates that the committee was unaware of it until it met on the evening of the 17th. In the circumstances there would appear to be no reason to impute bias to Dodds because of this omission.

The appellants also allege that it was Dodds' suggestion to Luter that Smithfield proceed by way of a takeover for any and all shares of Schneider -- as opposed to a plan of arrangement -- and that this suggestion also indicates Dodds' bias against Maple Leaf. The proposal to proceed by way of takeover as opposed to merger was not a suggestion that came from Dodds, but one that had been identified previously as the alternative Luter was prepared to pursue if the Board could not recommend the Smithfield proposal.

Farley J. found that Dodds pressed the negotiations with the bidders diligently and did nothing inappropriate. His conclusions are supported by the evidence. There is no merit in this ground of appeal.

Process Arguments

(i) Should the special committee have been created?

The appellants submit that by creating a special committee, hiring advisers, and setting up a data room, the Family used Schneider's money to better the offer from Maple Leaf, which it was not entitled to do. In addition to being rejected by Farley J., a similar argument was rejected by Montgomery J. in Olympia & York, supra, at p. 272. The reason is obvious; the appointment of a special committee is intended to ensure that the interests of those the oppression remedy is intended to protect are not unfairly disregarded or prejudiced. It is clearly in the interests of a company, and of all shareholders, for alternatives to an unsolicited takeover offer to be explored. It might give the shareholders a higher price for their shares. The creation of a special committee was part of

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the process undertaken by the Board to obtain the best transaction available in the circumstances.

(ii) Should the special committee have created a data room?

The appellants' submission that proprietary confidential information obtained from the data room was a valuable corporate asset that was either given away to the acquiring company or dissipated must also fail. As Farley J. pointed out, access to the data room was essential in order to conduct a market canvass for alternative offers. Other bidders, particularly those who had not operated in the Canadian market, needed to gain an appreciation of market conditions, and of Schneider's business. That could only be obtained with access to Schneider's confidential information. No alternative bid would have been elicited without access to Schneider's confidential information. Maple Leaf, as a competitor of Schneider for many years, had an appreciation of market conditions and of Schneider's business and did not require further information in order to make its bid.

The decision to establish a data room at the company's expense was that of the special committee, made with full knowledge of the Family's position that it was not committed to selling. The Board did not seek the approval or the consent of the Family to establish the data room, for the use of information, or for the nature of the confidentiality agreements that were signed with prospective bidders.

In creating a data room the special committee acted independently and reasonably. The creation of a data room made confidential information available to all bidders as part of a process to get the best transaction available to the shareholders in the circumstances. I see no merit in this ground of appeal.

(iii) Flawed committee process

The appellants submit that the trial judge ignored or failed to appreciate the evidence given by Ruby, the chairman of the special committee, to the effect that the special committee had

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no involvement in any negotiations with prospective bidders, that Dodds conducted the negotiations, and that the special committee did not consider whether Dodds had any conflict of interest. After considering the circumstances under which Dodds acted, I have already concluded that Dodds did not have a conflict of interest.

The special committee had no prior experience in dealing with a take-over bid and did not have the in-depth knowledge of Schneider that Dodds did. It was therefore appropriate for the special committee not to conduct the negotiations with potential bidders directly. Farley J. found that although the special committee did try to determine the views of the Family "recognizing its gatekeeper and veto role", there was no evidence that the approval of the Family was sought with respect to any decision taken by the special committee. The evidence supports the conclusion that the members of the special committee acted independently in the sense that they were free to deal with the impugned transaction on its merits. This ground of appeal also fails.

(iv) Should the special committee have insisted that Maple Leaf and any other interested party be given an opportunity to make their best and final offer prior to the board of directors of Schneider taking the steps that it did on December 17, 1997 to commit its shares to Smithfield?

The appellants submit that the Board was obliged to keep the bidding process alive by going back to Maple Leaf after it received the Smithfield bid on December 17. This submission has two alternative premises: (1) the directors could only discharge their duty to act in the best interests of the corporation by conducting an auction of the shares of Schneider; (2) a public expectation had been created by the comments made by the Schneider family that an auction would be held and therefore both the Family and the Board were under a duty to ensure that an auction was conducted.

The appellant's first premise is wrong in law. The second is contrary to Farley J.'s findings of fact and those findings are

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supported by the evidence.

Was there a duty to conduct an auction of the shares of Schneider?

The decision in Revlon v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), stands for the proposition that if a company is up for sale, the directors have an obligation to conduct an auction of the company's shares. Revlon is not the law in Ontario. In Ontario, an auction need not be held every time there is a change in control of a company.

An auction is merely one way to prevent the conflicts of interest that may arise when there is a change of control by requiring that directors act in a neutral manner toward a number of bidders: Barkan v. Amsted Industries Inc., 567 A.2d 1279 at p. 1286 (Del. 1989). The more recent Paramount decision in the United States, supra, at pp. 43-45 has recast the obligation of directors when there is a bid for change of control as an obligation to seek the best value reasonably available to shareholders in the circumstances. This is a more flexible standard, which recognizes that the particular circumstances are important in determining the best transaction available, and that a board is not limited to considering only the amount of cash or consideration involved as would be the case with an auction: Paramount, supra, at p. 44. There is no single blueprint that directors must follow. Although the decision in Paramount and the other decisions of the courts in Delaware to which I have referred are not the law of Ontario, they can, however, offer some guidance.

When it becomes clear that a company is for sale and there are several bidders, an auction is an appropriate mechanism to ensure that the board of a target company acts in a neutral manner to achieve the best value reasonably available to shareholders in the circumstances. When the board has received a single offer and has no reliable grounds upon which to judge its adequacy, a canvass of the market to determine if higher bids may be elicited is appropriate, and may be necessary: Barkan, supra, at p. 1287, citing In re Fort Howard Corp. Shareholders Litig., Del. Ch., C.A. No. 991, 1988 WL 83147.

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The Family did not seek to sell its controlling interest in Schneider. The Board received an offer from Maple Leaf that it felt was inadequate, but, in the final analysis, the best way to judge its adequacy was to determine if higher bids could be elicited through a market canvass. The fact that a market canvass was conducted did not mean that the Family would agree to sell its stake. Indeed, Farley J. found as a fact that the Family's decision to sell was highly conditional on a satisfactory offer being received.

The appellant submits that there was considerable evidence indicating that the Schneider Family had by December 17, if not before, concluded that a sale of its shares was inevitable. Having undertaken a market canvass, however, there was no obligation on the special committee to turn this canvass into an auction, particularly because to do so was to assume the risk that the competing offers that the market canvass had generated might be withdrawn. There was no obligation on the special committee or the Board to go back to Maple Leaf on December 17 and ask it to make another offer. A market canvass and not an auction was being conducted; the special committee and the Board only had a short time within which to consider Maple Leaf's offer; Maple Leaf had already been asked to make an appropriate offer and there was no certainty it would make a higher bid. There was an obligation on the special committee and the directors to consider the bids which their market canvass had realized in addition to Maple Leaf's bid. Farley J. found Maple Leaf knew, or should have known, that the bidding process was almost over when it made its $22 per share bid. Maple Leaf's board had authorized the issuance of enough Maple Leaf shares to finance a $29 a share bid for Schneider before the bidding process entered its final stage. Maple Leaf was nonetheless content to let its $22 bid stand despite knowing that there were competing bids that might be accepted in preference to its own, and despite the fact that Maple Leaf's board had authorized a higher $29 bid. This was a risk Maple Leaf chose to assume.

Was there a public expectation created by the Family that an auction would be held?

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Conduct which disregards the interests of any shareholder and not simply a shareholder's legal rights will infringe s. 248 of the OBCA. This is because the oppression remedy is basically an equitable remedy and the court has jurisdiction to find an action is oppressive, unfairly prejudicial, or unfairly taken in disregard of the interests of a security holder if it is wrongful, even if it is not actually unlawful: Westfair Foods Ltd. v. Watt, [1990] 4 W.W.R. 685, 48 B.L.R. 43 (Alta. Q.B.), affirmed [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48 (Alta. C.A.), leave to appeal refused [1991] 3 S.C.R. viii.

A statement made to shareholders in a press release can create a public expectation that is deserving of protection through the oppression provisions of the OBCA. As Carthy J.A. stated in Themadel Foundation, supra, at p. 753:

> The public pronouncements of corporations, particularly those that are publicly traded, become its commitments to shareholders within the range of reasonable expectations that are objectively aroused.

While s. 248 protects the legitimate expectations of shareholders, those expectations must be reasonable in the circumstances and reasonableness is to be ascertained on an objective basis. [Find Note 5 at end of document.] The interests of the shareholders of a company are intertwined with the expectations that have been created by the company's principals: Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 23 B.L.R. (2d) 286 (C.A.). Therefore, the question is whether the statements made by the Family, and widely reported in press releases issued in response to Maple Leaf's bids, created a reasonable expectation that an auction would be held. Whether or not a reasonable expectation has been created is a question of fact: Arthur v. Signum Communications Ltd., [1993] O.J. No. 1928 (Div. Ct.), Campbell J., for the court, at paras. 6-7. After examining the press releases and the evidence, Farley J. found that any expectations of the claimants, who were non-Family shareholders, were not reasonable or founded in fact.

A summary of his findings on this point is as follows:

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-- The Family's position on selling its controlling shareholding in Schneider was always conditional to a high degree. The Family only said that they "might consider" selling. The conditional nature of the Family's position was always clearly expressed by the Board in its public statements.

-- It was inappropriate for Maple Leaf to ignore the plain meaning of the public statements made by the Family and the Board. Maple Leaf "wished" that there was an unrestricted auction for Schneider but in fact there never was.

