Court File No.: CV-17-11846-00CL

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 SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each an "**Applicant**", and collectively, the "**Applicants**")

BOOK OF AUTHORITIES
(For an order appointing a Litigation Trustee, returnable February 15, 2018)

February 14, 2018

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TAB 1

2018 NLCA 1
Newfoundland and Labrador Court of Appeal

Reference re Section 32 of the Pension Benefits Act, 1997, Re

2018 CarswellNfld 7, 2018 NLCA 1

IN THE MATTER OF Section 13 of Part I of the Judicature Act, RSNL 1990, c. J-4

IN THE MATTER OF Section 32 of the Pension Benefits Act, 1997, SNL 1996, c. P-4.01

IN THE MATTER OF a Reference of the Lieutenant-Governor in Council to the Court of Appeal, for its hearing, consideration andopinion on the interpretation of the scope of section 32 of the Pension Benefits Act, 1997

J.D. Green C.J.N.L., B.G. Welsh J.A., C.W. White J.A.

Heard: September 21, 2017; September 22, 2017
Judgment: January 15, 2018
Docket: 201701H0029

Counsel: Doug Mitchell, Edward Béchard-Torres, for Superintendent of Pensions of Newfoundland and Labrador
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No one for Morneau Shepell Ltd.
Stephen F. Penney, Joseph Thorne, for Ville Sept-Îles
Daniel Boudreault, for Syndicat des Métallos, locales 6254 and 6285

Subject: Constitutional; Corporate and Commercial; Employment

REFERENCE brought by Lieutenant-Governor in Council regarding interpretation of provisions of *Pension Benefits Act, 1997*.

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Per curiam:

1 The Lieutenant-Governor in Council for Newfoundland and Labrador referred questions regarding the interpretation of provisions of the *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01, to this Court pursuant to sections 13 and 14 of the *Judicature Act*, RSNL 1990, c. J-4. Following are the decision and opinion of the Court, including an analysis of submissions made by intervenors regarding the appropriate context within which the questions should be considered.

The Questions

2 By Orders-in-Council 2017-103 and 2017-137, the Lieutenant-Governor in Council for Newfoundland and Labrador referred the following questions to this Court (the "Questions"):

1. The Supreme Court of Canada has confirmed in *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.), that, subject only to the doctrine of paramountcy, provincial laws apply in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. What is the scope of section 32 of the *Pension Benefits Act, 1997*, SNL 1996, c. P-4.01 deemed trusts in respect of:

   a) unpaid current service costs;

   b) unpaid special payments; and

   c) unpaid wind-up deficits?

2. The Salaried Plan is registered in Newfoundland and Labrador and regulated by the *Pension Benefits Act*, *1997*.

   a)

      (i) Does the federal *Pension Benefits Standards Act*, RSC 1985, c. 32 deemed trust also apply to those members of the Salaried Plan who worked on the railway (i.e., a federal undertaking)?

      (ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and the *Pension Benefits Standards Act*? If so, how is the conflict resolved?

   b)

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(i) Does the Quebec *Supplemental Pension Plans Act*, CQLR, c. R-15.1 also apply to those members of the Salaried Plan who reported for work in Quebec?

(ii) If yes, is there a conflict with the *Pension Benefits Act, 1997* and the Quebec *Supplemental Pension Plans Act*? If so, how is the conflict resolved?

(iii) Do the Quebec *Supplemental Pension Plans Act* deemed trusts also apply to Quebec Salaried Plan members?

3. Is the *Pension Benefits Act, 1997* lien and charge in favour of the pension plan administrator in section 32(4) of the *Pension Benefits Act, 1997* a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

Context for the Questions

3 In December 2015, the Superintendent of Pensions of Newfoundland and Labrador terminated pension plans covering employees of Wabush Mines, a company operating in Labrador. The employer had discontinued operations and was the subject of proceedings in the Quebec courts under the *Companies*' *Creditors Arrangement Act* (the "Quebec Proceedings"). The Monitor in that action sought directions regarding priorities with respect to claims under the *Act*. A preliminary issue was raised as to whether the Quebec Superior Court "should request the aid" of the Newfoundland and Labrador courts regarding the "scope and priority of the deemed trust and other security" created by the Newfoundland and Labrador *Pension Benefits Act, 1997* (decision of the Quebec Court, 500-11-048114-157, January 30, 2017, at paragraph 2). The Court decided to proceed without referring any issues to the courts of this Province. On September 11, 2017, Hamilton J.S.C. issued his decision, concluding, among other things:

[218] . . .

f) Nothing in the [*Pension Benefits Act, 1997* of Newfoundland and Labrador] limits the assets covered by the deemed trust to assets located in the province of Newfoundland and Labrador;

g) The Court would not recognize or enforce the deemed trust under the [*Pension Benefits Act, 1997* of Newfoundland and Labrador] against assets located in the province of Québec.

[219] Finally, with respect to the orders sought by the Representative Employees in their Argumentation Outline, the Court adds that the Plans are governed by the [federal pension legislation] for the railway employees, by the [Québec pension legislation] for the

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> non-railway employees who reported for work in Québec, and by the [Newfoundland and Labrador pension legislation] for the non-railway employees who reported for work in NL.
>
> [220] At the outset, the Court said it would reserve the rights of the parties to ask the Court to revise the conclusions of the present judgment if: (1) the [Newfoundland and Labrador Court of Appeal] decides that the interpretation of the [*Pension Benefits Act, 1997*] is different from the interpretation that the Court assumed, and (2) that difference is material to the Court's conclusions.
>
> [221] However, based on its analysis and conclusions in the present judgment, the Court can now remove that reserve, because the interpretation of the [*Pension Benefits Act, 1997*] was not material to the Court's conclusions.

4 In concluding that the *Pension Benefits Act, 1997* was not material, Hamilton J.S.C. explained:

> [210] In light of all these circumstances, the Court concludes that it would frustrate the purpose of Parliament if the deemed trust under the [*Pension Benefits Act, 1997*] operated in the context of a CCAA proceeding. The doctrine of federal paramountcy therefore renders the deemed trust under the [*Pension Benefits Act, 1997*] inoperable.

5 In the meantime, in April 2017, proceedings were commenced to inscribe the Reference in which the Lieutenant-Governor in Council referred the Questions to this Court. Several of the parties and intervenors expressed concern that, in answering the Questions, the Court would interfere with the Quebec Proceedings. At the hearing, it became clear that references, if any, to the Wabush Mines' pension plans would be for the sole purpose of providing a context for considering the Questions insofar as an example may be helpful. The responses to the Questions would not determine rights as between the parties to the Quebec Proceedings except to the extent that the Court's interpretation of the legislation may subsequently be applied in those particular circumstances.

6 While a Reference may have its roots in litigation between parties, in fact, it is designed to provide the Lieutenant-Governor in Council with the Court's opinion regarding issues of concern to the government such as the validity of proposed legislation or the interpretation and effect of legislative language. For example, in *Reference re Workers' Compensation Act, 1983 (Newfoundland)* (1987), 67 Nfld. & P.E.I.R. 16 (Nfld. C.A.), the judge had expressed the view that two provisions of the legislation were of no force or effect. Since this was *obiter dictum*, which did not provide grounds for an appeal, the Lieutenant-Governor in Council referred the question of the validity of the legislation to the Court of Appeal. See also: *Reference re Upper Churchill Water Rights Reversion Act, 1980*, [1984] 1 S.C.R. 297 (S.C.C.),

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in which the Lieutenant-Governor in Council referred questions as to the constitutional validity of proposed legislation.

7 In summary, the response by the Court to the Questions comprises an advisory opinion, with reasons, designed to assist government and persons having an interest with an interpretation of the legislation at issue. As a result of the Reference, the rights of parties to litigation may be affected, but this is an incidental effect that may flow from application of the Court's response to the Questions.

Paramountcy of Federal Legislation

8 The Reference specifically exempts from consideration the question of whether the relevant provisions of the *Pension Benefits Act, 1997* are rendered inoperative, based on the doctrine of paramountcy, where the *Companies*' *Creditors Arrangement Act* applies.

The Legislation

9 Section 32 of the *Pension Benefits Act, 1997* provides for pension funds to be held in trust:

> (1) An employer or a participating employer in a multi-employer plan shall ensure, with respect to a pension plan, that
>
> (a) the money in the pension fund;
>
> (b) an amount equal to the aggregate of
>
> (i) the normal actuarial cost, and
>
> (ii) any special payments prescribed by the regulations, that have accrued to date; and
>
> (c) all
>
> (i) amounts deducted by the employer from the member's remuneration, and
>
> (ii) other amounts due under the plan from the employer that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own money, and shall be considered to hold the amounts referred to in paragraphs (a) to (c) in trust for members, former members, and other persons with an entitlement under the plan.
>
> (2) In the event of a liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that under subsection (1) is considered to be held in trust shall be

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considered to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own money or from the assets of the estate.

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

Section 32(4) provides for a lien and charge on the employer's assets:

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

10 Section 61 of the *Act* provides for payment into a pension fund upon termination of the plan:

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

(a) an amount equal to the aggregate of

(i) the normal actuarial cost, and

(ii) special payments prescribed by the regulations,

that have accrued to the date of termination; and

(b) all

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

(ii) other amounts due to the pension fund from the employer

that have not been remitted to the pension fund at the date of termination.

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

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Question One

11 What is the scope of the deemed trusts in section 32 of the *Pension Benefits Act, 1997* (the "Newfoundland legislation") in respect of:

(a) unpaid current service costs;

(b) unpaid special payments; and

(c) unpaid wind-up deficits?

Unpaid Current Service Costs and Unpaid Special Payments

12 In *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), Deschamps J., for the Court on the issue, concluded that, since 1983, the deemed trust set out in the Ontario legislation was intended to include current service costs and special payments. The legislation required an employer, upon terminating a pension plan, to pay to the administrator an amount equal to the current service cost and prescribed special payments that had accrued to the date of termination. (See also the concurring reasons of Cromwell J., at paragraphs 133 and 151.) The Newfoundland legislation has a similar effect.

13 Section 32(1) requires an employer to ensure that an amount equal to "the normal actuarial cost" and prescribed special payments "that have accrued to date" is kept separate from the employer's money. That amount is considered to be held in trust for pension beneficiaries. Section 32(3), which applies upon termination of a pension plan, requires an employer to hold in trust "an amount of money equal to employer contributions due under the plan to the date of termination". Read together with subsection (1), this language clearly includes unpaid current service costs and special payments such that those amounts, due to the date of termination, are deemed to be held in trust for pension beneficiaries.

Unpaid Wind-up Deficits

14 In *Sun Indalex*, Deschamps J., for the majority on the question of the wind-up deficiency, concluded:

> [45] In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find ... that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

15 In reaching this conclusion, Deschamps J. explained:

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> [34] ... The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.
>
> (Italics in original; underlining added.)

16 That conclusion follows from an interpretation of the language of the Ontario legislation which deems "an amount of money equal to employer contributions *accrued to the date of the wind up but not yet due* under the plan or regulations" to be held in trust for pension beneficiaries (*Sun Indalex*, at paragraph 26, underlining added). Rejecting a narrow definition of "accrued", Deschamps J. determined that "a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date" (*Sun Indalex*, at paragraph 36). That is, under the legislation, liabilities for payments to the pension plan:

> [36] ... are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. ...

17 The legislative language addressed in *Sun Indalex* is somewhat different from that used in the Newfoundland legislation. In contrast to "contributions accrued to the date of the wind up but not yet due under the plan or regulations", which is used in the Ontario legislation, the Newfoundland legislation refers to actuarial cost and special payments "accrued to the date of termination" together with "all other amounts due to the pension fund from the employer that have not been remitted to the pension fund at the date of termination" (section 61).

18 In analyzing the Newfoundland legislation, it is important to apply a purposive interpretation to the relevant provisions, which must be read together. Section 61 addresses the employer's responsibilities on termination of a pension plan. Subsection (1) requires the employer to "pay into the pension fund all amounts that would otherwise have been required to be paid to meet the requirements prescribed by the regulations for solvency". Section 11 of the *Pension Benefits Act Regulations*, NLR 114/96, addresses determination of a solvency deficiency:

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> In the preparation of an actuarial valuation report to determine the existence of a solvency deficiency, a solvency valuation shall be performed in the following manner:
>
> > (a) the solvency liabilities of a pension plan shall be determined on the basis that the plan is terminated or on a basis that is certified by an actuary to be reasonably approximate to that, taking into account any significant increases or decreases in pension benefits to the plan members as a result of the termination; ...

19 Payments that an employer is required or liable to make under section 61(1) must be made within thirty days of the date of termination of the pension plan (section 25 of the *Regulations*).