-- The claimants had not proved that their reasonable expectations were thwarted. "When the gatekeeper shareholder merely indicates that it 'might consider' accepting a more financially attractive offer, then the shareholders are speculating that a deal on that basis may come to pass in which they could participate."

There was more than adequate evidence to support these findings and they cannot be disturbed.

In as much as there was no reasonable expectation on the part of the non-Family shareholders that an auction would be held after receiving the last Smithfield bid, the special committee was not obliged to give Maple Leaf an opportunity to make a third bid for Schneider's shares.

Was the course of action and the advice given by the special committee in the best interests of Schneider and its shareholders? Should the special committee and the Board of Directors have refused to waive the standstill provisions in the confidentiality agreement with Smithfield?

The appellants allege that the advice given by the special committee to the Board of Schneider was not in Schneider's best interests or those of its shareholders. They submit that the special committee should have refused to waive the standstill provisions in the confidentiality agreement with Schneider, thereby preventing the agreement between the Family and

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Smithfield. The appellants also submit that if the Board of Schneider could not enter into a share exchange with Smithfield because of fairness concerns it could not agree to a takeover bid. These submissions are really alternative ways of saying that the transaction with Smithfield was unfair to the non-Family shareholders, that it was not in the best interests of the company.

If the Smithfield offer can reasonably be considered to be the best available offer in the circumstances, then the Smithfield offer was not unfair or contrary to the best interests of the company. This is also essentially a fact driven question on which Farley J. made the following findings:

-- The Smithfield offer was solicited by Schneider. Smithfield, a reluctant suitor, had to be "coaxed" to make a bid. Smithfield imposed a "no-shop" condition on its offer to the Schneider Family and did not want to haggle.

-- There was no breach of confidence in the communications between Smithfield, and the Schneider Board and the Family. The spirit of the standstill provision between Smithfield and Schneider was honoured. Confidential information was used appropriately in the best interests of the shareholders. At all times the Schneider Board remained in control of the process dealing with the Smithfield offer.

-- It was reasonable for the Board to accommodate a transaction between Smithfield and the Family by waiving the standstill provision contained in the Smithfield confidentiality agreement in view of advice received that the share price of Schneider would fall back to a range of $18 to $20 per share in the absence of a change of control transaction.

-- Maple Leaf could not have made an offer that would have been satisfactory to the Schneider Family at that time.

-- The Board exercised their powers and discharged their duties honestly and in good faith.

-- The Board pursued all available opportunities to maximize

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shareholder value and achieved reasonable results for all of the shareholders of Schneider.

-- It was unfair to say that the special committee had the Family's interests uppermost in its mind not those of the shareholders generally, or the non-Family shareholders specifically. It was beyond the power of the special committee to insist that the Family give up its veto power and the special committee realized this.

As Farley J. emphasized, one of the particular circumstances having a bearing on a board of directors' attempts to obtain the best deal available in the circumstances was whether the company has a controlling shareholder. For example, in Paramount, supra, control of the corporation was not vested in a single person, entity, or group, but was widely held by a number of unaffiliated shareholders. In that case, the proposed sale of shares represented a premium for the change and consolidation of control of the company in a group that would have the power to materially alter the interests of the widely dispersed shareholders. Here, the control premium for the shares of Schneider belongs to the Family. The unaffiliated shareholders do not own, and are not giving up, the power to control the company's future.

Another distinction between this case and Paramount is that the offer from Maple Leaf, which was before the special committee at the time it was asked to make its decision, was considerably less than the Smithfield offer. In coming to its conclusion that it was not in the interests of the non-Family shareholders to prevent the Family from entering into a lockup agreement with Smithfield the Special Committee considered, among other things:

(a) that the shares would likely trade in the $18 to $20 range if no sale was effected;

(b) the position of the Family that it would not accept the Maple Leaf offer at $22 or the Booth Creek offer -- or indeed any other offers from them; [See Note 6 at end of document.]

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(c) that Smithfield would publicly withdraw its offer if the offer was shopped and, if this happened, the amount that Maple Leaf would be prepared to offer was problematic.

While Smithfield's offer was not within the range that Nesbitt Burns had placed on the shares as fair value, "a decent respect for reality forces one to admit that . . . advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvass of the relevant market can provide": Barkan, supra, at p. 1287. It was widely known that a change of control was being considered, and few rival bids were forthcoming over an extended period of time: these facts support the decision to proceed with the impugned transaction.

The Board acted on the advice of the special committee in agreeing to facilitate the Smithfield bid by passing a resolution waiving the standstill provision, thereby allowing Smithfield to bid and to enter into the lock-up agreement with the Schneider Family. Unless another bid was received that was not conditional on the tender of any of the Schneider Family shares, which was highly unlikely, this decision by the Board had the effect of making the Smithfield bid the only one which would effectively be available to the shareholders. Implicit in the steps taken by the Board was a decision by the Board that the Smithfield bid was in the best interests of all the shareholders and therefore a bid which the Board could recommend to the shareholders.

The special committee was entitled to make, and did make, business and negotiating judgment calls which, having regard to the interests of the non-Family shareholders, were reasonable in the intense and time-limit-driven context. The deal with Smithfield was the only deal that the controlling shareholder was willing to consider. With respect to the alleged pre-empting of the process by not going back to Maple Leaf, Farley J. stated:

> . . . it appears that this merely prevented a further round of enquiry of Booth [Creek] and Maple Leaf which may or may

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not have elicited a higher bid than Smithfield whose last bid was tested.

If Maple Leaf was given an opportunity to top the Smithfield bid and that bid was then publicly withdrawn, then there was no guarantee that Maple Leaf would make a higher offer. There was no alternative bid which was definitely available and clearly more beneficial to Schneider and all its shareholders than the Smithfield bid. The Board acted on the advice of the special committee. The advice given and accepted was reasonable at the time and fair to the non-Family shareholders.

I would dismiss the first main ground of appeal.

THE COATTAIL PROVISIONS

There are three sub-issues here:

(a) whether Farley J. erred in his interpretation of the coattail provisions;

(b) whether, as held by Farley J., the filing of anti-conversion certificates by Schneider prevented the coattail provisions from being triggered; and

(c) whether Maple Leaf's failure to disclose the exclusionary nature of its offers in the take-over bid circulars and notices of variation is an omission of a material fact, and if so, what the remedy should be.

Did Farley J. Interpret the Coattail Provisions Correctly?

(i) Facts re interpretation of coattail provisions

Coattail provisions are designed to ensure that if the common voting shareholders wish to accept an offer that will lead to a change in control and if the price or terms offered to the common voting shareholders are more favourable than those offered to the holders of non-voting shares, the non-voting shareholders get an equal opportunity to participate in any change of control premium.

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The provisions work in the following way. If the holders of restricted shares, such as non-voting shares, are excluded from participating in the common voting share takeover bid, they will then be given a right of conversion of their restricted or non-voting shares into common voting shares. Coattail provisions are intended to encourage non-exclusionary bids. When triggered, the non-voting shareholders then have the opportunity to participate in the take-over bid.

The Schneider Family proposed that a coattail provision be added to its articles of incorporation in a tradition of "fair dealing" in 1988, even though a company listed on the Toronto Stock Exchange ("TSE") was not required to have a coattail provision at that time. The Schneider coattails are consistent with the present TSE policy requirements. Mr. MacKay, Schneider's lawyer at the time, obtained the particular wording for the coattail from a precedent provided by the TSE. It was intended that the Class A shareholders would be entitled to share in the control premium only if the requisite number of common voting shareholders accepted the offer and the premium was in fact paid to the holders of common shares. Instead, in the coattail provision provided by the TSE as a precedent, and adopted by Schneider, even if it was apparent that a change of control would not take place because a sufficient number of common shares had not been acquired or purchased pursuant to the offer to the common shareholders, the co mpany making the offer would have to take up and pay for all the shares held by the Class A shareholders who tendered to the offer.

Read literally, the coattail provision provided that if even a single common share was tendered to the offer for the common shares, the company making the offer would have to pay for all the Class A shares tendered whether or not any Class A shares were actually taken up and purchased or acquired. This is because the definition of exclusionary offer in para. 12(e) of the articles of Schneider uses the word "tendered" as opposed to the word "purchased" or "acquired".

Paragraph 12(e) defines an exclusionary offer as follows:

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(e) "Exclusionary Offer" means an offer to purchase common shares of the Corporation that:

(i) must by reason of applicable securities legislation . . . be made to all or substantially all holders of common shares . . .; and

(ii) is not made concurrently with an offer to purchase Class A Non-Voting shares that is identical to the offer to purchase common shares in terms of price per share and percentage of outstanding shares to be taken up exclusive of shares owned immediately prior to the offer by the Offeror and in all other material respects and that has no condition attached other than the right not to take up and pay for shares tendered if no shares are tendered pursuant to the offer for common shares.

(Emphasis added)

If the word acquired or purchased had been used in the definition of "exclusionary offer" instead of tendered there would not have been a problem with coattail provision. But Maple Leaf's lawyers recognized the problem. Maple Leaf's offer to purchase the common shares of Schneider was made concurrently with its offer to purchase the Class A shares. The offer to the Class A shareholders contained a condition entitling Maple Leaf not to take up and pay for any Class A shares deposited if Maple Leaf did not acquire any common shares pursuant to the offer to purchase common voting shares. This was not the condition permitted under the coattail provisions. The coattail provisions gave the right not to take up and pay for Class A shares if no common shares were tendered. Because the condition attaching to its Class A shares was different, Maple Leaf submits that its offer to the common shareholders was an exclusionary one.