20 Pursuant to section 61(2) of the *Act*, upon termination, where "the assets in the pension fund are less than the value of the benefits provided under the plan", the employer is required to make payments, in addition to those under section 61(1), "that are necessary to fund the benefits provided under the plan". However, section 25.1(1) of the *Regulations* allows for payment over time:

> The amount required to be paid under subsection 61(2) of the Act shall be divided into equal payments that are calculated over a period of not more than 5 years commencing from the date of termination of the pension plan.

21 The fact that an employer may make payments required under section 61(2) over time does not lead to the conclusion that the amounts are not, in fact, "due to the pension fund" at the date of termination. As explained by Deschamps J. in *Sun Indalex*, liabilities for payments under the pension plan "are completely constituted at the time of the wind up, because no pension entitlements arise after that date" (paragraph 36). While the language used in the Ontario legislation is slightly different from that used in the Newfoundland legislation, the explanation set out by Deschamps J. would apply equally to both.

22 That interpretation is consistent with the legislative history of the Newfoundland legislation. Subsection (2) was added to section 61 by amendment in 2008 (SNL 2008, c. 16). The purpose of adding subsection (2) was explained by the Minister when the Bill was considered for second reading (Hansard, April 24, 2008, Vol. XLVI No. 16):

> Before I get into the aspects of the bill, one of the most important aspects of a person's life as they age is their benefit of having a pension that they would have when they retire to get older and enjoy life to the fullest once their work life is over. So, it is very, very important, as the minister responsible for my department, to make sure that we protect the employees in regard to that pension plan, in its fullest, all the way along until their

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> eventual retirement. That is what this amendment does, Mr. Speaker. It ensures the protection of pension plans for workers all over this Province.
>
> There is a need to improve this protection by amending the Pension Benefits Act, and to ensure — and what this amendment does is ensure that funding of deficits in pension plan windups is fully funded; because, if it is not fully funded thus it decreases the benefits to the employee. The benefits that they expected in the front end when they started paying into the pension plan would not be there at the end, once they retire.
>
> . . .
>
> If there is a solvency deficit, the pension plan sponsor is now required to fund that deficit over a five year period. That is what this amendment will do, thus certainly ensuring that the employee is certainly protected over the lifetime of the pension and certainly at the end.

23 In a similar vein, although in the context of the interplay between pension benefits and compensation for wrongful dismissal, in *Waterman v. IBM Canada Ltd.*, 2013 SCC 70, [2013] 3 S.C.R. 985 (S.C.C.), Cromwell J., for the majority, wrote:

> [85] Pension benefits have consistently been viewed as an entitlement earned by the employee. As Lord Reid put it in *Parry* [*v. Cleaver*, [1970] A.C. 1], at p. 16: "The products of the sums paid into the pension fund are in fact delayed remuneration for [the employee's] current work. That is why pensions are regarded as earned income." The pension is therefore a form of retirement savings earned over the years of employment to which the employee acquires specific and enforceable rights. ...

24 The net effect of section 61 gleaned from the language, history and purpose of the legislation is that, upon termination of a pension plan, the employer must pay all amounts that are due to the pension fund or that are necessary to fund the benefits provided under the plan.

25 Consistent with this purpose, section 32 of the *Act* imposes a trust on the monies required to be paid in respect of a pension plan. In the case of termination of a plan, section 32(3) requires the employer to hold in trust for the pension beneficiaries an amount equal to "employer contributions due under the plan to the date of termination". Those amounts are set out in section 61.

26 In the result, under section 32, all amounts due under the plan to the date of termination are covered by the deemed trust (sections 32(1)(c)(ii) and 32(3)). The amounts due as of that time are set out in section 61, which includes all amounts necessary to make the plan actuarially sound going forward. No entitlements under the pension plan arise after its

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termination, but the plan must have sufficient funds so that the value of the benefits provided under the plan may be satisfied. It follows that, upon the termination of a pension plan, any unpaid wind-up deficiency falls within the scope of the deemed trusts under section 32 of the *Act*.

27 Accordingly, the answer to Question One is: (a) unpaid current service costs, (b) unpaid special payments, and (c) unpaid wind-up deficits fall within the scope of the deemed trusts under section 32 of the *Act*.

Question Two

28 Consistent with the purpose of a Reference, Question Two, while stated in terms of the Wabush Mines situation, will not determine issues as between the parties to litigation (paragraph 7, above). With this in mind, the essential question raised by the Reference is one of jurisdiction, that is, whether the Newfoundland legislation would apply to: (1) employees who work on a federal undertaking such as a railway; and (2) employees who report for work in another province.

29 We begin with principles discussed in Hogg, *Constitutional Law of Canada*, fifth edition, supplemented (Toronto, ON: Thomson Reuters Canada, 2017), at 23.2, pages 23-8 and 23-9:

> The power to regulate corporate activity is distributed in accordance with the classes of subject listed in the Constitution, especially in ss. 91 and 92. Once a company has been incorporated, its activity will be subject to the legislation of whichever order of government has validly enacted laws in respect of that activity. In ascertaining the appropriate regulatory jurisdiction, as opposed to the appropriate incorporating jurisdiction, the territorial extent of the company's objects is not decisive. The mere fact that a company's activity extends beyond the limits of any one province will not by itself bring the activity within federal regulatory jurisdiction. If the activity wears an aspect within provincial legislative jurisdiction such as "property and civil rights" — and most business activity does — then each province will have the power to regulate that part of the company's activity which occurs within the province's borders. Conversely, if the activity wears an aspect which is within federal jurisdiction, then it will be under federal control even if it is local. Some examples may clarify the point. ... An interprovincial telephone company may be incorporated provincially, but its rates will be subject to federal regulation. A hotel may be owned and operated by a federally-incorporated company, but its labour relations will be subject to provincial regulation. The point is that the jurisdiction of incorporation has the power to confer on a company its legal personality, its organization, and its essential powers; but its business will be regulated by whichever jurisdiction possesses and exercises the power to regulate that kind of business.

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Employees Who Work on a Federal Undertaking, in Particular, a Railway

30 We reiterate that the purpose of a Reference is to interpret legislation, rather than to determine rights as between parties. To apply that principle here it is necessary to re-state the question, which refers specifically to the Wabush Mines situation in which employees worked on a railway. Restated, the question is whether the federal *Pension Benefits Standards Act*, RSC 1985, c. 32 (2nd Supp.) applies to employees of a company, operating in the Province, who work on a railway, and whether that legislation precludes the application of the Newfoundland legislation.

31 The scope of application of the federal *Pension Benefits Standards Act* is addressed in section 4, which provides, in relevant parts:

> (1) This Act applies in respect of pension plans.
>
> (2) In this Act, "pension plan" means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment ....
>
> . . .
>
> (4) In this Act, "included employment" means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,
>
>> . . .
>>
>> (b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;
>>
>> . . .
>>
>> (h) any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces;
>>
>> . . .

32 Where, on the facts of a particular situation, employees fall within the scope of application of section 4, the federal pensions legislation would apply. However, as explained

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by Hogg in *Constitutional Law of Canada*, the particular circumstances must be considered. For example, at 22.9, page 22-19:

> Legislative jurisdiction over transportation by land depends upon the principles explained in the previous sections of this chapter. Jurisdiction over trains, ... depends primarily on whether they are operated as part of an interprovincial (or international) undertaking, in which case jurisdiction is federal under s. 92(10)(a), or whether they are operated as part of an intraprovincial undertaking, in which case jurisdiction is provincial under s. 92(10). Some intraprovincial undertakings, including many local railways, have been brought under federal jurisdiction by exercise of the declaratory power under s. 92(10)(c).

33 Another consideration that may apply in particular circumstances relates to the extent to which a company's operations may involve more than one undertaking, and the extent to which the undertakings are operated separately or as part of the core business (Hogg, *Constitutional Law of Canada*, at 22.7, pages 22-10 to 22-15).

34 In addition, the extent to which the federal and provincial legislation may operate together, without conflict, may be relevant. The constitutional doctrines of interjurisdictional immunity and pith and substance are discussed in detail in *Constitutional Law of Canada*, at 15.8, pages 15-28 to 15-38.8. At page 15-38.5, Hogg refers to the decision in *Bell Canada c. Québec (Commission de la santé & de la sécurité du travail)*, [1988] 1 S.C.R. 749 (S.C.C.):

> In *Bell 1988*, Beetz J. made an effort to define the boundary between the pith and substance doctrine, on the one hand, and the interjurisdictional immunity doctrine, on the other. ...
>
> According to this formulation, provincial laws may validly extend to federal subjects unless the laws "bear upon those subjects in what makes them specifically of federal jurisdiction". The rule that emerged from this formulation was this: if the provincial law would affect the "basic, minimum and unassailable" core of the federal subject, then the interjurisdictional immunity doctrine stipulated that the provincial law must be restricted in its application (read down) to exclude the federal subject. If, on the other hand, the provincial law did not affect the core of the federal subject, then the pith and substance doctrine stipulated that the provincial law validly applied to the federal subject.
>
> ... However, in *Canadian Western Bank* [*v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3] the majority narrowed the doctrine by insisting that, if a provincial law merely affected (without having an adverse effect on) the core of a federal subject, then the doctrine did not apply. In that case, the pith and substance doctrine would prevail, enabling the

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provincial law to apply to the core of the federal subject. Only if the provincial law would "impair" the core of the federal subject, would interjurisdictional immunity apply. ...

35 Counsel for the intervenor, the representative beneficiaries of the Wabush salaried pension plan, submits that a statutory benefit in provincial legislation that provides a benefit in addition to benefits under the federal legislation would not constitute a conflict engaging the doctrine of interjurisdictional immunity. Accordingly, it is submitted, the additional benefit should be available to the employees.

36 The proposition that interjurisdictional immunity is not engaged does not lead to the conclusion that pension beneficiaries may gain additional benefits not included in the applicable legislation. The relevant principle in response to counsel's submission is not which of federal or provincial legislation takes precedence. Where the legislation enacted by both levels of government deals with precisely the same matter, such as in the case of pension legislation, the question of conflict does not arise since either one legislative scheme or the other must apply on the particular facts. That is, it is not open to the pension beneficiaries to choose the provisions from both statutes that would provide the greater benefit. Similarly, it would not be open to the pension beneficiaries to take the benefit of a provision in another statute, that did not otherwise apply, on the assumption that the benefit in question should have been included in the applicable legislation. The essential principle is that, in the circumstances, in respect of a particular class of workers, the employer would be bound to comply with one pension scheme, not with portions of two schemes.

37 In summary, the extent to which principles and doctrines such as the above may apply in a particular situation will depend on the facts at issue. For purposes of this Reference, it is not appropriate to conduct an analysis of the factual circumstances at play for the purpose of drawing conclusions regarding termination of the Wabush Mines pension plan.

Employees Who Report for Work in Another Province

38 The generally applicable principle is that "each province will have the power to regulate that part of the company's activity which occurs within the province's borders" (Hogg, *Constitutional Law of Canada*, paragraph 29, above). For this reason, in general, where a company has operations in more than one province, the employment-related laws of the province where the employees work would apply.

39 As set out above, it is not within the appropriate scope of this Reference to make determinations regarding termination of the Wabush Mines' pension plan. Whether issues such as the residence of a company's workers, as opposed to where the work is carried out, or the nature of a company's business which may involve work being done in another province, may affect the application of the general rule cannot be determined in this Reference. Such

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issues are essentially factual in nature and do not rely on an interpretation of the legislation that was placed before this Court. Nor were such issues argued in submissions to the Court.

40 In summary, it is not possible to answer Question Two as stated in the Reference. It is clear from the above principles that many factors may affect the answer to the issues posed. The use of the Wabush Mines scenario as a possible example provides insufficient information on which to test relevant principles. The jurisdictional questions, that is, whether the Newfoundland pension legislation would apply to employees who work on a federal undertaking such as a railway or to employees who report for work in another province, may be determined only by applying the relevant law to all the facts of a particular situation.

Question Three

41 Is the lien and charge provided for in section 32(4) of the *Act* a valid secured claim in favour of the plan administrator? If yes, what amounts does this secured claim encompass?

42 Section 32(4) of the *Act* provides:

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

43 At the hearing, the Court invited counsel to provide further written submissions on this question. In particular, the Court identified the following issues:

1. When does the lien and charge arise, and what triggers its operation?

2. What is the nature of the lien and charge?

3. How do the lien and charge operate in the context of termination of a pension plan?

4. How does the lien in section 32(4) compare to other statutory liens?

44 The amount which the lien and charge secures is determined by the operation of sections 61 and 32 of the *Act*, as discussed above. That is, with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan.

45 In determining the nature of the lien and charge, the legislation must be interpreted in a manner consistent with its purpose. As set out above, that purpose is to protect the benefits

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accrued to employees under a pension plan, recognizing that such benefits "have consistently been viewed as an entitlement earned by the employee" (paragraphs 22 and 23, above).

46 Additional interpretive assistance may be gleaned from other legislative schemes that impose a lien and charge on assets. To that end, in his supplementary factum, the Attorney General of Newfoundland refers by example to taxing statutes as well as workers' compensation and mechanics' lien legislation. We agree with his explanation:

> 24. Depending on the statute, a lien may attach at different times, in different ways, and have different priorities, yet the ultimate effect is essentially the same. Each statute serves to create a legislative scheme in which a lien is created to offer additional protection to a beneficiary, a service provider, or even the Crown.
>
> . . .

47 In the case of pensions, consistent with the purpose of the legislation, the lien and charge is a fixed charge which is engaged upon creation of the deemed trust under section 32. There is nothing in the language of the legislation that would make it only a floating charge, as was submitted in argument. Accordingly, the pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust but does not in fact hold.

48 Whenever a deemed trust arises pursuant to subsections (1) or (3) of section 32, the lien and charge attach to the assets held by the employer regardless of their nature or location, in amounts that would satisfy the trust obligations as they exist from time to time. The effect is to provide additional protection for pension beneficiaries. That is, the lien and charge against the employer's assets would operate to give effect to the deemed trusts should the trusts fail due to a lack of funds.

49 To impose a fixed lien and charge in this way is not inconsistent with appropriate business practice. The employer has an incentive to operate a solvent pension plan, maintaining the trust funds required to protect what has been earned by the employees. Further, the employer would not be encumbered from dealing with business assets since, where necessary, an estoppel certificate of compliance or, considering the nature and significance of the asset relative to any outstanding trust obligations, a waiver could be obtained from the pension administrator, which could be relied upon by any affected third party.

50 Finally, the effect of section 32(4) of the *Act* in relation to the operation of the *Companies' Creditors Arrangement Act* is not addressed because that question was not included in the Reference. In any event, such a question, and particularly the question of priorities under that *Act*, would require an analysis based on a specific factual scenario such as arises in litigation

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between parties, a matter outside the scope of the Reference. Accordingly, it is not necessary to deal with the submissions by counsel for the intervenor, the representative beneficiaries of the Wabush salaried pension plan, as to the reasons why the decision in *General Chemical Canada Ltd., Re*, 2007 ONCA 600 (Ont. C.A.), which held that an administrative lien and charge was ineffective in a bankruptcy situation, should not apply because this case involves different statutory definitional language under the *Companies' Creditors Arrangements Act*.

51 Accordingly, the answer to Question Three is: The lien and charge under section 32(4) of the *Act* create a valid secured claim in favour of the plan administrator. The lien and charge would be engaged upon the creation of a deemed trust under section 32 and would attach to the assets held by the employer regardless of their location. The pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust under section 32 from time to time, as set out in section 61. In particular with respect to a pension plan that is terminated, the amount to which the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan.

SUMMARY

52 The answers to the Questions posed in the Reference are:

(1) *Question One*: Unpaid current service costs, unpaid special payments, and unpaid wind-up deficits fall within the scope of the deemed trusts under section 32 of the *Act*.

(2) *Question Two*: It is not possible to answer Question Two as stated in the Reference. It is clear from the principles discussed above that many factors may affect the answer to the issues posed. The use of the Wabush Mines scenario as a possible example provides insufficient information on which to test relevant principles. The jurisdictional questions, that is, whether the Newfoundland pension legislation would apply to employees who work on a federal undertaking such as a railway or to employees who report for work in another province, may be determined only by applying the relevant law to all the facts of a particular situation.

(3) *Question Three*: The lien and charge under section 32(4) of the *Act* create a valid secured claim in favour of the plan administrator. The lien and charge would be engaged upon the creation of a deemed trust under section 32 and would attach to the assets held by the employer regardless of their location. The pension administrator has a lien and charge on the assets of the employer in an amount equal to the amount the employer is required to hold in trust under section 32 from time to time, as set out in section 61. In particular with respect to a pension plan that is terminated, the amount to which

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the lien and charge would apply is the total of the accrued normal actuarial costs and special payments and all other amounts due to the pension fund from the employer that have not been remitted at the date of termination, together with any other payments necessary to fund the benefits provided under the plan.

Ruling issued.

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TAB 2

2012 ONSC 7050
Ontario Superior Court of Justice [Commercial List]

Sino-Forest Corp., Re

2012 CarswellOnt 15913, 2012 ONSC 7050, 224 A.C.W.S. (3d) 21

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 Sino-Forest Corporation, Applicant

Morawetz J.

Heard: December 7, 2012
Judgment: December 12, 2012
Docket: CV-12-9667-00CL

Counsel: Robert W. Staley, Kevin Zych, Derek J. Bell, Jonathan Bell, for Sino-Forest Corporation
Derrick Tay, Jennifer Stam, Cliff Prophet, for Monitor, FTI Consulting Canada Inc.
Robert Chadwick, Brendan O'Neill, for Ad Hoc Committee of Noteholders
Kenneth Rosenberg, Kirk Baert, Max Starnino, A. Dimitri Lascaris, for Class Action Plaintiffs
Won J. Kim, James C. Orr, Michael C. Spencer, Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP, Comité Syndicale Nationale de Retraite Bâtirente Inc.
Peter Griffin, Peter Osborne, Shara Roy, for Ernst & Young Inc.
Peter Green, Ken Dekkar, for BDO Limited
Edward A. Sellers, Larry Lowenstein, for Board of Directors of Sino-Forest Corporation
John Pirie, David Gadsden, for Poyry (Beijing)
James Doris, for Plaintiff in New York Class Action
David Bish, for Underwriters
Simon Bieber, Erin Pleet, for David Horsley
James Grout, for Ontario Securities Commission
Emily Cole, Joseph Marin, for Allen Chan
Susan E. Freedman, Brandon Barnes, for Kai Kit Poon
Paul Emerson, for ACE/Chubb
Sam Sasso, for Travelers

Subject: Insolvency; Civil Practice and Procedure

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MOTION by debtor corporation for order sanctioning plan of compromise and reorganization.

***Morawetz J.*:**

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 (*Sino-Forest Corp., Re*, 2012 ONSC 7041 (Ont. S.C.J. [Commercial List])). 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 (Ont. S.C.J. [Commercial List])), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816 (Ont. C.A.)).

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;

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(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

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

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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, preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

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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 [2012 CarswellOnt 14701 (Ont. C.A.)], 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 *Sino-Forest Corp., Re* (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

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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.

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 [2012 CarswellOnt 9430 (Ont. S.C.J. [Commercial List])], 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 [2012 CarswellOnt 11239 (Ont. S.C.J. [Commercial List])], an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

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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;

(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.

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

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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;

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(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

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%

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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;

(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 *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), leave to appeal denied, 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 (S.C.C.) and *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750, 79 C.B.R. (5th) 307 (Ont. S.C.J.)).

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

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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 *Canadian Airlines Corp., Re*.

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., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Canadian Airlines Corp., Re*, and *Nortel Networks Corp., Re*, [2009] O.J. No. 2166 (Ont. S.C.J. [Commercial List]). 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.

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 Group Ltd., Re*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Canwest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

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

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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 Communications Corp., Re* and *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.). 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 *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]). 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.

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

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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 Corp.*, 2008 ONCA 587, 45 C.B.R. (5th) 163 (Ont. C.A.) 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*, *Nortel Networks Corp., Re*, 2010 ONSC 1708 (Ont. S.C.J. [Commercial List]), and *Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]). 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.

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77 I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

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.

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.

Motion granted.

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TAB 3

2015 ONSC 439
Ontario Superior Court of Justice

Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.

2015 CarswellOnt 621, 2015 ONSC 439, 124 O.R. (3d) 687, 248 A.C.W.S. (3d) 766

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, The Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong, Plaintiffs and Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (Formerly Known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC), Defendants

Perell J.

Heard: January 12, 2015
Judgment: January 20, 2015
Docket: CV-11-431153CP

Counsel: Jonathan Ptak, Garth Myers, A. Dimitri Lascaris, Kirk M. Baert, for Plaintiffs
Jonathan G. Bell, Amanda McLachlan, for Defendants, Sino- Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, and Peter Wang
Emily Cole, John Chapman, for Defendant, Allen T.Y. Chan
Brandon Barnes, for Defendant, Kai Kit Poon
Larry Lowenstein, Geoffrey Grove, for Defendants, William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West

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John Fabello, Rebecca Wise, for Defendants, Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC)
Kenneth A. Dekker, David Vaillancourt, for BDO Limited

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Restitution; Securities; Torts

MOTION by plaintiffs to certify action as class proceeding.

***Perell J.*:**

1. Introduction

1 This proposed securities class action was originally scheduled for a 10-day hearing.

2 Save for one contested issue that affects two motions, the parties have agreed to settle, to adjourn, or not to oppose, the five multifaceted-motions that were to comprise the 10-day hearing; namely: (1) a motion for leave to deliver a Second Fresh as Amended Statement of Claim to plead an additional cause of action based on United States law; (2) a motion for an Order certifying this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6; (3) a motion for leave under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (and, if necessary, the equivalent provisions of the securities legislation of the other provinces and territories of Canada) to assert a secondary market misrepresentation action; (4) a motion for an Order striking the affidavits of Michael Chepiga, Edward Greene, and Rose Lombardi filed by the Defendant underwriters to resist the certification motion; and (5) a motion brought by the Defendant Allen T.Y. Chan to strike the affidavit of Stephen Chandler delivered for the Plaintiffs.

3 The motion to amend the Statement of Claim is not opposed and is granted - subject to the rights of the Defendants, Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated (successor by merger to Banc of America Securities LLC) (the "Underwriters") to oppose the amendments.

4 Subject to the one contested issue, which I foreshadow to say I shall decide in the Plaintiffs' favour, the motion for leave under Part XXIII.1 of the Ontario *Securities Act* is

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unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not to be affected by this Order.)

5 Subject to the one contested issue, which, as already mentioned, I shall decide in the Plaintiffs' favour, the motion for certification is unopposed or on consent. For the reasons set out below, the motion is granted. (Once again, the Underwriters are not affected by this Order.)

6 The motion to strike the Chepiga, Greene, and Lombardi affidavits is adjourned.

7 The motion to strike Mr. Chandler's affidavit is withdrawn.

2. The Parties and the Claims

8 This proposed securities class action arises out of the cataclysmic collapse and subsequent bankruptcy of Sino-Forest Corporation ("Sino-Forest"). Investors lost billions of dollars. The action is brought on behalf of purchasers of Sino-Forest's securities (notes and shares) from March 19, 2007 to June 2, 2011 ("the proposed Class Period").

9 During the proposed Class Period, Sino-Forest raised $2.7 billion pursuant to seven public offerings of securities; visualize:

• ***Note Offerings***

(1) the July 2008 Note Offering pursuant to an Offering Memorandum dated July 17, 2008

(2) the June 2009 Note Offering to exchange Sino-Forests Guaranteed Senior Notes for new notes pursuant to an Exchange Offer Memorandum dated June 24, 2009

(3) the December 2009 Note Offering pursuant to a Final Offering Memorandum dated December 10, 2009

(4) the October 2010 Note Offering pursuant to a Final Offering Memorandum dated October 14, 2010

• ***Share Offerings***

(5) the June 2007 Share Offering pursuant to a Short Form Prospectus, dated June 5, 2007

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(6) the June 2009 Share Offering pursuant to a Final Short Form Prospectus, dated June 1, 2009

(7) the December 2009 Share Offering pursuant to a Final Short Form Prospectus, dated December 10, 2009.

10 The Plaintiffs allege that Sino-Forest made misrepresentations in its public disclosure in the following documents:

• 2006 - 2010 Annual Consolidated Financial Statements

• 2006 - 2010 Annual Information Forms ("AIFs")

• 2006 - 2010 Annual Management's Discussion and Analysis ("MD&A")

• Management Information Circulars: Management Information Circular dated April 27, 2007, April 28, 2008, April 28, 2009, May 4, 2010, and May 2, 2011

• Quarterly Financial Statements: Q1 2006, Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 Quarterly Financial Statements (collectively, the "Quarterly Financial Statements");

• Quarterly MD&A: Q1, Q2, Q3 2007, Q1, Q2, Q3 2008, Q1, Q2, Q3, 2009, Q1, Q2, Q3 2010 MD&A

• Prospectuses dated June 2007, June 2009, and December 2009

• Offering Memoranda dated July 2008, June 2009, December 2009, and October 2010.