(ii) Findings of the trial judge

With respect to the coattail provision in the articles of Schneider, Farley J. made the following findings:

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-- the so called "flaw" in the coattail was recognized by Maple Leaf well before it made its offer;

-- a literal or technical interpretation of the wording of the Schneider coattail would be impractical and lead to a commercial absurdity;

-- when Maple Leaf made its offer, the intention and the effect of the conditions it imposed in its offer was to make its offers identical for both the voting and non-voting shares of Schneider;

-- Maple Leaf did not disclose to the shareholders that its offer was exclusionary in its original take-over bid circular or in any subsequent amendment to that circular prior to the announcement of the Smithfield lock-up agreement with Schneider on December 19, 1997. It was not until January 8, 1998, that Maple Leaf issued a notice of variation which disclosed to all shareholders for the first time its belief that its offer was exclusionary;

-- Schneider's directors, on the other hand, described the Maple Leaf offer as a non-exclusionary offer in the directors' circular which was submitted to shareholders on November 23, 1997;

-- he did not accept any of Maple Leaf's reasons for failing to disclose its belief that its offer was exclusionary.

With respect to Maple Leaf's failure to disclose its belief that it had made a non-exclusionary offer, the trial judge made the following findings:

-- Maple Leaf put too narrow a focus on its obligation to disclose that its bid was designed to be exclusionary. It was inappropriate and misleading for Maple Leaf not to set out in an obvious fashion the information which a reasonable shareholder requires to make an informed decision;

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-- Maple Leaf "lay in the weeds" about its interpretation of the coattail, notwithstanding its knowledge of the Schneider directors' statement that Maple Leaf's offer was non-exclusionary. Maple Leaf did so because it did not want other competitive offerors to "twig" to its scheme;

-- the technical interpretation now urged by Maple Leaf was not consistent with the intention of instituting the coattail at any time leading up to and including the time of the takeover.

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In view of his findings, Farley J. held that the word "tender" should be construed as "tendered and taken up" thereby embodying the concept of "acquired" or "purchased".

Discussion

The following principles are of assistance in determining whether Farley J. correctly interpreted the coattail provisions:

-- The interpretation of a word or words is not a technical exercise undertaken in isolation from the objective or purpose sought to be accomplished: see Dreidger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at p. 131; thus, where giving a word its ordinary grammatical construction would lead to a contradiction of its apparent purpose or to a commercial absurdity, a construction may be put upon it which modifies the meaning of the word: P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12th ed. (London: Sweet & Maxwell, 1969), at p. 228.

-- A purposive approach is to be used whether one is interpreting a provision of a statute, a contract or other form of private legal document. In many respects the problems are the same in all three. A document is also a form of "sub-legislation" respecting those governed by its provisions: see Morden, "The Partnership of Bench and Bar" (1982), 16 Law Soc. Gaz. 46, and cases cited therein at pp. 89-95; Dreidger on the Construction of Statutes, at p.

131; Maxwell on the Interpretation of Statutes, at p. 228.

-- The words of a statute to be interpreted are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: Rizzo v. Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. (This decision holds that although the literal reading of the words in the Employment Standards Act entitling an employee to severance, termination or vacation pay upon termination by the employer would not include the employer's bankruptcy, when the words are examined in their entire context they must be interpreted to include a termination resulting from the bankruptcy of the employer.) So, too, here, the wording of the coattail provision must be given an interpretation which accords with its object and the intention of the framers of the provision.

-- The interpretation of a coattail provision must be viewed objectively and as a reasonably prudent business person would view it: Saunders v. Cathton Holdings Ltd. (1997), 88 B.C.A.C. 264 at p. 272, 36 B.L.R. (2d) 151.

-- When the public interest is involved, evidence with respect to the understanding and intention of the provision is admissible to assist in determining whether a proposed interpretation is consistent with the public interest: Re Canadian Tire Corp. (1987), 35 B.L.R. 117 (Ont. Div. Ct.) at pp. 143-44.

The purpose of adopting a coattail provision is to discourage exclusionary offers, whereas a literal reading of Schneider's coattail provision gives the opposite effect. Certainty of meaning is of paramount importance in commercial transactions that affect the public. Those considering whether or not to tender to an offer to purchase their shares must know what investment decision they are making: see Saunders, supra, at pp. 272-73. In this instance, it appeared to the shareholders that the offers were the same because the amount to be paid to both classes of shareholders was the same. Maple Leaf understood how its offers would be perceived. If, instead,

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Maple Leaf was of the opinion that its offer was exclusionary, it could have said in its offering circular that it intended to apply to the appropriate authorities to have the issue of whether or not the offer was exclusionary determined in court as was done in CW Shareholdings, supra. Maple Leaf did not.

The interpretation of Maple Leaf's offers adopted by Farley J. is consistent with the way a reasonably prudent business person would construe the offer. The outcome he reaches is consistent with public expectations and is commercially sound. It employs a purposive approach. Farley J. did not err in holding that the Maple Leaf offer for common shares was not an "exclusionary offer" and that the coattail provisions in Schneider's articles had not been triggered.

THE ANTI-CONVERSION CERTIFICATES

Did Farley J. Err in his Conclusion That an Effective Anti-Conversion Certificate Had Been Filed?

The articles of Schneider provide that conversion of the Class A non-voting shares into common voting shares does not arise, even if an offer is an exclusionary offer, if the holders of 50 per cent or more of the common shares file a certificate with the transfer agent and the secretary of the corporation, under s. 16, indicating that they will not accept an exclusionary offer without giving the transfer agent written notice of their intention. Such a certificate can be a standing certificate filed before an offer is made (a 16(a) certificate), or a certificate filed within seven days of the making of an exclusionary offer (a 16(b) certificate). It is only if no certificate under s. 16 is filed that conversion rights arise.

The purpose of the filing of a s. 16(a) certificate with the transfer agent is to have an outside entity receive confirmation of the controlling shareholder's intention concerning exclusionary bids. Unless and until a bid for change of control of the company is made, the transfer agent does not have to take any further steps. As soon as possible after the seventh day after an offer is received, art. 17 and 18 of

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Schneider's articles require the transfer agent to send holders of Class A non-voting shares a notice advising them whether they are entitled to convert their Class A non-voting shares into common shares (presumably on the basis whether a s. 16(a) or s. 16(b) certificate is filed) and the reasons they are, or are not, entitled to convert their shares. The manifest purpose of the provision is to make the Class A non-voting shareholders aware of their rights.

Farley J. found as a fact that when the coattails were adopted, Schneider's secretary filed a 16(a) certificate under cover of May 2, 1988, with the transfer agent of Schneider which, at the time, was the Canada Trust Company.

Royal Trust Corporation succeeded Canada Trust as transfer agent for Schneider and later sold its transfer agency business to a company, which became CIBC Mellon Trust Company, Schneider's current transfer agent. Schneider did not file a new 16(a) certificate with Royal Trust when it became its transfer agent. CIBC Mellon has no record of having received the 1988 certificate from any source prior to receiving it from Goodman Phillips & Vineberg on December 29, 1997 -- after the Maple Leaf offers had been made. A representative of CIBC Mellon testified that he would not expect Canada Trust to have forwarded the April 29, 1988 certificate to Royal Trust or its successors because CIBC Mellon's practice, and the practice in the industry generally, was not to do so. He testified that this is the type of document a company would redeliver. Mr. MacKay, however, testified that he had arranged for Canada Trust to deliver this certificate to Royal Trust. Farley J. accepted MacKay's evidence on this point. Assuming the certificate was received by Royal Trust, there was no evidence what Royal Trust did with the certificate once Royal Trust sold its business to CIBC Mellon.

Article 16 of Schneider simply states that the certificate is to be delivered to "the transfer agent". Farley J. stated:

> . . . the coattails provisions as provided for in the TSE precedent and adopted by Schneider provides for the certificate to be given to the transfer agent and to the

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secretary of Schneider. It does not say that it is to be given to the Secretary "for the time being". The context of the delivery of the certificate is that it be given to both at the same [general] time.

The articles of Schneider do not require the controlling shareholder to redeliver a s. 16(a) certificate when the company changes transfer agents. Farley J. held that in the circumstances the s. 16(a) certificate did not have to be redelivered by Schneider. I agree with this interpretation. The role of a transfer agent is to maintain the records of a corporation. When there is a change in transfer agent, as with a change in trustee, it does not deprive the shareholders of the effect of the document. The notice to the original transfer agent is valid: see Slattery v. Slattery, [1945] O.R. 811 at p. 819 (C.A.).

Even if the Maple Leaf bid was an exclusionary bid the 16(a) certificate delivered in 1988 was effective and blocked the conversion of the Class A shares into common voting shares.

There is a further alternative argument raised in relation to the anti-conversion certificates. It is whether the filing of a s. 16(b) certificate after Maple Leaf's bid was made was effective.

Following notice that Maple Leaf's holding company SCH proposed to make a bid for Schneider, Eric Schneider delivered to himself as corporate secretary on November 11, 1997 a s. 16(b) certificate, but it was not provided to CIBC Mellon until December 22, 1997 and was therefore ineffective because it was not delivered within seven days of the "offer date" by SCH. On December 12, 1997, Maple Leaf, and not its holding company SCH, made a bid for the shares of Schneider and increased its offer to $22 a share. In addition, for the first time shares of Maple Leaf were offered as partial consideration for the shares of Schneider. Schneider again filed a s. 16(b) anti-conversion certificate dated December 19.

Farley J. found that the Family had a consistent intention to implement an effective anti-conversion certificate against any

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exclusionary offer. He acknowledged that under the ordinary principles of contract law a change in the essential terms of the offer such as occurred here between the November 11 offer and the December 12 offer, would be a new offer. He held, however, that the December 12 bid by Maple Leaf was not a new offer having regard to the definition of "Exclusionary Offer" contained in art. 12(e)(ii) of the coattails provision which says in part:

> . . . if an offer to purchase common shares is not an Exclusionary Offer . . . the varying of any term of such offer shall be deemed to constitute the making of a new offer unless an identical variation concurrently is made to the corresponding offer to purchase Class A Non-Voting shares;

I am of the opinion that Farley J. erred in holding that the December 12 offer by Maple Leaf was not a new offer on the basis of art. 12(e)(ii). The words construed by Farley J. are a saving provision. The saving provision presupposes that an offer was originally non-exclusionary and the offer is varied with the result that unequal terms are offered to the common and Class A shareholders. In those circumstances the offer will be considered to be a new offer which is exclusionary. The deeming provision of article 12(e)(ii) does not deprive the controlling shareholder of the substantive right in art. 16(b) to file an anti-conversion certificate if the original offer made is exclusionary and the subsequent offer is also exclusionary but completely different as to its terms. This interpretation is supported by regard to art. 16(b). Under art. 16(b), the anti-conversion certificate must be delivered within seven days after "the offer date". The "offer date" is defined in art. 12(g):

> Offer Date means the date on which an Exclusionary Offer is made.

Thus, whenever an offer which is exclusionary is made, Schneider has seven days to deliver an anti-conversion certificate.

Based on both the wording of the articles and on general

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contract principles, the offer of December 12 was a new offer and the 16(b) anti-conversion certificate filed was effective.

The Omission of Maple Leaf to State that its Offers Were Exclusionary in its Offering Circular and the Effect, if any, of such Omission

Farley J. did not find it necessary to decide this issue and I am of the opinion that it is unnecessary to do so in view of my conclusions concerning the other issues raised.

DISPOSITION

For the reasons given, the appeals from the judgment of Farley J. are dismissed. Because I have held that Farley J. did not err in holding that the offer to purchase common shares made by Maple Leaf to shareholders of Schneider was not an exclusionary offer within the meaning of the articles of Schneider, it was not necessary to deal with the cross-appeals by the Family. I have, however, dealt with one aspect of the cross-appeals, namely, the effectiveness of the anti-conversion certificates. If it were necessary to do so, I would allow the cross-appeal to the extent necessary to grant relief in accordance with para. (a) of the Family's notice of cross-appeal. The balance of the cross-appeal has not been considered and is dismissed. If necessary, I would also allow the cross-appeal of Smithfield which relates to the same point, namely, the effectiveness of the anti-conversion certificates.

Counsel have asked to make further submissions concerning costs. I would invite the respondents to file their submissions in writing within 15 days from the release of these reasons and the appellants ten days thereafter. Reply submissions respecting costs, if any, should be filed within a further five days.

Appeal dismissed.

APPENDIX

Business Corporations Act, R.S.C. 1995, c. B.16

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134(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholders agreement.

. . . . .

248(1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court

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may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

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(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Notes

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Note 1: There are four branches of the Schneider Family. In this appeal, "Family" refers to: the collective family holding company J.M. Schneider Family Holdings Limited (Family Holdings); the four individual family holding companies (Harbour Glen Securities Limited, Kinspan Investments Limited, Laurel Ridge Investments Limited, and Jadebridge Holdings Limited); and seven of the eight Family members who serve as directors of Family Holdings, Herbert J. Schneider, Frederick P. Schneider, Jean M. Hawkings, Betty L. Schneider, Anna Fontana, Eric Schneider, and Bruce Hawkings.

Note 2: For the sake of convenience I will refer to s. 248 as the "oppression remedy". For ease of reference the text of ss. 134 and 248 is attached to these reasons as an appendix [at p. 214 post].

Note 3: Reversing the burden of proof was rejected by Farley J. in this case. He declined to adopt the test in this case and to place the burden of proof on the directors. He indicated that the rights of shareholders in Ontario were protected by s. 248 of the OBCA and he would apply it. The enhanced scrutiny standard was also rejected by Blair J. in CW Shareholdings Inc., supra at p. 27, in dealing with an application under the Canadian Business Corporations Act to set aside defensive measures taken by a company respecting a takeover. He commented that to the extent "enhanced scrutiny" imposed the initial evidenciary burden on the directors of a target company to justify their actions and their business decisions it went too far and did not represent the law in Ontario. While s. 248 of the OBCA does not clearly state on whom the onus lies, the use of the term "complainant" in s. 248 and the broad definition of a "complainant", which includes any other person whom the court considers a proper person, suggest that the onus is on the person alleging that the directors have unfairly prejudiced, disregarded, or acted oppressively towards the person. In many cases the facts necessary to found such a complaint will be in the knowledge of the person alleging them and the burden of adducing evidence on those facts should rest on that person. The cases arising under these sections are, however, fact specific. In cases where trust property is the subject of the litigation and it is alleged that a personal benefit has been

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given to members of the Board as a result of its actions, the Board may bear the burden of adducing evidence as to the nature of the transaction.

Note 4: There are fewer and fewer situations today where the resolution of the questions turns on the onus of proof. See the comments of Sopinka J. in Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96.

Note 5: It is worthwhile noting however that on a subjective basis no shareholder testified that any public pronouncment made by the family created an expectation that an auction would be conducted.

Note 6: Recall that the Maple Leaf and the Booth Creek offers were worth considerably less to the Family and to the non-Family shareholders, provided they were in a similar tax position to the family. Smithfield's share exchange offer was worth approximately $4 a share more to them.

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TAB QQ

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

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James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

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ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

[2] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

[3] With the exception of one party, SFC's position is either supported or is not opposed.

[4] Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] The defined terms have been taken from the motion record.

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

[7] Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

[9] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

[10] The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[11] Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

[12] SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

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[13] SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

[14] SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

[15] On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

[16] SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

[17] Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

[18] The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings,

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preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

[19] SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

[20] On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

[21] On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

[22] As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

[23] After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

[24] *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

[25] The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

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[26] In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

[27] Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

[28] The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

[29] The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

[30] The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

[31] SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

[32] On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

[33] In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

[34] On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

[35] According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

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(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

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[36] Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

[37] SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

[38] SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

[39] The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

[40] Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

[41] Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

[43] The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

[44] The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

[45] The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

[46] The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

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c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	12	92.31%	$ 8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$ 340,000	3.90%
Total Claims Voting	13	100.00%	$ 8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a "no" vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	263	98.50%	$ 1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$ 150,754,087	9.28%
Total Claims Voting	267	100.00%	$ 1,624,903,169	100.00%

[47] E&Y has now entered into a settlement ("E&Y Settlement") with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

[48] As noted in the endorsement dated December 10, 2012, which denied the Funds' adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

[49] Further, SFC's counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

[50] Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

[51] To establish the court's approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

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(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

[52] SFC submits that there has been strict compliance with all statutory requirements.

[53] On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

[54] The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

[55] SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

[56] Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation*.

[57] Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc*. (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* (2009) O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

[58] In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

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[59] I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

[60] SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

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[61] In *Nelson Financial,* I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

[62] The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

[63] In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

[64] I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

[65] The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

[66] In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

[67] In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

[68] As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

[69] With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation,* (2005) 14 C.B.R. (5th) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

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[70] Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

[71] The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

[72] In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

[73] Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

[74] In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

[75] With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

[76] It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

[77] I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

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[78] Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

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Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

[80] Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

MORAWETZ J.

Date: December 12, 2012

TAB RR

THE LAW OF CONTRACT IN CANADA

by

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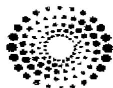

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confer a benefit upon C or impose an obligation upon C, but it cannot result in C's being a party to the contract in the ordinary, usual sense.[4] To acquire rights and be subject to liabilities under a contract, one must be a party to it.[5] Thus identifying who is and who is not a party is crucial, as in *Seip & Associates Inc. v. Emmanuel Village Management Inc.*,[6] in which one issue was whether a particular corporation was liable for work done by the plaintiff, which depended on whether the corporation was a party to the contract under which the plaintiff acted as consultant in the construction of a retirement apartment building.[7] Someone described in a contract as a contractor was held to be a party, and therefore personally liable to the plaintiff, in *Nadeau v. Ba-Oose Inc.*[8] So was a wife who was held to be jointly and severally liable with her husband for breach of a contract to feed and calve a herd of the cattle.[9] But there must be evidence to establish that someone was a party to a contract. Such evidence was lacking in *Pen-Bro Holdings Ltd. v. Demchuk*[10] where the father of a defendant was neither a partner nor a joint venturer with his son, and therefore was not a party to the relevant contract.

Some situations have given rise to difficulty. One such concerned a contract between A and B under which B promised A to pay A's widow after the death of A. When A died, his widow became A's personal representative, either as administratrix or executrix. When B failed to fulfil his promise to pay A's widow, and the widow sued, it was held that she could do so in her capacity as personal representative, but

French conferred no rights on defendant who was not party to the agreement. Compare *Watson v. C.F. Hart Ltd.* (1986), 59 Nfld. & P.E.I.R. 308 (Nfld. Dist. Ct.); *Iampen v. Royal Bank* (1987), 79 A.R. 305 (Alta. Master). Contrast *Moss v. Richardson Greenshields of Can. Ltd.*, [1988] 4 W.W.R. 15 (Man. Q.B.); affirmed [1989] 3 W.W.R. 50 (Man. C.A.), where the broker was held to be privy to an options trading agreement entered into by the plaintiff, an investor; *Dale v. Manitoba* (1995), 128 D.L.R. (4th) 512 (Man. Q.B.), contract between provincial government and University of Manitoba could result in contract between student and university (affirmed (1997), 147 D.L.R. (4th) 605 (Man. C.A.)).

4 *E.g.*, *Maritime Life Assurance Co. v. Regional Capital Properties Corp.* (1996), 44 Alta. L.R. (3d) 267 (Alta. Master); affirmed (1996), 195 A.R. 102 (Alta. Q.B.); affirmed (1997), 57 Alta. L.R. (3d) 401 (Alta. C.A.), borrower of money not a party to contract between CMHC and bank, therefore plaintiff, the borrower, could not sue CMHC. A more liberalizing attitude to privity was adopted in Australia in *Trident General Insurance Co. v. McNiece Brothers Proprietary Ltd.* (1988), 165 C.L.R. 107 (Australia H.C.).