11 The Plaintiffs are the Trustees of the Labourers' Pension Fund of Central and Eastern Canada (the "Labourers Fund"), the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario (the "OE Fund"), Sjunde Ap-Fonden ("AP7"), David Grant, and Robert Wong.

12 The Labourers Fund is a multi-employer pension plan. It currently has approximately $2 billion in assets, over 39,000 members and over 13,000 pensioners and beneficiaries and approximately 2,000 participating employers. The Labourers Fund purchased Sino-Forest's common shares over the Toronto Stock Exchange ("TSX") during the Class Period and continued to hold 128,700 shares at the end of the Class Period.

13 The OE Fund is a multi-employer pension plan. It has approximately $1.5 billion in assets, over 9,000 members and pensioners and beneficiaries. The OE Fund purchased Sino-

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Forest's common shares over the TSX during the Class Period and continued to hold 324,100 shares at the end of the Class Period.

14 AP7 is the Swedish National Pension Fund. As of June 30, 2011, it had approximately $15.3 billion in assets under management. Funds managed by AP7 purchased Sino-Forest's common shares over the TSX during the Class Period and continued to hold 139,398 common shares at the end of the Class Period.

15 Mr. Grant resides in Calgary, Alberta. He purchased 100 of Sino-Forest's 6.25% Guaranteed Senior Notes that were offered by the October 2010 Offering Memorandum and in the distribution to which that Offering Memorandum related. Mr. Grant continued to hold 100 Notes at the end of the Class Period.

16 Mr. Wong resides in Kincardine, Ontario. During the Class Period, he purchased Sino-Forest's common shares over the TSX and continued to hold some or all of such shares at the end of the Class Period. In addition, Mr. Wong purchased 30,000 Sino-Forest common shares offered by the December 2009 Prospectus and in the distribution to which that Prospectus related, and he continued to own 518,700 shares at the end of the Class Period, including the shares he purchased on the primary market.

17 The Plaintiffs seek leave to add Davis Selected Advisers, L.P. ("DSALP") and Davis New York Venture Fund, Inc. ("DNYVF") as representative plaintiffs. DSALP is an asset management firm, and DNYVF is a fund managed by DSALP. DSALP purchased Sino-Forest's common shares over the TSX during the Class Period and allocated these shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

18 DSALP purchased Sino-Forest's Notes pursuant to the July 2008 Offering Memorandum and in the distribution to which that Offering Memorandum related, and allocated these Notes to funds, including DNYVF, who continued to hold those Notes at the end of the Class Period. DSALP purchased Sino-Forest's common shares pursuant to the December 2009 Prospectus and in the distribution to which that Prospectus related, and allocated these common shares to funds managed by DSALP, including DNYVF, who continued to hold those common shares at the end of the Class Period.

19 Sino-Forest operated forest plantations in the People's Republic of China ("PRC" or "China"). Sino-Forest was incorporated in 1994 under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 in 2002. It was a "reporting issuer" in all provinces of Canada. Sino-Forest had shares outstanding that were listed for trading on various exchanges including the TSX. Sino-Forest also had various debt instruments, derivatives and other securities that are traded in the secondary market in Canada and elsewhere.

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20 Since the commencement of this action, the Plaintiffs have settled their claims against P• yry (Beijing) Consulting Company Limited, a forestry consulting firm, Ernst & Young LLP, Sino-Forest's auditors after 2007, and David Horsley, Sino-Forest's CFO.

21 Pending court approval, there is also a settlement recently reached with the Underwriters. Pending the approval of the settlement, the parties have consented to an adjournment of the certification and leave motions and also the Plaintiffs' motion to strike out affidavits about foreign law filed by the Underwriters.

22 The remaining Defendants are: BDO Limited, Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, and Garry J. West.

23 Mr. Chan and Mr. Poon were co-founders of Sino-Forest. Mr. Chan was Sino-Forest's Chairman, CEO, and a Director until his resignation in August 2011. Mr. Poon was Sino-Forest's President and a Director.

24 As Sino-Forest's CEO, Mr. Chan signed and certified Sino-Forest's disclosure documents during the Class Period. He signed and certified Sino-Forest's annual and quarterly MD&As and Financial Statements as well as the AIFs. He signed and certified the June 2007, June 2009, and December 2009 Prospectuses as constituting full, true, and plain disclosure of all material facts relating to the securities offered.

25 Messrs. Wang, Martin, Mak, Murray, Hyde, Ardell, Bowland, and West were Sino-Forest's Directors during the Class Period. Mr. Poon was a Director until May 2009. Mr. Ardell became a Director in January 2010. Mr. Bowland and Mr. West became Directors in February 2011. Mr. Hyde was the chairman of Sino-Forest's Audit Committee, and Messrs. Bowland, West, and Martin were members of the Audit Committee. Messrs. Martin and Hyde signed and certified the June 2007, June 2009, and December 2009 Prospectuses. Mr. Hyde, along with Mr. Chan, signed each of the 2007 - 2010 Annual Consolidated Financial Statements on behalf of all of the members of Sino-Forest's Board of Directors.

26 BDO Limited ("BDO"), formally known as BDO McCabe Lo Limited, was Sino-Forest's auditor from March 21, 2005 to August 12, 2007. It audited Sino-Forest's annual consolidated financial statements for 2005 and 2006.

27 On August 12, 2007, Ernst & Young LLP ("E&Y") replaced BDO as auditor.

3. The Catastrophic Collapse of Sino-Forest and the Claims against the Parties

28 After its establishment in 1994, Sino-Forest appeared to experience extraordinary growth. It reported profits from the first quarter of 2000 through to the fourth quarter of

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2010. As at year-end 2010, Sino-Forest reported approximately $5.7 billion in assets and annual revenue of approximately $2 billion. Immediately before its collapse in 2011, Sino-Forest enjoyed a market capitalization of approximately $4.5 billion.

29 However, on June 2, 2011, Muddy Waters LLC, a short seller, issued a research report alleging that Sino-Forest had: (a) falsely claimed to have acquired trees; (b) reported sales that had not been made or had been made in a manner that did not permit Sino-Forest to include those sales as revenue under Canadian Generally Accepted Accounting Principles ("GAAP"); and (c) failed to disclose numerous related-party transactions.

30 The Plaintiffs allege that Sino-Forest's purportedly strong financial performance and its ever growing assets and revenues were based on fraudulent transactions indicating plantation assets that did not exist or to which Sino-Forest did not have valid proof of ownership for public disclosure or financial reporting purposes. The Plaintiffs allege that Sino-Forest's financial statements violated GAAP.

31 The Plaintiffs also allege that in its public disclosure documents Sino-Forest: (a) misrepresented the extent of its assets, which were exceptionally overstated; (b) failed to disclose numerous and extensive related party transactions with and among its Authorized Intermediaries ("AIs") and suppliers; (c) failed to disclose that it had title to only 8% of its purported standing timber holdings; (d) massively overstated its cash flow from operating activities; and (e) failed to disclose the risks that its subsidiaries were engaging in unlicensed business activities in China (i.e., Sino-Forest never received any proceeds for its sale of timber through AIs) and Sino-Forest engaged in unlawful and potentially criminal payments to staff at Chinese forestry bureaus.

32 The Plaintiffs allege that the senior officers and directors of Sino-Forest breached their duties to ensure that the public statements of Sino-Forest were not false or misleading.

33 The Plaintiffs allege that BDO made two misrepresentations in the 2005 and 2006 Audit Reports: (1) that BDO audited Sino-Forest's financial statements in accordance with Generally Accepted Auditing Standards ("GAAS"), and (2) that Sino-Forest's financial statements presented fairly, in all material respects, Sino-Forest's financial position and the results of its operations and its cash flows.

34 BDO consented in writing to the inclusion of its 2005 and 2006 Audit Reports in: (a) the June 2007 Prospectus; (b) the December 2009 Prospectuses; (c) the July 2008 Offering Memorandum; (d) the June 2009 Offering Memorandum; and (e) the December 2009 Offering Memorandum. On each occasion, in consideration of new fees, BDO entered into a new engagement agreement with Sino-Forest that required BDO, among other things, to review Sino-Forest's interim financial statements, to review subsequent events up to the

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date of the filing of the Offering Memorandum, to communicate with Sino-Forest's legal counsel and management, and to participate in due diligence meetings with the Underwriters.

35 The Plaintiffs allege that BDO breached a duty of care to Class Members to perform proper audits of Sino-Forest.

36 The Plaintiffs allege that Class Members relied on the Defendants to their detriment in purchasing Sino-Forest's securities. In particular, the Plaintiffs allege that Class Members relied that: (a) Sino-Forest's financial statements were GAAP-compliant; and (b) BDO had conducted audits in compliance with GAAS. The Plaintiffs submit that the market, including the Class Members, would not have relied on Sino-Forest's financial reporting had BDO disclosed that Sino-Forest's financial statements were in fact unreliable.

4. The Aftermath of the Muddy Waters Research Report

37 The market immediately and brutally responded to the news of the Muddy Waters Research Report. Sino-Forest's shares dropped from $18.21 on June 1 to $5.23 on June 2, a decline of 71.3%.

38 BDO submits that the Muddy Waters Report was manipulative (self-interested), libelous, and contained false and unproven allegations about the mismanagement of the finances of Sino-Forest and about its financial position. BDO denies that its audit was deficient in any way. Other Defendants deny the truth of the allegations made by the Muddy Waters Report.

39 In any event, the Muddy Waters Report was taken seriously by Sino-Forest and by the marketplace. The Report had serious consequences. The Board of Sino-Forest struck an Independent Committee to investigate the allegations made by Muddy Waters. The initial members of the Committee were Messrs. Hyde, Ardell, and Bowland. On August 26, 2011, the Ontario Securities Commission (the "OSC") issued a cease-trade order in respect of Sino-Forest securities. The shares stopped trading.

40 On November 13, 2011, the Independent Committee released an interim report, revealing that: (a) there was a risk that certain of Sino-Forest's operations were in violation of Chinese law; (b) Sino-Forest lacked proof of title to the majority of its holdings of standing timber; (c) there was no verification that income tax and value added tax ("VAT") have been paid; (d) Sino-Forest's "transaction volumes with a number of AIs and Suppliers did not match the revenue reported by such Suppliers in their SAIC filing"; and (e) none of the British Virgin Island timber purchase contracts had as attachments either: (i) plantation rights certificates or (ii) villager resolutions, both of which are standard attachments to a timber purchase contract.

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41 On January 31, 2012, the Independent Committee released its final report which indicated that the Committee had been unable to find evidence to refute Muddy Waters' allegations.

42 On March 30, 2012, Sino-Forest filed for insolvency protection pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA").

43 In May 2012, Sino-Forest's common shares were delisted from the TSX and the OSC issued a Statement of Allegations against Sino-Forest and certain of its officers, alleging that they had engaged in deceitful and dishonest courses of conduct that resulted in the overstatement of Sino-Forest's assets and revenues.

44 On January 21, 2013, Sino-Forest's insolvency concluded with the implementation of Sino-Forest's Plan of Compromise and Reorganization. The shareholders received nothing. The noteholders experienced significant losses.

5. The Class Proceedings

45 This proposed class action was commenced on June 20, 2011.

(a) The Negligent Misrepresentation Claim

46 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for negligent misrepresentation.

47 The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.).

48 The Second Fresh as Amended Statement of Claim pleads:

> (a) Sino-Forest, the Individual Defendants, and BDO had a special relationship with members of the Class by virtue of their purported accounting, financial and managerial acumen and qualifications, and by virtue of having assumed the role of gatekeepers. These Defendants knew at all material times that the Impugned Documents were prepared for the purpose of attracting investment and inducing Class Members to purchase Sino-Forest securities.

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(b) Sino-Forest, the Individual Defendants, and BDO owed a duty of care to Class Members who purchased securities in the Share and Note Offerings and on the secondary market to exercise care and diligence to ensure that the Impugned Documents, including Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP;

(c) Sino-Forest and the Individual Defendants represented that the Impugned Documents, including the Prospectuses and Offering Memoranda and the documents incorporated therein, fairly and accurately disclosed Sino-Forest's financial condition and performance in accordance with GAAP which was untrue, inaccurate or misleading;

(d) BDO made the GAAP Representation in the 2005 and 2006 Audit Reports, which were incorporated into the June 2007, December 2009 Prospectuses, the July 2008, June 2009, and December 2009 Offering Memoranda, and Sino-Forest's Annual Financial Statements for 2005 and 2006;

(e) Sino-Forest, the Individual Defendants, and BDO acted negligently in making the GAAP Representation;

(f) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary and secondary markets during the Class Period reasonably relied, directly or indirectly, on the GAAP Representation; and

(g) The Labourers Fund, the OE Fund, AP7, Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary or secondary markets during the Class Period suffered damages as a result of relying on the GAAP Representation.