5 *Rummery v. Matthews*, [2000] 9 W.W.R. 286 (Man. Q.B.); varied [2001] 11 W.W.R. 473 (Man. C.A.); additional reasons at [2001] 11 W.W.R. 486 (Man. C.A.).

6 (2008), 44 B.L.R. (4th) 287 (Ont. S.C.J.); reversed (2009), 78 C.L.R. (3d) 159 (Ont. C.A.).

7 Compare *Sellathurai v. Sriskanda* (2007), 59 R.P.R. (4th) 273 (Ont. S.C.J.); affirmed (2008), 66 R.P.R. (4th) 216 (Ont. C.A.); corporate plaintiff not a party to an agreement of purchase and sale with the defendant, therefore not entitled to benefit of an alleged warranty that property was zoned for a party hall.

8 (2006), 56 C.L.R. (3d) 105 (B.C.S.C.).

9 *Deeg v. Jacques* (2008), 313 Sask. R. 1 (Sask. Q.B.).

10 (2007), 33 B.L.R. (4th) 304 (Alta. Master); see also *British Confectionery Co. v. National Bank of Canada* (1994), 118 Nfld. & P.E.I.R. 234 (Nfld. T.D.); *Kimak v. Kasprick* (1993), 87 Man. R. (2d) 204 (Man. Q.B.); *Fraternal Order of Eagles Winnipeg Aerie No. 23 v. Blumes*, [1994] 7 W.W.R. 360 (Man. C.A.); *Rich v. Enns*, [1995] 6 W.W.R. 257 (Man. C.A.); *Sherlock v. CITC Timber Corp.* (1995), 17 B.C.L.R. (3d) 102 (B.C.C.A.); *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]); *MedCentra Inc. v. Economical Mutual Insurance Co.* (2009), 78 C.C.L.I. (4th) 112 (Ont. S.C.J.) (in none of which was someone claiming, or alleged to be a party to the contact, held to be a party to a contract).

TAB SS

1995 CarswellOnt 541
Ontario Court of Appeal

Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.

1995 CarswellOnt 541, [1995] O.J. No. 1609, 125 D.L.R. (4th) 193, 21 B.L.R. (2d) 165, 24 O.R. (3d) 97, 46 R.P.R. (2d) 153, 55 A.C.W.S. (3d) 797, 82 O.A.C. 25

MONTREAL TRUST COMPANY OF CANADA v. BIRMINGHAM LODGE LIMITED, NORMAN N. WARNER, PAUL MARTIN, 672069 ONTARIO INC., COMPLEAT HEALTH CORPORATION and BIRMINGHAM LODGE MOUNT FOREST LTD.

Brooke, Robins and Laskin JJ.A.

Heard: February 13, 1995
Judgment: June 2, 1995
Docket: Doc. CA C18926

Counsel: *A.M. Robinson*, for appellant Norman N. Warner.
Appellant Paul Martin unrepresented.
Howard Swartz and *Natalie Marconi*, for respondent.

Subject: Corporate and Commercial; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Guarantee and Indemnity --- Guarantee — Grounds for termination of guarantee — Conduct of creditor — Breach of contractual terms and conditions — Material and prejudicial variation

Guarantee and indemnity — Guarantee — Grounds for termination of guarantee — Distinction between successor and assign — Guarantor agreeing to remain liable if variations made between lender and successor of borrower — Guarantor not agreeing to be bound by variation made between lender and assignee of borrower — Guarantor discharged where variation made by assignee of borrower.

Guarantee and indemnity — Nature and definition — Guarantee and indemnity distinguished — Guarantor agreeing to term of guarantee describing its liability as primary — Language not determinative — Entire guarantee and subsequent conduct of parties indicating that parties intending that guarantor did not have primary liability.

The guarantors, as shareholders, directors and officers of the borrower, BL Ltd., guaranteed a $1,325,000 debenture between BL Ltd. and the lender M Trust Co. The debenture required that the guarantors guarantee the mortgage payments "to the Lender, its successors and assigns". It also stated "as between the Guarantors and the Lender, the Guarantors shall be considered as primarily liable therefor". In addition, the guarantors agreed that variations in the terms of the mortgage made by "[BL Ltd.] or any successor" did not affect their liability. However, this provision made no mention of "assigns" of BL Ltd.

After the debenture was executed, the mortgaged property was transferred twice and the terms of the mortgage were varied three times. The guarantors agreed to and signed the first sale of the property by BL Ltd. in November 1986. They did not sign the three subsequent mortgage renewal agreements or the second transfer of property. The guarantors asserted that

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they had no knowledge of any transaction involving the mortgage loan after the second sale of the property in 1986. They did not consent to the second sale of the property nor did they consent to the two renewal agreements that increased the interest rate or the final renewal agreement that lowered the interest rate.

After the debenture went into default, M Trust Co. commenced an action. The guarantors claimed that there was a distinction between the terms "successor" and "assign". They argued that they did not agree to remain liable on their guarantee for variations in the terms of the mortgage made by M Trust Co. and an assign of BL Ltd. The motions court judge dismissed the argument and held that "the distinction between 'successor' and 'assign' is spurious". He found the guarantors liable and granted summary judgment against them. The guarantors appealed.

Held:

The appeal was allowed.

A surety will generally be discharged if the principal contract guaranteed is varied in a material way without consent. Here, the guarantors agreed to remain liable for variations made by BL Ltd. and its successors. They did not agree to remain liable for variations made by the assigns of BL Ltd. There is a distinction between successors and assigns. One who purchases mortgaged assets is an assign, not a successor.

M Trust Co. submitted that the guarantors were liable as primary debtors as agreed in the "no prejudice" clause. This type of provision did not automatically convert a contract of guarantee into a contract of indemnity. The entire document should be examined to ascertain the parties' intention. Extrinsic evidence, including the parties' subsequent conduct, may then be looked at to clarify what meaning the parties attached to the document. Here, the debenture and the subsequent conduct of the parties indicated that the parties intended the appellants to be guarantors. The debenture, renewal offers and the statement of claim referred to the appellants as guarantors. Their consent, as guarantors, was requested on the sale agreements and the renewal offers.

Annotation

In what can only be described as yet another "stunning" guarantee decision, the Ontario Court of Appeal has again managed to drive the hearts of lenders' counsel far higher into their chest cavities than is anatomically correct. The decision of Mr. Justice Laskin in the *Birmingham Lodge* case, following, as it does, the Court of Appeal's other recent heart-stopper, *Manulife Bank of Canada v. Conlin*, (1994), 41 R.P.R. (2d) 283, 20 O.R. (3d) 499, 75 O.A.C. 117, 17 B.L.R. (2d) 143, 120 D.L.R. (4th) 234, leaves the lending bar scrambing to determine what, if anything, can still be said about the enforceability of guarantees.

The Court of Appeal in both cases invoked, to the benefit of the mortgage guarantors, the rule in *Holme v. Brunskill*, (1878), 3 Q.B.D. 495 (C.A.), a cornerstone of guarantee law since prior to the turn of the century. The rule in *Holme v. Brunskill*, succinctly stated, relieves guarantors of their liabilities under their guarantees where the underlying obligations have been materially altered to the detriment of the guarantors without the consent of the guarantors.

Prior to *Conlin* and *Birmingham Lodge*, the sting of the rule in *Holme v. Brunskill* had been thought to have been lopped off by the Supreme Court of Canada decision in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, 33 C.B.R. (N.S.) 291, 10 B.L.R. 209, 110 D.L.R. (3d) 424, 32 N.R. 191, which essentially provided that guarantors could opt out of the protection afforded by the rule in *Holme v. Brunskill* (and, indeed, all other defences) so long as the guarantees were worded appropriately. In the aftermath of *Bauer*, Canadian lending practice witnessed a blossoming of guarantee drafting in the spirit of *Bauer*, resulting in the comprehensive, if wordy, modern long form guarantees now forming parts of the document packages of most sophisticated lenders.

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While it has been suggested that *Birmingham Lodge*, like *Conlin* immediately before it, has added new and astounding twists to the rule in *Holme v. Brunskill*, the better view might be that *Birmingham Lodge* and *Conlin* have added nothing new to the rule in *Holme v. Brunskill*, but, instead, have collectively added new and astounding twists (and, ultimately, limitations) to the continuing applicability of *Bauer* in Canadian law as a panacea to the rule in *Holme v. Brunskill*. By making *Bauer* — esque comfort levels harder to achieve, *Conlin* and *Birmingham Lodge* have become very serious challenges to the enforceability of Canadian long form guarantees.

The *Conlin* decision, although not the subject of this annotation, was definitely the "edge of the wedge". In *Conlin*, the Ontario Court of Appeal denied enforcement of a guarantee of a renewed mortgage debt because, essentially, the guarantor thereunder did not expressly waive his defences in respect of "renewals" of the underlying obligation. Much of the concern emanating from lenders' counsel after *Conlin* was muted, however, when the Supreme Court of Canada granted leave to appeal. Even if *Conlin* were not reversed on appeal, it was argued, *Conlin* was but an anomaly, easily corrected by more careful drafting.

If *Conlin* can fairly be described as a "hole in the dyke", the *Birmingham Lodge* decision is better analogized as a "dam buster". The attack on long form guarantees which is *Birmingham Lodge* is far more complex and difficult to combat with simple improvements to the wording of long form guarantees.

Mr. Justice Laskin's decision in *Birmingham Lodge* starts off with a rendition of the facts, a reiteration of the rule in *Holme v. Brunskill*, and a reaffirmation of the court's reasoning in *Conlin*. Turning to the guarantee in dispute, Laskin J.A. then points out that, while the guarantors apparently agreed to continue to be liable for amendments made by "successors" of the original debtor, the guarantors did not agree to be bound by amendments made by "assigns" of the original debtor. The original mortgage debt appeared to have been assigned and renewed a couple of times without the consent of the individual guarantors.

Mr. Justice Laskin's finding that the concept of "assigns" is somehow distinct from the concept of "successors" is not entirely without merit, and, on the facts at hand, there is some sympathy for the argument that the guarantors had not intended, within the context of *Bauer*, to render themselves continuously liable to amendments made by the assigns of the mortgage debt. It is submitted, however, that while this aspect of the decision takes up a great portion of Laskin J.A.'s decision, in and of itself, it is a very minor issue, being within the category of drafting subtleties that could have been corrected going forward. If the "assigns" argument was the Court of Appeal's only stumbling block to a finding of enforceability, this annotator would be tempted to quickly admonish lenders' counsel to simply amend the "successors and assigns" language in their long form guarantees, and theradfter sleep well at night.

The Court of Appeal, however, did not stop at the "assigns"argument. Instead, and far more dangerously, the court expressly denied collection of the indebtedness as a principal obligation, notwithstanding that the guarantee specifically provided that "as between the guarantors and the lender, the guarantor shall be considered primarily liable". Many lenders rely on these "principal debtor" clauses as the ultimate backstop, and one would have thought that such a characterization of the guarantors as principal debtors should have been dispositive of the issue. Instead, the Court of Appeal adopted with favour a line of judgments (not, however, without contra cases — see, e.g., *Morguard Trust Co. v. Heritage Horizons Ltd.*, (1987), 44 R.P.R. 135, 36 B.L.R. 16 (B.C. S.C.)) supporting the proposition that an admission by guarantors that they are in fact principal debtors is not necessarily determinative of the guarantors' true relationship to the lender.

Mr. Justice Laskin points out that, notwithstanding a "primary debtor" clause, the court is free to, and should, consider the balance of the documentation, and even extrinsic evidence as to the parties' conduct under the documentation in order to determine the nature of the guarantor's liabilities, if any, to the lender. In effect, Laskin J.A. provides that a guarantor and a principal debtor are mutually exclusive concepts, and that, if a lender's actions or documents characterize a party as a guarantor, the lender is thereafter precluded from seeking recovery against that guarantor as if it were a primary debtor.

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By the last few pages of the decision, the faint of heart amongst the lending bar would have already succumbed. The brave (or foolish, as time will tell) might simply respond to *Birmingham Lodge* by correcting the "successors and assigns" language, then globally changing the word "guarantor" to "indemnifier", or "co-debtor", or some other like term. However, Laskin J.A. appears to have anticipated this legal sophistry by providing that, even if the guarantors had been identified as "indemnifiers" or "co-debtors", the lender may not have been able to recover against such co-principal debtors unless the lender's conduct towards such parties throughout the course of the loan was otherwise consistent with their alleged characterization as co-principal debtors.

As will be all too familiar to lenders, the practical aspects of loan administration make remote the likelihood of multiple co-prinicipal debtors being dealt with collectively on a day-to-day basis throughout the course of a loan. It is rare in modern lending for more than one party to receive demands or to make payments. Strict compliance with *Birmingham Lodge* might compel lenders, henceforth, to require cheques drawn against joint accounts of all the co-principal debtors, and to routinely correspond with all co-principal debtors, regardless of the manifest logistical problems created thereby.

Borrowers themselves may find the post — *Birmingham Lodge* lending environment less than ideal. For instance, borrowers may prefer, from tax and balance sheet perspectives, to see primary liability vested with a principal borrower, while the secondary, contingent liability is vested with one or more guarantors. Such planning may no longer be possible as lenders desperately try to avoid the application of *Birmingham Lodge* by making all related borrowers co-principal debtors.

It is difficult to imagine the changes to loan documentation that may be spawned as a result of the lending bar's reaction to *Conlin* and *Birmingham Lodge*. It is not inconceivable that there will be a wholesale abandonment of guarantees altogether in favour of redrafted indemnity contracts, or, where the number of parties makes the process manageable, co-signed primary indebtedness. At the very least, cautious enforceability opinions will henceforth probably avoid guarantees like the plague. After all, if the guarantees in *Conlin* and *Birmingham Lodge* could be struck down because of a less than perfect "renewal" and "successors and assigns" clauses, query what other verbiage in those long form guarantees might provide the necessary fodder for the next test case?

Conlin is on its way to the Supreme Court of Canada. The lending bar waits with bated breath.

Jeffrey W. Lem

Table of Authorities

Cases considered:

Arthur Andersen Inc. v. Toronto Dominion Bank (1994), 14 B.L.R. (2d) 1, 13 C.L.R. (2d) 185, 17 O.R. (3d) 363, (sub nom. *Andersen (Arthur) Inc. v. Toronto Dominion Bank)* 71 O.A.C. 1 (C.A.) [additional reasons at (1994), 14 B.L.R. (2d) 1 at 49 (Ont. C.A.), leave to appeal to S.C.C. refused (1994), 16 C.L.R. (2d) 223 (note), 16 B.L.R. (2d) 254 (note), 19 O.R. (3d) xvi (note), 178 N.R. 397 (note), 80 O.A.C. 240 (note) (S.C.C.)] — *referred to*

Bank of Montreal v. University of Saskatchewan (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.) — *referred to*

Brown Brothers Motor Lease Canada Ltd. v. Ganapathi (1982), 18 B.L.R. 229, 139 D.L.R. (3d) 227 (B.C. S.C.) — *applied*

Canadian National Railway v. Canadian Pacific Ltd., [1979] 1 W.W.R. 358, 95 D.L.R. (3d) 242 (B.C. C.A.), affirmed without written reasons [1979] 2 S.C.R. 668, [1979] 6 W.W.R. 96, 105 D.L.R. (3d) 170 — *considered*

Communities Economic Development Fund v. Canadian Pickles Corp., [1991] 3 S.C.R. 388, [1992] 1 W.W.R. 193, 8 C.B.R. (3d) 121, 85 D.L.R. (4th) 88, 131 N.R. 81, 76 Man. R. (2d) 1, 10 W.A.C. 1 — *followed*

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First City Trust Co. v. 122637 Developments Ltd. (1989), 8 R.P.R. (2d) 155, 79 Sask. R. 175 (Q.B.) — *referred to*

Heald v. O'Connor, [1971] 1 W.L.R. 497, [1971] 2 All E.R. 1105 (Q.B.) — *applied*

Holme v. Brunskill (1878), 3 Q.B.D. 495 (C.A.) — *referred to*

Manulife Bank of Canada v. Conlin (1994), 41 R.P.R. (2d) 283, 20 O.R. (3d) 499, 75 O.A.C. 117, 17 B.L.R. (2d) 143, 120 D.L.R. (4th) 234 (C.A.), leave to appeal to S.C.C. granted (1995), 122 D.L.R. (4th) vi (note) (S.C.C.) — *applied*

Morguard Trust Co. v. Heritage Horizons Ltd. (1987), 36 B.L.R. 16, 44 R.P.R. 135 (B.C. S.C.) — *considered*

National Trust Co. v. Mead, [1990] 2 S.C.R. 410, 12 R.P.R. (2d) 165, [1990] 5 W.W.R. 459, 71 D.L.R. (4th) 488, 112 N.R. 1, 87 Sask. R. 161 — *followed*

Walter E. Heller Financial Corp. v. Timber Rock Enterprises Ltd. (1982), 40 B.C.L.R. 85 (S.C.)*applied*

Statutes considered:

Limitation of Civil Rights Act, The, R.S.S. 1978, c. L-16.

Mortgages Act, R.S.O. 1990, c. M.40 —

s. 20(2)

Appeal from decision granting motion for summary judgment in action to enforce contract of guarantee.

The judgment of the court was delivered by *Laskin, J.A.*:

1 The appellants, Norman Warner and Paul Martin, guaranteed payment of any money owing on a mortgage between the lender, Wellington Trust Company, now the respondent Montreal Trust Company of Canada, and the borrower, Birmingham Lodge Ltd. (the "Corporation"). The terms of the mortgage were subsequently varied without the appellants' consent. The issue on this appeal is whether these variations released the appellants from liability. This issue has been litigated in this court many times. Like the previous cases, this appeal turns on the intention of the parties and the interpretation of the guarantee. The motions court judge found the appellants liable, and granted summary judgment against them. This is an appeal from his judgment.

A. The Facts

2 The Corporation owned a residential retirement home and apartment complex in Mount Forest, Ontario. The appellants Warner and Martin were the officers, directors, and shareholders of the Corporation.

3 Under the terms of a registered debenture dated January 13, 1986, Wellington Trust Company loaned the Corporation $1,325,000 for three years at an interest rate of 12% per annum. The Corporation agreed to make monthly payments, and to pay the balance of the loan on February 1, 1989. On default in payment, the loan would immediately become due and payable at the option of the respondent.