(b) The Negligence Claim in the Primary Market

49 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin for negligence in the primary market.

50 The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.).

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51 The theory of the claim is that Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, and Martin had a duty to prevent the securities from being sold before the misrepresentations in the offering documents were corrected.

52 The claim for negligence against BDO is limited to those Class Members who purchased Sino-Forest's shares and notes in the primary market pursuant to the June 2007 and December 2009 Prospectuses and the July 2008, June 2009 and December 2009 Offering Memoranda.

53 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO owed a duty of care to Class Members who purchased Sino-Forest securities in the primary market during the Class Period to ensure that the Prospectuses and Offering Memoranda made full, true, and plain disclosure of all material facts relating to the securities offered thereby. In the circumstances plead, it was reasonably foreseeable that Class Members would be damaged by the alleged misrepresentations, and there are no policy considerations that negate the prima facie duty.

(b) Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO breached the standard of care by failing to prevent the Note and Share Offerings from occurring prior to the correction of the misrepresentations in the offering documents or in the documents incorporated therein, and by failing to maintain or ensure that Sino-Forest had appropriate internal controls in place to ensure that its disclosure documents adequately and fairly presented its business and affairs on a timely basis.

(c) Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO's breach directly caused damages to Grant, Wong, DSALP and other Class Members who purchased Sino-Forest securities on the primary market during the Class Period when Sino-Forest's misrepresentations were revealed and the price of Sino-Forest's securities fell.

(d) The causal link between Sino-Forest's alleged negligence and the damage to the Class Members arises from the fact that had Sino-Forest Chan, Poon, Wang, Martin, Mak, Murray, Hyde, and BDO complied with the standard of care, the securities regulators would not have issued a receipt for any of the Prospectuses, and the Share and Note Offerings would not have occurred, or would have occurred at prices that reflected the true value of Sino-Forest's securities

(c) Unjust Enrichment in the Primary Market and the Secondary Market

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54 The Plaintiffs sue Sino-Forest for unjust enrichment in the primary market.

55 The Plaintiffs sue Messrs. Chan, Poon, Mak, Murray, and Martin for unjust enrichment in the secondary market.

56 The elements of a claim of unjust enrichment claim are: (1) the defendant being enriched; (2) a corresponding deprivation of the plaintiff; and, (3) no juristic reason for the defendant's enrichment at the expense of the plaintiff: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at para. 30.

57 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest was enriched by the difference between the amount for which the securities offered in the primary market were actually sold, and the amount for which such securities would have been sold had the offerings not included Sino-Forest's misrepresentation.

(b) Chan, Martin, Poon, Mak and Murray sold shares during the Class Period at prices that were inflated as a result of their wrongful acts and omissions during the Class Period, and were enriched thereby.

(c) primary and secondary market purchasers of the securities sold by Sino-Forest, Chan, Martin, Poon, Mak and Murray were correspondingly deprived.

(d) no juristic reason existed for the enrichment

(d) Negligent Misrepresentation under New York State Common Law

58 The Plaintiffs sue Sino-Forest and BDO for negligent misrepresentation under New York State law.

59 To state a claim for negligent misrepresentation under the common law of the State of New York, a plaintiff must allege: (1) a special relationship that creates a duty to exercise reasonable care toward the plaintiff; (2) the transmittal of false information; and (3) justifiable, detrimental reliance on the false information.

60 The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Offering Memoranda.

61 The Second Fresh as Amended Statement of Claim pleads:

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(a) Sino-Forest and BDO were in a special relationship with Grant, DSALP, and other Class Members who purchased notes in the primary market in the Class Period;

(b) the Offering Memoranda contained misstatements; and

(c) DSALP, Grant and Class Members who purchased notes in the primary market during the Class Period justifiably relied upon Sino-Forest's representation, and suffered losses.

(e) Section 12(a)(2) of the United States Securities Act of 1933

62 The Plaintiffs sue Sino-Forest and BDO for breach of s. 12(a)(2) of the United States *Securities Act of 1933.*

63 The claim against BDO is limited to those Class Members who purchased Sino-Forest's notes in the primary market pursuant to the July 2008, June 2009, and December 2009 Note Offerings.

64 To state a claim under s. 12(a)(2) of the *United States Securities Act of 1933*, a plaintiff must allege that the defendant: (1) sold or offered the sale of a security; (2) by the use of any means of communication in interstate commerce; (3) through a prospectus or oral communication that contained a material misstatement or omission; and (4) the plaintiff is entitled to rescission or damages.

65 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest sold notes pursuant to the Note Offerings;

(b) the Notes were sold pursuant to the Offering Memoranda;

(c) the Offering Memoranda contained misstatements made by Sino-Forest and BDO; and

(d) Grant, DSALP, and Class Members who purchased notes in the primary market are entitled to damages.

(f) Section 130 of Ontario Securities Act (Primary Market Claim)

66 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Wang, Mak, Murray, Hyde, and Martin for breach of s. 130 of Ontario's *Securities Act* and, if necessary, equivalent provincial legislation.

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67 Section 130 of the Ontario *Securities Act* provides purchasers of a security offered by prospectus during the period of distribution or during distribution to the public a remedy for a misrepresentation in the prospectus. The remedy is available against the issuer of the security as well as directors of the issuer and others who have signed the prospectus or have allowed their reports or statements to be used in the prospectus.

68 The claim against BDO is limited to those Class Members who purchased shares in the primary market pursuant to the December 2009 Share Offering.

69 The Second Fresh as Amended Statement of Claim pleads:

(a) The June 2009 and December 2009 Prospectuses and the documents incorporated therein contained the GAAP Representation and other misrepresentations, and that Wong, DSALP, and other Class Members purchased shares during the period of distribution or during distribution to the public of these Offerings.

(b) There were misrepresentations in BDO's 2005 and 2006 Audit Reports, that BDO consented to the inclusion of the 2005 and 2006 Audit Reports in the December 2009 Prospectus.

(c) Chan, Wang, Mak, Murray, and Hyde were Directors of Sino-Forest when the June 2009 and December 2009 Prospectuses were filed.

(g) Section 130.1 of Ontario Securities Act (Primary Market Claim)

70 The Plaintiffs sue Sino-Forest for breach of s. 130.1 of Ontario *Securities Act* and, if necessary, the equivalent securities legislation in other provinces.

71 The elements of a claim for statutory liability for misrepresentation in prospectus are: (a) the issuer's offering memorandum contains a misrepresentation; and (b) the purchaser purchased a security offered by the offering memorandum during the period of distribution.

72 The Second Fresh as Amended Statement of Claim pleads that Sino-Forest's July 2008, June 2009, December 2009, and October 2010 Offering Memoranda and the documents incorporated therein by reference contained the representation and other misrepresentations, and that Mr. Grant, DSALP, and other Class Members purchased notes during the period of distribution.

(h) Section 138.5 of the Ontario Securities Act (Secondary Market Claim)

73 Section 138.5 of the Ontario *Securities Act* provides purchasers of a security with a right of action for misrepresentations in ongoing public disclosure. If leave to make the claim

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is granted, subject to statutory defences, an issuer, such as Sino-Forest, and each Director of the issuer at the time the document was released, is liable under s.138.5 if there was a written misrepresentation. If leave to make the claim is granted, subject to statutory defences, an auditor such as BDO is liable under s. 138.5 where a misrepresentation was contained in the auditor's report, and the audit report is included, summarized or quoted in a document released by a responsible issuer, and the auditor consented to the use of its report.

74 The Plaintiffs sue Sino-Forest, BDO, and Messrs. Chan, Poon, Wang, Mak, Murray, Hyde, Ardell, Martin, Bowland and West for breach of s. 138.5 of the Ontario *Securities Act*.

75 In the Second Fresh as Amended Statement of Claim, the Plaintiffs plead in some considerable detail that there were misrepresentations in all of the impugned disclosure documents.

76 These claims require leave under the Ontario *Securities Act*.

(i) Conspiracy (Secondary Market Claim)

77 The Plaintiffs sue Sino-Forest and Messrs. Chan and Poon for conspiracy in the secondary market.

78 The elements of a claim of conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants either (a) use some means (lawful or unlawful) for the predominant purpose of injuring the plaintiff; or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and (4) the plaintiff suffers damages as a result of the defendants' conduct: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.); *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

79 The Plaintiffs allege that Sino-Forest and Messrs. Chan, and Poon conspired to inflate the price of Sino-Forest's securities by making misrepresentations, and to profit from such misrepresentations by issuing themselves stock options in respect of which the strike price was impermissibly low.

80 The Second Fresh as Amended Statement of Claim pleads:

(a) Sino-Forest, Chan, and Poon reached an agreement;

(b) the common predominant intention of the agreement was to inflate the price of Sino-Forest shares;

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(c) Sino-Forest, Chan, and Poon committed acts that were either unlawful (under the *Securities Act* and other statutes) and likely to cause injury to the class members, or had the predominant purpose of causing injury to the class members; and

(d) Sino-Forest, Chan, and Poon thereby cause damage to be suffered by the Class Members.

6. Certification

81 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

82 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

83 On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 16.

84 As I will discuss later in these Reasons for Decision there is a dispute about the certification of the claims of Class Members who are the former owners of Sino-Forest notes ("Former Noteholders"). For the immediate purposes of discussing the certification criteria, I will ignore this dispute about the claims of Former Noteholders who assigned their notes to others. I will return to the dispute with a more fulsome discussion below. I foreshadow to say that my conclusion is that this dispute does not alter my decision to certify the action as a class proceeding or to grant leave under the Ontario *Securities Act*.

7. Cause of Action Criterion

85 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*,

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supra, is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

86 Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.); *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).

87 On consent or because the cause of action criterion was unopposed, I conclude that the Plaintiffs have satisfied the cause of action criterion as follows:

(a) the claims and rights of action asserted on behalf of the Class against Sino-Forest are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory liability for misrepresentation in offering memoranda, breach of section 12(a)(2) of the *United States Securities Act of 1933*, negligent misrepresentation under New York State law, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the Ontario *Securities Act* ("OSA"), unjust enrichment, and conspiracy;

(b) the claims and rights of action asserted on behalf of the Class against BDO are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, negligent misrepresentation under New York State law, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(c) the claims and rights of action asserted on behalf of the Class against Allen T.Y. Chan are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;

(d) the claims and rights of action asserted on behalf of the Class against Kit Kai Poon are negligence, negligent misrepresentation, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, unjust enrichment, and conspiracy;

(e) the claims and rights of action asserted on behalf of the Class against Peter Wang and James M. E. Hyde are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

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(f) the claims and rights of action asserted on behalf of the Class against William E. Ardell, Gary J. West, and James P. Bowland are negligent misrepresentation, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA;

(g) the claims and rights of action asserted on behalf of the Class against Simon Murray and Edmund Mak are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, and statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment;

(h) the claims and rights of action asserted on behalf of the Class against W. Judson Martin are negligence, negligent misrepresentation, statutory liability for misrepresentation in a prospectus, statutory civil liability to secondary market purchasers for misrepresentation pursuant to Part XXIII.1 of the OSA, and unjust enrichment.

8. Leave under Part XXIII.1 of the Securities Act

88 Leave under Part XXIII.1 of the *Securities Act* must be granted if the Court is satisfied that: (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. See: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (Ont. C.A.) at para 90; leave to appeal granted [2014] S.C.C.A. No. 137 (S.C.C.); *Zaniewicz v. Zungui Haixi Corp.*, 2012 ONSC 6061 (Ont. S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 (Ont. S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Ont. S.C.J.).

89 On consent or because leave was not opposed, I conclude that leave should be granted to the Plaintiffs.

9. Identifiable Class Criterion

90 The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).

91 Subject to a concession made as a result of an observation made during the oral argument of the leave and certification motion with respect to the Plaintiffs' claim on behalf of noteholders, the Class is defined as:

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(i) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period on the Toronto Stock Exchange or other secondary market in Canada, which includes securities acquired over-the-counter, and all persons and entities who acquired Sino-Forest Corporation's Securities during the Class Period who are resident of Canada or were resident of Canada at the time of acquisition and who acquired Sino-Forest Corporation's Securities outside of Canada, except: those persons resident or domiciled in the Province of Quebec at the time they acquired Sino-Forest Corporation's Securities, and who are not precluded from participating in a class action by virtue of Article 999 of the *Quebec Code of Civil Procedure*, RSQ, c C-25, and except the Excluded Persons; and

(ii) all persons and entities, wherever they may reside, who acquired Sino-Forest Corporation's Securities during the Class Period by distribution in Canada in an Offering, or are resident of Canada or were resident of Canada at the time of acquisition and acquired Sino-Forest Corporation's Securities by offering outside of Canada, except the Excluded Persons.