4 The loan was secured by a first mortgage on the Corporation's property and chattels, and the Corporation agreed that it would not sell, assign, or transfer the property without the written approval of the respondent. The appellants agreed to guarantee the Corporation's mortgage payments. Article 10.1 of the debenture provides for the appellants' guarantee. It states that variations

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in the terms of the mortgage made by the Corporation or any successor do not affect the appellants' liability. The relevant parts of Article 10.1 are as follows:

> 10.1 IN CONSIDERATION of the premises and of the Lender advancing the said money to the Corporation, PAUL MARTIN AND NORMAN M. WARNER (the "Guarantors") *do hereby absolutely and unconditionally jointly and severally guarantee to the Lender, its successors and assigns, the due and punctual payment by the Corporation of all principal monies, interest and other monies owing on the security of this Debenture*, and the Guarantors for themselves, their heirs, executors, administrators and assigns, covenant with the Lender that if the Corporation shall at any time make default in the punctual payment of any monies payable hereunder, they will pay all such monies to the Lender without any demand being required to be made.
>
> AND IT IS HEREBY EXPRESSED that although as between the Guarantors and the Corporation, the Guarantors are only sureties for the payment by the Corporation of the monies hereby guaranteed, *yet as between the Guarantors and the Lender the Guarantors shall be considered as primarily liable therefor* and that no release or releases of any portion or portions of the Secured Property, and no indulgence shown by the Lender in respect of any default by the Corporation or any successor which may arise under this Debenture, and *that no extension or extensions granted by the Lender to the Corporation or any successor for payment of the monies hereby secured or for the doing, observing or performing of any covenant, agreement, matter or thing herein contained, to be done, observed or performed by the Corporation or any successor nor any variation in or departure from the provisions of this Debenture nor any other dealings between the Corporation or any successor and Lender including any variation or increase of the interest rate, nor any release of the Corporation or any other thing whatsoever whereby the Guarantors as sureties only would or might have been released shall in any way modify, alter, vary or in any way prejudice the Lender or affect the liability of the Guarantors in any way under this covenant, which shall continue and be binding on the Guarantors, and as well after as before default and after as before maturity of this Debenture, until the said monies are fully paid and satisfied*. In the event of an increase in the interest rate, the liability of the Guarantors would continue to include the increased interest rate for which the Guarantors would be considered as primarily liable therefor. And it is hereby further expressly declared that the Lender shall not be bound to exhaust its recourse against the Corporation or the Secured Property before being entitled to payment from the Guarantors of the amount hereby guaranteed by the Guarantors.
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> . . . . .
>
> ALL COVENANTS, liabilities and obligations entered into or imposed hereunder upon the Guarantors shall be equally binding upon their heirs, executors, administrators and assigns.
>
> THE LENDER may vary any agreement or arrangement with the Guarantors and grant extensions of time to or otherwise deal with them, their heirs, executors, administrators and assigns, without any consent on the part of the Corporation. [Emphasis added.]

5 The appellants rely on the repeated use of the phrase "the Corporation or any successor" in the second clause of Article 10.1 (the "no prejudice clause"). They argue that they did not agree to remain liable on their guarantee for variations in the terms of the mortgage made by the respondent and an assign of the Corporation.

6 Following the execution of the debenture, the mortgaged property was transferred twice, and the terms of the mortgage were varied three times. The material facts concerning these five transactions are as follows:

> (i) By an agreement dated November 1986, the Corporation sold the property and chattels to 672069 Ontario Inc. ("672069"). The respondent consented to the sale. 672069 assumed liability for the mortgage debt "as principal debtor and not as surety." The appellants, described as "original guarantors," were parties to this agreement. They agreed that the covenant in their original guarantee would remain in effect "notwithstanding the entering into of this agreement." Compleat Health Corporation ("Compleat"), described as the "new guarantor," also agreed to guarantee the debt. The Corporation and each appellant signed this agreement.

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(ii) By an agreement dated February 1, 1989, 672069, the respondent and Compleat agreed to renew the mortgage for one year from March 1, 1989, to February 1, 1990, at a new interest rate of 12.75% per annum. The respondent offered this renewal on condition "that the consent of all existing guarantors shall be obtained to the renewal of the mortgage." The appellants — again described as original guarantors — were shown as parties to the renewal agreement, but they did not consent to the renewal, and they did not sign the agreement.

(iii) On April 4, 1990, the respondent wrote to Compleat, offering to renew the mortgage for another year at a rate of 13.25% per annum. The respondent's offer to renew was conditional on "receipt of acceptance of renewal offer signed by all mortgagors and guarantors." Compleat and 672069 accepted the offer and the mortgage was renewed. Neither the Corporation nor the appellants, however, signed the offer. The Corporation was dissolved on August 14, 1989, and the appellants said that they had no knowledge of this or any other transaction involving the mortgage loan after the Corporation sold the property in 1986.

(iv) By an assumption agreement dated August 1990, Vanguard Leisure Lodges Limited ("Vanguard") acquired the property and chattels from 672069. The respondent approved the sale, and the parties agreed that Vanguard would become the principal debtor, and that 672069 and Compleat would continue to be responsible jointly and severally with Vanguard for the loan secured under the debenture. The agreement as drafted provided for its execution by the Corporation, and by the appellants (who are again referred to as original guarantors), but neither the Corporation nor the appellants signed the agreement. Instead, a line was drawn through their names, and a line was also drawn through the clause in the agreement that recited that the appellants' covenants were to "remain in full force and effect."

(v) On March 25, 1991, the respondent wrote to Vanguard offering to renew the mortgage for another year, this time at an interest rate of 11.5% per annum. Again, the offer to renew was conditional on "receipt and acceptance of renewal offer signed by all Mortgagors and Guarantors." Although Vanguard accepted the offer, again, neither the Corporation nor the appellants signed it.

7 In summary, the appellants consented to the sale to 672069 in 1986. They did not consent to the subsequent sale to Vanguard, and they did not consent to the two renewal agreements that increased the interest rate, or, for that matter, to the last renewal agreement that lowered the rate.

8 The debenture went into default on January 1, 1992. The respondent appointed a receiver-manager to operate the retirement home on January 31, 1992. It issued a notice of sale under mortgage in February 1992, and served the notice on the appellants. The respondent commenced this action on April 6, 1992, and brought its motion for summary judgment on April 12, 1992. The motions court judge granted judgment for the respondent for $1,440,931.13, the amount owing on the mortgage, and ordered the appellants to deliver possession of the property to the respondent.

9 The appellants submit that they were relieved from liability on their covenant on the following four grounds:

(i) The terms of the mortgage were varied without their consent.

(ii) This court's judgment in *Manulife Bank of Canada v. Conlin* (1994), 20 O.R. (3d) 499 (Ont. C.A.), leave to appeal to the Supreme Court of Canada granted May 4, 1995.

(iii) Section 20(2) of the *Mortgages Act*, R.S.O. 1990, c. M.40.

(iv) Novation.

10 Counsel agreed that we could deal with the first three submissions by summary judgment. I propose to address only the appellants' first submission because in my opinion it is decisive of this appeal.

B. Did the Variations in the Terms of the Mortgage Release the Appellants from Liability?

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11 The legal principles governing the liability of a guarantor are well established. Robins J.A. set them out succinctly in his dissenting judgment in *Manulife Bank of Canada v. Conlin*, supra, at pp. 502-503:

> The general rule is that the surety will be discharged if the principal contract which he guaranteed is varied or altered without his consent in a material way not necessarily beneficial to him. The scope of this rule, which has become known as the rule in *Holme v. Brunskill*, was stated in that case (1878), 3 Q.B.D. 495 at pp. 505-06, 47 L.J.Q.B. 610 (C.A.), as follows:
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> > The true rule ... is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will ... hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.
>
> It follows that a change in the interest rate payable on a guaranteed obligation may discharge the surety from liability as may an extension of time within which the principal obligor is to pay or perform the guaranteed obligation. Changes of this nature have been held to materially alter the basis on which a surety agreed to become liable under a guarantee and therefore to release him from liability: see *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, [1936] 2 D.L.R. 481.
>
> However, a guarantor will not be released if such changes are provided for under the terms of the guarantee or are otherwise within the contemplation of the contract. It is open to parties to a guarantee to make their own arrangements modifying or excluding the rights and defences to which a surety is entitled in law or in equity. This was made clear by the Supreme Court of Canada in *Bank of Montreal v. Bauer*, [1980] 2 S.C.R. 102 at p. 107, 110 D.L.R. (3d) 424. Whether in any given case involving changes of the type we are concerned with here the creditor can be said to have effectively reserved its rights against the guarantor or, conversely, whether the guarantor can be said to have contracted out of the defences afforded him by the law is essentially a matter of interpretation. The determination of whether the changes were in fact authorized or contemplated will depend on the construction to be given the contract and the intention of the parties as evidenced by the transaction viewed as a whole: see *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, 85 D.L.R. (4th) 88; ....

12 In this case, the appellants agreed that if the Corporation or a successor varied the interest rate or extended the time for payment, they would remain liable on their guarantee. They submit, however, that they did not agree to remain liable if an assign of the Corporation varied the terms of the mortgage without their consent. They argue that when 672069 entered into the renewal agreements of February 1, 1989, and April 4, 1990, with the respondent, it did so as an assign of the Corporation, not a successor. Since each renewal agreement extended the time for payment and increased the interest rate, the appellants submit that they are released from liability. The motions court judge dismissed this argument, holding that "the distinction between 'successor' and 'assign' is spurious." I respectfully disagree. There is a valid distinction between the two terms. Wilson J. discussed this distinction in *National Trust Co. v. Mead* (1990), 71 D.L.R. (4th) 488, at pp. 497-498 (S.C.C.):

> Turning to s. 40(2) of the Act, the provision states that if a corporation waives its protection, that waiver binds all successors and assigns "notwithstanding anything in this Act." When used in reference to corporations, a "successor" generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation ....
>
> The word "assign" has, of course, a broader meaning. An "assign" is anyone to whom an assignment is made and presumably, but for the specific reference to "successors", would include both individuals and corporations. As between mortgagors, an assignment would be an agreement between the original mortgagor and his purchaser by which the latter would assume the mortgage debt in exchange for valuable consideration.

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13 The definitions of "successor" and "assign" that Wilson J. used are taken from *Black's Law Dictionary* (see, e.g., 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), at pp. 118 and 1431.) She used them to assist her in interpreting a section of the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16. I think that they also assist in construing the appellants' guarantee.