92 During the oral argument, it was observed that a person who purchased a note during the Class Period and who sold the note during the Class Period was not affected by the alleged wrongdoings of Sino-Forest because they would not have suffered any consequent damages. The Plaintiffs conceded that subject to drafting appropriate language, the class definition should be amended accordingly.

93 Subject to this amendment with respect to noteholder claimants being made, on consent or because the identifiable class criterion was unopposed, I conclude that the Plaintiffs have satisfied the identifiable class criterion.

10. Common Issues Criterion

94 The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each Class Member's claim and its resolution must be necessary to the resolution of each Class Member's claim: *Hollick v. Metropolitan Toronto (Municipality)*, *supra* at para. 18. An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each Class Member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.

95 On consent or because the common issues criterion was not opposed, I conclude that the Plaintiffs have satisfied this criterion with respect to the following common issues:

Were There Misrepresentations?

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(1) Did the financial statements of Sino-Forest Corporation comply with Canadian GAAP?

(2) Did the Defendants make misrepresentations, including a failure to make timely disclosure, and if so, who made these representations, when, where and how?

Negligent Misrepresentation

(3) Did the Defendants owe a duty of care to the Class Members purchasing Sino-Forest? If so, what is the content of such duty, which Defendants owed such a duty and when?

(4) If the answer to (1) is no, did the Defendants negligently make misrepresentations that Sino-Forest's financial statements complied with GAAP (the "GAAP Misrepresentation")?

(5) If the answer to (4) is yes, did the Defendants make the GAAP Misrepresentation intending that the Class Members rely upon it and acquire Sino-Forest securities?

Statutory Liability -Secondary Market under the Securities Legislation

(6) If the answer to (2) is yes, do the misrepresentations give rise to liability under section 138.3 of the *Securities Act*, R.S.O. 1990, c. S.5, or the equivalent securities legislation in other provinces? If so, for which Defendants, for which misrepresentations for each Defendant and for what time period?

(7) If the answer to (6) is yes,

> i. Did each of the Individual Defendants who were not Directors at the time of the misrepresentations authorize, permit or acquiesce in the release of each of the documents containing such misrepresentations?
>
> ii. Did each of Sino-Forest, Chan, Poon, or BDO know of each of the misrepresentations at the time they were made? If not, were these Defendants wilfully blind to each of the misrepresentations at the time that they were made and does wilful blindness constitute knowledge for the purposes of subsection 138.7(2) of the *Securities Act* or the Equivalent securities legislation in other provinces?

(8) What are the damages payable by each Defendant found liable under section 138.3 of the

Securities Act or the equivalent securities legislation in other provinces? Statutory Liability -Primary Market under the Securities Legislation

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(9) If the answer to (2) regarding Sino-Forest's June 2009 or December 2009 prospectuses is yes, do the misrepresentations give rise to liability in favour of the Class Members who purchased shares in such prospectus offerings, pursuant to section 130 of the *Securities Act* or the equivalent securities legislation in other provinces? If so, for which defendants?

(10) What are the damages payable by each Defendant found liable under section 130 of the *Securities Act* or the equivalent securities legislation in other provinces?

(11) If the answer to (2) regarding Sino-Forest's July 2008, June 2009, December 2009 and October 2010 offering memoranda is yes, is Sino-Forest liable to Class Members who purchased notes in such offerings, pursuant to section 130.1 of the *Securities Act* or the equivalent securities legislation in other provinces?

(12) If the answer to (11) is yes, what are the damages payable by Sino-Forest?

Negligence for Primary Market Offerings

(13) Did Sino-Forest, Chan, Poon, Wang, Martin, Mak, Murray, Hyde, or BDO owe a duty of care to the Class Members purchasing Sino-Forest securities in an offering? If so, which Defendants owed such a duty, for which offerings and what is the content of such duty?

(14) If the answer to (13) is yes, did the Defendants owing such a duty breach that duty of care in connection with the offerings? If so, which Defendants breached their duty and how?

Unjust Enrichment: Chan, Poon, Martin and Murray: Secondary Market

(15) Are there are any members of the class who can be identified as having bought shares of Sino-Forest Corporation from any of Poon, Chan, Martin or Murray?

(16) In connection with amounts paid by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, were these defendants enriched by the price paid for those shares?

(17) Was there a corresponding deprivation by those class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin or Murray, as at the time that they disposed of or were deprived of their shares of Sino-Forest?

(18) Did each of Chan, Poon, Martin and Murray have continuous disclosure obligations and if so during what period(s) of time?

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(19) If the answer to (18) is yes, did Chan, Poon, Martin and Murray fail to meet their continuous disclosure obligations or fail to ensure that Sino-Forest met its continuous disclosure obligations under the securities legislation and regulation in Ontario and other provinces? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(20) If the answer to (19) is yes, are the class members who can be identified as having purchased Sino-Forest shares from Chan, Poon, Martin and Murray entitled to repayment as restitution of the amounts paid for such shares, to the extent that each was deprived of their shares or, as applicable, to the difference between such amounts paid by each of them and the lesser amounts received by each of them at the time that they disposed of their shares?

Unjust Enrichment: Sino-Forest: Primary Market

(21) In connection with amounts paid by the class members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period, was Sino-Forest enriched by the amounts it received in connection with its offerings, and was there a corresponding deprivation by the Class Members who purchased Sino-Forest securities in the Share or Note Offerings during the Class Period?

(22) Did Sino-Forest fail to meet its disclosure obligations under the securities legislation and regulation in Ontario and other provinces in connection with its offerings? If so, did such a failure deprive such defendants of a juristic reason for their resulting enrichment?

(23) If the answer to (22) is yes, are the class members who purchased Sino-Forest securities in the share and note offerings during the class period entitled to repayment as restitution of the amounts paid for such securities that Sino-Forest received or, alternatively, the difference between such amounts paid and the amount Sino-Forest would have been received had there not been a failure by Sino-Forest to meet its disclosure obligations?

Conspiracy

(24) Did Sino-Forest, Chan, and Poon, or some of them, conspire one with the other, or with persons unknown, for the purpose of inflating the price of Sino-Forest securities? If so, who conspired with whom, when, where, why and for what purpose?

Breach of Section 12(a)(2) of the United States Securities Act of 1933

(25) Did Sino-Forest sell or offer for sale a security by the use of any means of communication in interstate commerce through a prospectus?

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(26) If the answer to (25) is yes, did the prospectus contain a material misstatement or omission?

Negligent Misrepresentation under New York State Common Law

(27) Was there a special relationship between the Defendants and the Class that creates a duty to exercise reasonable care towards the Class?

(28) If the answer to (27) is yes, was the duty to exercise reasonable care breached and was false information transmitted?

(29) If the answer to (28) is yes, was the false information transmitted with the intention that the Class Members rely upon it and acquire Sino-Forest securities?

Inflation in Securities

(30) Did the price of Sino-Forest's securities incorporate and reflect any of the alleged misrepresentations made during the Class Period, and if so, what effect did any such misrepresentations have on the prices of Sino-Forest's securities during the Class Period?

Vicarious Liability

(31) Is Sino-Forest vicariously liable or otherwise responsible for the acts of the individual defendants and their other officers, directors and employees?

(32) Is BOO vicariously liable or otherwise responsible for the acts of their respective officers, directors, partners and employees?

Punitive Damages

(33) Should any of Sino-Forest, Chan, and Poon pay punitive damages? If so, which Defendant, in what amount and to whom?

Costs of Administration and Distribution

(34) Should the defendants pay the cost of administering and distributing recovery to the Class?

11. Preferable Procedure Criterion

96 On consent or because the preferable procedure criterion was not opposed, I conclude that the Plaintiffs have satisfied the preferable procedure criterion.

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12. Representative Plaintiff Criterion

97 The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

98 On consent or because the representative plaintiff criterion was unopposed, I conclude that the Plaintiffs have satisfied this criterion.

13. Miscellaneous Orders

99 I order that the form, manner and cost of notice and the time and manner of opting out shall be determined by further order of this Court.

14. The Dispute about the Claims of Current and Former Noteholders

100 The discussion can now turn to the one disputed issue that affects both the certification motion and also the leave motion. This is the dispute between Sino-Forest and the Plaintiffs about the claims of Former Noteholders. For reasons that will soon become apparent, I shall be circumspect in resolving this dispute, which I shall resolve as a matter of civil procedure rather than as a matter of substantive law.

101 To be frank, while I disagree with the Plaintiffs' argument that as a matter of jurisdiction the Court cannot resolve this dispute at this juncture, and while I agree with Sino-Forest's argument based on *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 15 that some substantive matters, such as standing and who are the parties to a claim, can be resolved at the certification motion, I think it would be prudent and preferable for the Court to decide the dispute about the Former Noteholders' claims — only after the certification motion.

102 If Sino-Forest's argument is substantively correct, about which I express no opinion, given that megamillions approaching billions of dollars of claims might be taken out of the class action, it is preferable that Sino-Forest, which has not yet delivered a statement of defence, first, be put to the pain of pleading a defence to the class action and, second, it should be required to either pose a substantive question for the common issues trial or bring a summary judgment motion for a dismissal of the Former Noteholders' Claims.

103 In my opinion, in the circumstances of the case at bar, the preferable approach to resolving the situation of the Former Noteholders is to postpone until after the certification motion a question that is, in truth, a determination of a matter of necessary, proper, or improper parties. I have four reasons for postponing a substantive decision.

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104 First, it appears to me that up to and including the oral argument of the certification and leave motions, the Plaintiffs have never understood the substantive law point being advanced by Sino-Forest, and, thus, Sino-Forest's argument and the Plaintiffs' counterargument are like legal battleships unknowingly passing each other on a foggy night. The opposing parties characterize or classify the legal problem differently, and, thus, they never come to terms about each other's arguments.

105 Second, given that, as will be seen, Sino-Forest's argument is not comprehensive of all of the Former Noteholders' claims, there is little to recommend deciding the substantive legal point now.

106 Third, were the point to be decided now, there would be the inevitable appeal, which would delay the advancement of the certified Class Action, which has numerous other claims against Sino-Forest. The dispute between the parties can conveniently be decided later.

107 Fourth, even if Sino-Forest's argument about the Former Noteholders is substantively correct, then, nevertheless, in all the circumstances, Sino-Forest is not prejudiced by having to be patient and waiting its vindication after the certification motion.

108 A circumspect synthesis of the factual and legal context for the disputed issue about the Former Noteholders' claims is that the Noteholder Class Members advance seven tort or statutory causes of action against Sino-Forest; namely: (1) negligent misrepresentation; (2) negligence; (3) unjust enrichment; (4) negligent misrepresentation under New York State common law; (5) breach of s. 12(a)(2) of the *United States Securities Act of 1933;* (6) breach of s. 130.1 of the Ontario *Securities Act;* and (7) breach of 138.5 of the Ontario *Securities Act*.

109 The Sino-Forest notes are expressly governed by New York law, and under New York law, with an exception for federal enactments (such as s. 12(a)(2) of the *United States Securities Act of 1933*), unless expressly reserved in writing, a transfer of any bond vests in the transferee (viz., not a Class Member) all claims or demands of the transferor (viz., the Class Member Former Noteholder) for damages against the obligor (viz., Sino-Forest).

110 From this legal and factual background, Sino-Forest argues that save for their claims under s. 12(a)(2) of the *United States Securities Act of 1933*, the Class Members that are Former Noteholders have assigned their claims, and the transferees (Former Noteholders) should not be included in the class and further, leave should not be granted under the Ontario *Securities Act*, because there is a no possibility, let alone a reasonable possibility, that the action will be resolved at trial in favour of the Former Noteholders who have legally assigned their claims and causes of action.

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111 To be somewhat more precise about the factual and legal background and using the July 2008 Note to illustrate Sino-Forest's argument, pursuant to s. 12.08(a) of the July 2008 Note, the note is governed by New York State law. Section 12.08(a) states:

> Each of the Notes, the Subsidiary Guarantees and the Indentures shall be governed by and construed in accordance with, the laws of the State of New York without giving effect to applicable principles of conflicts of law to the extent that the application of the law of another jurisdiction would be required thereby.

Pursuant to sections 2.06, 2.12, 2.13, and the transfer certificate of the July 2008 Note, the transfer and sale of the notes from original holders to subsequent noteholders is also governed by New York law.

112 The provisions of the June 2009 Note, the December 2009 Note, and the October 2010 Note are similar and state that those notes are also governed by New York State law.

113 Without having delivered a Statement of Defence, Sino-Forest delivered an affidavit from Gregory P. Joseph, as an expert on New York law.

114 In his report dated October 7, 2013, Mr. Joseph explained that under New York law, all claims and causes of action, other than the claims under s. 12(a)(2) of the *Federal Securities Act of 1933*, whether asserted under New York State law or Canadian law, by former noteholders who transferred or sold their notes before the end of the class period are automatically assigned by operation of New York General Obligations Law ("GOL") § 13-107 to the subsequent purchaser of the notes. Therefore, Mr. Joseph opined that under New York law, the former noteholders are not entitled to pursue an assigned cause of action against Sino-Forest, other than the claims advanced under s. 12(a)(2) of the *Federal Securities Act of 1933*.

115 GOL § 13-107, states:

> 1. Unless expressly reserved in writing, a transfer of any bond shall vest in the transferee all claims or demands of the transferrer, whether or not such claims or demands are known to exist, (a) for damages or rescission against the obligor on such bond, (b) for damages against the trustee or depository under any indenture under which such bond was issued or outstanding, and (c) for damages against any guarantor of the obligation of such obligor, trustee or depository.
>
> 2. As used in this section, "bond" shall mean and include any and all shares and interests in an issue of bonds, notes, debentures or other evidences of indebtedness of individuals, partnerships, associations or corporations, whether or not secured.

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3. As used in this section, "indenture" means any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement (including any supplement or amendment to any of the foregoing), under which bonds as herein defined are issued or outstanding whether or not any property, real or personal, is, or is to be, pledged, mortgaged, assigned or conveyed thereunder.

116 In *Bluebird Partners v. First Fid. Bank*, 97 N.Y.2d 456 (U.S. N.Y. Ct. App. 2002), at pp. 460 -462, the New York Court stated that the wording of GOL § 13-107 makes it clear that the buyer of a bond receives exactly the same claims or demands as the seller held before the transfer. See also: *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F.Supp.2d 162 (U.S. Dist. Ct. S.D. N.Y. 2011), at pp. 181 -82; *LNC Investments, Inc. v. First Fidelity Bank*, 173 F.3d 454 (U.S. C.A. 2nd Cir. 1999), 462.

117 Sino-Forest thus seeks an Order denying certification of all claims advanced by Former Noteholders against them other than the claim advanced pursuant to the *Federal Securities Act of 1933*, on behalf of the Former Noteholders.

118 In a counterargument, which in my opinion is not responsive to Sino-Forest's argument, the Plaintiffs submit that there is no standing or proper-parties issue and that Sino-Forest is improperly and prematurely attempting to have the substantive defence of what law governs the tort claims of some of the noteholders determined on a certification motion when that issue must be determined on a full evidentiary record after pleadings or upon a motion for summary judgment or at the common issues trial.

119 As noted above, I disagree with the Plaintiffs' argument that the Court cannot decide the merits of Sino-Forest's argument at this juncture, but, in my opinion, while the Court could decide the substantive issue, it is procedurally preferable that the decision come later.

120 As a matter of substance, the Plaintiffs submit that the tort claims of Former Noteholders are not governed by a choice of law clause because under Canadian law contractual choice of law clauses do not govern the substantive law applicable to claims in tort claims are governed by the *lex loci delicti*, the substantive law of where the tort occurred.

121 As a matter of substance, although the Plaintiffs' position is that the matters discussed by Mr. Joseph ought not properly to be determined at this juncture of the proceedings, out of an abundance of caution, they retained Adam C. Prichard as their expert in New York State law. Mr. Prichard's opinion was similar to Mr. Joseph's, but Mr. Prichard explained that GOL § 13-107 does not preclude claims against others and was limited in its application to Sino-Forest.

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122 However, more to the substantive point, the Plaintiffs submit that for the present purposes of the certification and leave motions, the opinions of Messrs. Joseph and Prichard beg the critical question of whether or not the Ontario Court should apply New York law to the Former Noteholders' tort claims.

123 Mr. Joseph, who was cross-examined, conceded that he was not retained as an expert on conflict of laws issues and that he was not opining on conflict of laws issues. Further, he conceded that he is not qualified to opine on conflict of laws issues under the law of Ontario; and that he cannot opine on whether under Canadian law, there has been any assignment of rights under the notes. Mr. Joseph did not provide an opinion as to whether or not this Court would apply New York or Ontario law to the tort claims of Class Members.

124 Once again, I shall express no opinion about the merits of the Plaintiffs' argument. I simply note again my opinion that the Plaintiffs' argument is not substantively responsive to Sino-Forest's actual argument, which is not about what jurisdiction's law governs tort claims but is about the law about the assignment of causes of action, be those causes of action in contract, in debt, in tort, in restitution, or in statute. Sino-Forest is, in truth, quite content to have the *lex loci delicti* govern the tort claims of the Former Noteholders; Sino-Forest's point is that with an exception for s. 12(a)(2) of the *United States Securities Act of* 1933), the tort claims are vested in persons who are not Class Members.

125 In any event, for the reasons discussed above, it is prudent and preferable and procedurally fair to decide the substantive merits of the competing arguments about all the Former Noteholders' claims after Sino-Forest has pleaded its defence.

15. Conclusion

126 Orders accordingly.

127 I order that that the costs of these motions shall be determined by further Order of this Court.

Motion granted.

End of Document

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TAB 4

2016 ONSC 3226
Ontario Superior Court of Justice (Divisional Court)

SFC Litigation Trust (Trustee of) v. Chan

2016 CarswellOnt 8246, 2016 ONSC 3226, 266 A.C.W.S. (3d) 956, 37 C.B.R. (6th) 58

Cosimo Borelli, in his capacity as trustee of the SFC Litigation Trust, Plaintiff and Allen Tak Yuen Chan, Defendant

L.A. Pattillo J.

Judgment: May 25, 2016
Docket: 59/16

Counsel: Robert Staley, Derek J. Bell, Jonathan Bell, for Plaintiff
Robert Rueter, Sara J. Erskine, Malik Martin, for Defendant

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by defendant for leave to appeal order dismissing his motion to vary, set aside, or discharge worldwide ex parte Mareva injunction; dismissing his motion for fortification of trustee's undertaking as to damages; and dismissing his motion for security for costs of action.

***L.A. Pattillo J.*:**

Introduction

1 The defendant, Allen Tak Yuen Chan ("Chan"), seeks leave to appeal from the order of Hainey J. (the "Motion Judge") dated January 21, 2016 (the "Order"). The Order dismissed Chan's motion to vary, set aside, or discharge the worldwide Mareva injunction granted *ex parte* by the Motion Judge on August 28, 2014; dismissed Chan's motion for fortification of the plaintiff's undertaking as to damages, accepting in its place the undertaking of Emerald Plantation Holdings Limited ("Emerald Plantation"), a non-party to the action, to provide an undertaking as to damages; and dismissed Chan's motion for security for costs of the action.

Background

2 The plaintiff is Cosimo Borelli, in his capacity as trustee (the "Trustee") of the SFC Litigation Trust (the "SFC Litigation Trust").

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3 The Order arises in the aftermath and as a result of the dramatic rise and fall of Sino-Forrest Corporation ("SFC"), an integrated forest plantation operator and forest products company with assets stated to be primarily in the People's Republic of China. SFC is a CBCA corporation. At all relevant times its head office was in Mississauga, Ontario and its executive office was in Hong Kong. Chan, who is a resident of Hong Kong, was the Chairman and Chief Executive Officer of SFC from August 3, 2001 to August 28, 2011.

4 Between 2005 and December 31, 2010, SFC experienced remarkable growth. It raised in excess of $2.1 billion and $800 million in Canada's debt and capital markets. As of December 31, 2010, it had a market capitalization of $5.723 billion. In June 2011, serious allegations were made of fraud, corruption and illegal activity at SFC. Although the Board of SFC instituted an investigation, they were unable to obtain adequate and/or verifiable plausible explanations for many of the issues raised.

5 In March 2012, SFC filed for protection in Ontario under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). On December 10, 2012, the Superior Court of Justice (Commercial List) sanctioned a Plan of Compromise and Reorganization dated December 3, 2012 (the "CCAA Plan") which provided, among other things, that all of SFC's assets were transferred to Emerald Plantation. Further, the Plan contemplated the creation of the SFC Litigation Trust and the transfer of all Litigation Trust Claims, which included any cause of action that may be asserted by SFC against third parties, to the SFC Litigation Trust.

6 The SFC Litigation Trust was formed pursuant to a Litigation Trust Agreement dated January 30, 2013 and the Trustee was appointed the same day.

7 On January 31, 2013, Emerald Plantation assumed the SFC Group's assets and business operations.

8 Subsequent to the implementation of the CCAA Plan, SFC's creditors have determined that the reported assets of SFC and its affiliates simply did not exist resulting in net assets being written down by 89% or almost $3 billion.

9 This action was commenced by notice of action dated March 31, 2014. The statement of claim is dated April 30, 2014.

10 On August 28, 2014, the Trustee brought an *ex parte* motion for a world-wide Mareva injunction against Chan. In support of the motion the Trustee filed a four-volume motion record.

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11 In the Mareva motion, the Trustee alleged that Chan and certain other members of the senior management of SFC under Chan's direction were responsible for SFC's demise. In particular the affidavit of the Trustee, filed in support of the Mareva injunction, stated that Chan and some of the senior management of SFC acting on his instructions:

1) had operational and de facto control over a number of allegedly arm's length purchasers of SFC's timber known as "authorized intermediaries" and the suppliers of that timber, which control had not been disclosed to SFC, its auditors or directors;

2) caused SFC to significantly overpay for assets sold by companies secretly controlled by Chan;

3) withheld and/or hid information from SFC's auditors;

4) prepared, certified and/or published false or materially misleading financial statements (including interim financial statements) and public disclosure documents of SFC;

5) concealed their unlawful activities from SFC through the use of personal (non-company) emails;

6) entered into a number of transactions that were suspicious/or outright fraudulent; and

7) caused monies to be paid out by SFC and/or the subsidiaries for no meaningful commercial purpose.

12 In granting the *ex parte* world-wide Mareva injunction against Chan, the Motion Judge found:

a) Based on a review of the evidentiary record, there was a very strong *prima facie* case of fraud on the part of Chan;

b) The circumstances of the case and the nature of the alleged fraud carried on by Chan raised a very strong inference that he will dissipate his assets to put them out of reach of his creditors and the Trustee;

c) The Trustee will be irreparably harmed if Chan's assets are not available to satisfy any judgment obtained against him;

d) The balance of convenience clearly favours the granting of a worldwide Mareva injunction; and

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e) There is good reason to believe that Mr. Chan has considerable assets outside Canada, which he may dissipate.

13 Subsequently, Chan brought the motion to set aside, vary or dismiss the Mareva injunction and to require the Trustee to provide a proper undertaking for damages, to post security for the undertaking and to pay into court security for costs of the proceedings. In support of the motion, Chan and others filed affidavits. In addition to the initial motion record, the Trustee filed additional materials further particularizing what he alleged was the fraud Chan perpetrated on SFC. In total, the motion record comprised 11 volumes containing nearly 6,000 pages of evidence as well as transcripts from the cross-examinations of five witnesses taken over eight days in Hong Kong. The hearing of the motion took three full days.

14 In dismissing Chan's motion, the Motion Judge held that a worldwide Mareva injunction may be granted by an Ontario court whether or not a defendant has assets within the jurisdiction on the strength of the court's *in personam* jurisdiction. He further held that the Trustee had made full and frank disclosure in respect of five issues raised by Chan. He rejected Chan's responding evidence as not being credible and confirmed that the record establishes a strong *prima facie* case of fraud. He further found, based on the evidence, that there was a real risk that Chan would conceal or dissipate his assets if a Mareva injunction was not granted. In addition to requiring an undertaking as to damages from the Trustee, the Motion Judge also required Emerald Plantation to provide an undertaking as to damages and, dismissed Chan's motion for security for costs.

Test for Leave to Appeal

15 The test for granting leave to appeal under rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

16 Under rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) *and* that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted." A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Ont. Div. Ct.).