14 672069 purchased the Corporation's property and chattels. The respondent submits that a purchaser of the assets of the Corporation is a successor of the Corporation. But these definitions suggest otherwise. A purchaser is "anyone to whom an assignment is made," not someone who takes title through legal succession. Therefore, 672069 was an assign of the Corporation, not a successor.

15 In Article 10.1, the appellants agreed that their liability as guarantors would be unaffected if the respondent and a successor of the Corporation extended the term of the mortgage or increased the interest rate. They did not agree, however, that their liability would be unaffected if the respondent and an assign of the Corporation varied these terms without their consent. Undoubtedly the parties intended to make this distinction because the appellants were officers, directors, and shareholders of the Corporation. The usual phrase "successors and assigns" appears in several places in the debenture, including in the opening clause of Article 10.1 in reference to the lender. But in the no prejudice clause, which refers to the appellants' liability if the terms of the mortgage are varied, the phrase "the Corporation or any successor" is used, and it is used four times. The word assign is conspicuously absent. The appellants did not contract out of the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 (C.A.), for material variations made without their consent by the respondent and an assign of the Corporation. In my opinion, this is the only reasonable interpretation of Article 10.1. I therefore conclude that the renewal agreement of February 1, 1989, which was an agreement between the respondent and an assign of the Corporation, and which materially varied the terms of the mortgage, released the appellants from liability as guarantors.

16 The respondent advances two other arguments to support the judgment under appeal. It submits that even if the appellants are not liable as guarantors, they are still liable as primary debtors. The no prejudice clause of Article 10.1 does state that "as between the Guarantors and the Lender the Guarantors shall be considered as primarily liable therefor." As Robins J.A. noted in *Manulife Bank of Canada v. Conlin*, supra, lenders often include a provision in their guarantee documents purporting to make guarantors liable as principal debtors. Lenders often have considerable leverage in the negotiation of guarantee arrangements, and, not surprisingly, strive to cast a wide net to prevent guarantors escaping liability because of some un foreseen event. Nevertheless, a provision such as "the guarantors shall be considered as primarily liable" does not automatically convert a contract of guarantee into a contract of indemnity. In *Communities Economic Development Fund v. Canadian Pickles Corp.* (1991), 85 D.L.R. (4th) 88 (S.C.C.), Iacobucci J. wrote at p. 106:

> Contracts of guarantee are sometimes distinguished from contracts of indemnity. In a contract of indemnity, the indemnifier assumes a primary obligation to repay the debt, and is liable regardless of the liability of the principal debtor. An indemnifier will accordingly be liable even if the principal debt is void or otherwise unenforceable. The distinction between contracts of guarantee and of indemnity ought not to be overemphasized. The resolution of a given case will turn on the correct interpretation of the contract and of the intention of the parties; attempts to label the contract as one of guarantee or of indemnity may be less than helpful.

17 Iacobucci J. referred with approval to the English decision of *Heald v. O'Connor*, [1971] 1 W.L.R. 497 (Q.B.). In that case, the clause in question provided "that the liability hereunder of the guarantor shall be as a primary obligor and not merely as surety and shall not be impaired or discharged by reason of any time or other indulgence granted by the registered holder." Despite this language, Fisher J. wrote at p. 503:

> In the present case, the instrument was given pursuant to clause 7 of the agreement which calls for a personal guarantee. The word "guarantee" is used in it time and again. The obligation is to pay the principal moneys to become due under the debenture if and whenever the company makes default. The statement of claim refers to it as a guarantee and pleads the company's default and the consequent liability of the guarantor. The only straw for the plaintiff to clutch is the phrase "as a primary obligor and not merely as a surety" but that, in my judgment, is merely part of the common form of provision

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to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity.

18 Two British Columbia judgments have taken the same view of a similar clause in a guarantee document. In *Brown Brothers Motor Lease Canada Ltd. v. Ganapathi* (1982), 18 B.L.R. 229, at pp. 235-236 (B.C. S.C.), Locke J. stated:

> The clause has given me much trouble but I adopt the view of Wilde C.J. and say that even the very specific words "I shall be and shall be deemed to be a principal debtor and not a surety ..." were not intended to alter the basic intention of the parties, i.e., that Ganapathi was intended to be a guarantor alone.
>
> Among other reasons, if he was ever intended to be the principal debtor, I do not see why he was not so named as a co-debtor in the body of the agreement, nor do I see the need for any guarantee at all.
>
> . . . . .
>
> I think the overriding intention was always that Ganapathi be merely a guarantor. Once an overriding intention or circumstance is found, in my view the principle expressed by Davey J.A. (later C.J.B.C.) in *Sawley Agency Ltd. v. Ginter* (1966), 57 W.W.R. 561, 58 D.L.R. (2d) 757 applies, in words approved by the Supreme Court of Canada [1967] S.C.R. 451, 60 W.W.R. 701, 62 D.L.R. (2d) 768n. When interpreting an ambiguous clause he said [at p. 563 W.W.R.]:
>
> > ... *That circumstance*, in my opinion, dominates the clause and controls its meaning ...
>
> (The italics are mine.)
>
> In the result, I think the circumstance of *guarantee* dominates and was intended to dominate this entire document, and in particular cl. 25, and the clause should be so construed.

And in *Walter E. Heller Financial Corp. v. Timber Rock Enterprises Ltd.* (1982), 40 B.C.L.R. 85 (B.C. S.C.), Mackoff J. concluded that a provision in which the defendants "covenant with the mortgagee as principal debtors and not as sureties" conflicted with "the rest of the clause constituting the defendants as guarantors." He held that the defendants were guarantors, not principals. In his view:

> If the defendants were intended to be principal debtors it would have been very simple to name them as such in the agreement rather than to refer to them as guarantors throughout. (p. 89.)

19 Other cases have produced the opposite result. For example, in *Morguard Trust Co. v. Heritage Horizons Ltd.* (1987), 36 B.L.R. 16 (B.C. S.C.), Boyd L.J.S.C. held that a clause in a mortgage in which the guarantor "joins in all covenants with the mortgagee severally as well as jointly," and agrees that he "shall be and be deemed to be a principal debtor and not merely a surety," made the guarantor primarily liable. Justice Boyd distinguished the *Walter E. Heller* case because of the different language in each mortgage document. He concluded at p. 27 that

> in construing the document, it is not sufficient to simply identify contradictory wording and to construe the document as against the interests of the creditors. Rather, the Court's inquiry is always aimed at giving effect to that part of the document which is calculated to carry into effect the real intention of the parties.

20 See also *First City Trust Co. v. 122637 Developments Ltd.* (1989), 8 R.P.R. (2d) 155, at pp. 166-167 (Sask. Q.B.).

21 All these cases turn on the specific language of the document being considered. The mere inclusion of a phrase such as "the guaran tors shall be considered as primarily liable" is not determinative. The court should examine the entire document to ascertain the parties' intention. If the court is uncertain about the correct interpretation, it may resort to extrinsic evidence to assist it.

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22 In this case, I would not give effect to the respondent's submission that the appellants are liable as principal debtors. In my view, the parties intended that the appellants would be liable only as guarantors. They are referred to as guarantors throughout the debenture. They signed the debenture as guarantors. I therefore construe Article 10.1 of the debenture as a contract of guarantee.

23 Moreover, I think that the respondent's subsequent conduct resolves any doubt about the extent of the appellants' liability under Article 10.1. Subsequent conduct may be used to interpret a written agreement because "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date." S.M. Waddams, *The Law of Contracts*, 3d edition (Aurora, Ont.: Canada Law Book, 1993), at ¶323. Often, as Thomson J. wrote in *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193, at p. 199 (Sask. Q.B.), "there is no better way of determining what the parties intended than to look to what they did under it."

24 Lambert J.A. discussed the relevance of subsequent conduct in *Canadian National Railway v. Canadian Pacific Ltd.*, [1979] 1 W.W.R. 358, at p. 372 (B.C. C.A.), affirmed (1979), 105 D.L.R. (3d) 170 (S.C.C.):

> In Canada the rule with respect to subsequent conduct is that, if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or an ambiguity or as uncertainty or as difficulty of construction.

See also *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363, at p. 372 (C.A.).

25 In each of its mortgage renewal offers, the respondent referred to the appellants only as guarantors, not as primary debtors. Even in its statement of claim in this litigation, the respondent sued the appellants as guarantors. It did not allege in its pleading that the appellants were liable as principal debtors.

26 All three renewal offers, and both sale agreements, call for the appellants' consent. Eventually, the respondent agreed to the sale to Vanguard, and to each renewal, without obtaining the appellants' consent. Nevertheless, I infer that in making the appellants' consent a term of each transaction, the respondent recognized that without such consent the appellants would no longer be liable. Had the appellants been liable as primary debtors under Article 10.1, their consent to the subsequent transactions affecting the property would have been unnecessary. Had the appellants been liable as guarantors under the no prejudice clause, their consent would also have been unnecessary.

27 The conduct of the respondent after the debenture was executed is entirely consistent with interpreting Article 10.1 as a guarantee, not an indemnity, and with limiting the appellants' liability for material variations made without their consent to those made by the respondent and a successor of the Corporation.

28 The respondent also relies on Article 10.6 of the debenture, which provides:

> 10.6 Everything contained herein shall enure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of the Lender, and the Corporation.

29 This provision — which parenthetically uses the phrase "successors and assigns" again in reference to the lender — does not affect the appellants' liability. In my view, it does not assist the respondent.

30 I would allow the appeal, set aside the judgment below, and in its place grant judgment dismissing the action against the appellants Warner and Martin. Both appellants are entitled to their party-and-party costs of the motion, and the appellant Warner is entitled to his costs of this appeal. Finally, I wish to record my appreciation to counsel for a well-argued appeal.

Appeal allowed.

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

Court File No: CV15-10961-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

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