17 Under rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question *and* that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge

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granting leave be satisfied that the decision in question was actually wrong — that aspect of the test is satisfied if the judge granting leave finds that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (Ont. S.C.J.); *Ash v. Corp. of Lloyd's* (1992), 8 O.R. (3d) 282 (Ont. Gen. Div.). In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 (Ont. H.C.); *Greslik v. Ontario (Legal Aid Plan)* (1988), 65 O.R. (2d) 110 (Ont. Div. Ct.).

Analysis

18 Chan submits that in dismissing his motion to set aside, or discharge the worldwide Mareva injunction granted *against* him, the Motion Judge made a number of errors, including:

1. Failing to apply the correct test for a Mareva order as set out in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.);

2. Failing to find that the Trustee had not made full, true and plain disclosure of all material facts;

3. Holding that the Trustee had established prima facie evidence of fraud and failing to provide adequate reasons for that finding;

4. Holding that the Trustee had established that there was a very strong inference that Chan would dissipate his assets;

5. In the application of the legal principles concerning the required undertaking for damages and Chan's motion for security for costs.

19 In my view, leave ought not to be granted in respect of the issues set out in subparagraphs 2, 3, and 4 above. The Motion Judge's decision in respect of those issues was based on the extensive evidentiary record before him. As the issues are primarily fact driven, there are no conflicting cases.

20 Further, and based on the reasons for decision of the Motion Judge, there is no reason, in my view, to doubt the correctness of the Motion Judge's decision in respect of those issues. He correctly set out the principles in respect of the duty of full and frank disclosure and then specifically addressed Chan's five allegations of non-disclosure of material facts and dismissed each one. Further, Chan's submissions that the Trustee had not established a strong prima facie case of fraud were based on Chan's evidence which the Motion Judge rejected as

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not being credible in the face of other evidence which he accepted. In the absence of Chan's evidence, there was extensive evidence in the record to support the Motion Judge's conclusion that there was "a very strong *prima facie* case of fraud", both in respect of SFC's grossly inflated financial position and secret profits made through nominee companies. Nor do I consider that the Motion Judge's reasons were insufficient. They addressed the main issues raised by Chan and the conclusions were discernable. There is no requirement to address each and every point raised.

21 With respect to the allegation the Motion Judge erred in holding the Trustee had established a very strong inference that Chan will dissipate his assets in the absence of the Order, again, there was evidence in the record of Chan's behaviour after he left SFC which could support such inference.

22 I take a different view, however, both in respect of the test for a Mareva injunction applied by the Motion Judge and the sufficiency of the undertaking as to damages he required.

The Test for a Mareva Injunction

23 The jurisdiction of Ontario Courts to grant Mareva injunctions was confirmed by the Court of Appeal in *Chitel v. Rothbart*. The court referred to and adopted Lord Denning's "guidelines" for granting Mareva injunctions set out in *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645 (Eng. C.A.). They are:

i. The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

ii. The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

iii. The plaintiff should give some grounds for believing that the defendants have assets in the jurisdiction.

iv. The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.

v. The plaintiff must give an undertaking as to damages.

24 The Trustee's motion material indicated that Chan was a resident of Hong Kong and, as far as the Trustee was aware, did not have assets in Ontario. It went on to say that in light of the legal issues facing him in Ontario, Chan had no intention of returning to Ontario.

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25 In his brief endorsement granting the Trustee's *ex parte* motion, the Motion Judge stated the test for a Mareva injunction was: a strong *prima facie* case of fraud; a real and genuine risk that the defendant will put his assets beyond his creditors for the purpose of avoiding judgment; the moving party will suffer irreparable hardship; and the balance of convenience favours the moving party.

26 On the motion to set aside or vary the Mareva injunction, Chan argued that the Trustee had misled the Motion Judge as to the proper test for a Mareva injunction and in the absence of any grounds for believing that he had assets in Ontario, the Mareva injunction should be set aside. In rejecting Chan's submissions, the Motion Judge first noted that the Trustee had provided the proper test as set out in *Chitel v. Rothbart* and that he accepted the Trustee's submission that the court had the jurisdiction to grant a worldwide Mareva even where the defendant had no assets in the jurisdiction.

27 The Motion Judge held that a worldwide Mareva injunction may be granted by an Ontario court whether or not a defendant has assets within the jurisdiction on the strength of the court's *in personam* jurisdiction over the defendant. In reaching that decision, the Motion Judge relied on two British Columbia Supreme Court decisions, *Mooney v. Orr*, [1994] B.C.J. No. 2322 (B.C. S.C. [In Chambers]) and *Cussons v. Slobbe*, [1996] B.C.J. No. 3028 (B.C. S.C.), as well as an excerpt from the text *Injunctions and Specific Performance*, by Justice Robert Sharpe noting that the strict rule requiring assets in the jurisdiction has now been abandoned in England and that "orders of this kind have also been made by Canadian courts."

28 Although the five factors required to obtain a Mareva injunction set out in *Chitel v. Rothbart* were referred to in that decision as "guidelines" it is clear from subsequent cases in Ontario that those factors are considered the test that must be met to obtain a Mareva injunction. See for example: *Stans Energy Corp. v. Kyrgyz Republic*, 2014 ONSC 6195 (Ont. S.C.J. [Commercial List]) at para.22; *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.) at para. 11; *Luong (Litigation guardian of) v. Trinh*, 2014 ONSC 693 (Ont. S.C.J.) at para. 13. To the extent, therefore, that the Motion Judge effectively held that it was not necessary for the Trustee to establish some grounds for believing Chan has assets in Ontario, his decision conflicts with *Chitel v. Rothbart*.

29 In *Chitel v. Rothbart*, the court, agreed at para. 43 that the original purpose and point of a Mareva injunction was that the plaintiff proceeded by stealth so as to pre-empt any action by the defendant to remove his assets from the jurisdiction. Whether the court should expand its jurisdiction to issue a world-wide Mareva injunction where the defendant is a non-resident and has no assets in Ontario is an important question which should be considered by a higher court. It is therefore desirable that leave to appeal be granted in respect of that issue.

Sufficiency of the Undertaking as to Damages and Security for Costs

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30 In the original motion material, the Trustee deposed that he was prepared to provide an undertaking on behalf of the SFC Litigation Trust, "if it is required." In his brief endorsement on August 28, 2014, the Motion Judge stated that the Trustee had given an undertaking as to damages. In his reasons dismissing Chan's motion, the Motion Judge stated at para. 64:

> 64 When I granted the Mareva injunction I expected Mr. Borelli to provide his personal undertaking as to damages. I am of the view that he must do so. In addition, since it is not clear on the evidence before me that Mr. Borelli has sufficient assets within the jurisdiction to satisfy Chan's potential damages arising from the Mareva injunction, Emerald Plantation must also provide an undertaking as to damages as suggested by the plaintiff in para. 223 of its factum. The undertaking as to damages to be provided by Emerald Plantation should be on essentially the same terms as the draft undertaking as to damages attached as Appendix D to the plaintiff's factum.

31 An undertaking as to damages is an essential element of an injunction. This is particularly so in respect of a Mareva injunction given the severe consequences of such an order. In addition, it is important that the undertaking be one of substance. An undertaking with no substance is essentially meaningless.

32 Chan submits that the Motion Judge erred in permitting the Trustee initially to fail or refuse to provide his personal undertaking as to damages for a year after the *ex parte* Mareva was granted and then to give an undertaking that is supported only by an indemnification and undertaking from Emerald Plantation which is a non-resident corporation, has no assets in the jurisdiction and is not a party to the proceedings.

33 In my view, based on the evidence or lack thereof before the Motion Judge, there is reason to doubt the correctness of the Motion Judge's Order in regards to the sufficiency of the undertaking that he required. It is not clear from evidence whether the Trustee or the SFC Litigation Trust has assets in the jurisdiction. While Emerald Plantation holds what remains of SFC's assets, it has no assets in the jurisdiction and there is uncertainty as to what may happen to those assets given Emerald Plantation's mandate. Further, Emerald Plantation is not a party to the litigation.

34 In addition, I consider that the issue of sufficiency of the undertaking required for a Mareva injunction to be a matter of importance that goes beyond the interests of the parties.

35 In dismissing Chan's motion for security for costs, the Motion Judge acknowledged that Chan was entitled to be protected in respect of the costs of the proceeding but held that Emerald Plantation's undertaking as to damages was sufficient to protect Chan in that regard. Because I have concerns about the sufficiency of that undertaking, I consider that

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there is also reason to doubt the correctness of that portion of the Order dealing with security for costs.

Conclusion

36 Leave to appeal from the Order of the Motion Judge is therefore granted in respect of the following questions only:

> 1) Did the Motion Judge err in law in holding that an Ontario court may grant a Mareva injunction where the defendant has no assets in the jurisdiction?
>
> 2) Did the Motion Judge err in holding that the Trustee's proposed undertaking as to damages along with an undertaking from Emerald Plantation was sufficient?
>
> 3) Did the Motion Judge err in law in concluding that Emerald Plantation's undertaking as to damages was sufficient to protect Chan's costs in the action?

37 Having regard to the cost submissions filed by both parties, total costs of this motion fixed at $7,500 on a partial indemnity basis. Disposition of the costs is left to the discretion of the panel hearing the appeal.

Application granted.

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TAB 5

2006 BCSECCOM 745
British Columbia Securities Commission

Hollinger Inc., Re

2006 BCSECCOM 745

In the Matter of the Securities Legislation of British Columbia, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Yukon Territory and Nunavut (the "Jurisdictions") and In the Matter of the Mutual Reliance Review System for Exemptive Relief Applications and In the Matter of Hollinger Inc. (the "Applicant")

Susan Wolburgh Jenah, Kelly Gorman, Carol S. Perry

Date: December 7, 2006

Reference: None

Subject: Securities

Background

The local securities regulatory authority or regulator (the "Decision Maker") in each of the Jurisdictions has received an application from the Applicant for a decision under the securities legislation of the Jurisdictions (the "Legislation") that the Applicant be exempt from certain requirements of the Legislation, including certain requirements in National Instrument 51-102 - *Continuous Disclosure Obligations* ("NI 51-102") and National Instrument 52-107 - *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* ("NI 52-107"), as described below under the heading "Requested Relief".

Under the Mutual Reliance Review System for Exemptive Relief Applications:

(a) the Ontario Securities Commission (the "OSC") is the principal regulator for this application, and

(b) this MRRS decision document evidences the decision of each Decision Maker.

Requested Relief

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The Applicant has requested the relief set out below (the "Requested Relief"):

(a) With respect to the annual financial statements for the 12 months ended December 31, 2003 (the "December 2003 Financial Statements"), relief from the requirement in the Legislation and in section 3.1(1) of NI 52-107 that financial statements be prepared in accordance with Canadian generally accepted accounting principles ("GAAP") as applicable to public enterprises.

(b) With respect to each of the December 2003 Financial Statements and the annual financial statements for the 12 months ended December 31, 2004 (the "December 2004 Financial Statements"), relief from the requirement in the Legislation, if applicable, and in section 3.2(a) of NI 52-107 that financial statements that are required by securities legislation to be audited in accordance with Canadian generally accepted auditing standards ("GAAS") must be accompanied by an auditor's report that does not contain a reservation.

(c) With respect to the presentation format of (i) the December 2003 Financial Statements, which will be presented on a stand-alone basis, and (ii) the December 2004 Financial Statements, which will be presented in a multi-columnar format (the "Multi-Columnar Format") along with audited annual financial statements for the year ended December 31, 2005 (the "December 2005 Financial Statements") and audited annual financial statements for the transition year following a change in year-end consisting of the three months ended March 31, 2006 (the "March 2006 Financial Statements" and together with the December 2003 Financial Statements, the December 2004 Financial Statements and the December 2005 Financial Statements, collectively, the "Historical Annual Financial Statements"), relief from:

(i) the requirement in the Legislation, if applicable, and in section 4.1(a) and (b) of NI 51-102 that a reporting issuer must file comparative annual financial statements in respect of the most recently completed financial year and the financial year immediately preceding the most recently completed financial year; and

(ii) the requirement in the Legislation, if applicable, and in section 5.1(1) of NI 51-102 that a reporting issuer must file management's discussion and analysis ("MD&A") relating to the comparative annual financial statements required under Part 4 of NI 51-102.

Interpretation

Defined terms contained in National Instrument 14-101 - *Definitions* have the same meaning in this decision unless they are defined in this decision.

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Representations

This decision is based on the facts represented by the Applicant set out below.

1. The Applicant is a corporation continuing from an amalgamation under the *Canada Business Corporations Act* (the "CBCA"), and its principal and registered office is located at 10 Toronto Street, Toronto, Ontario, M5C 2B7. The Applicant is a reporting issuer (or its equivalent) in each of the provinces and territories of Canada where such status exists and is a foreign private issuer in the United States.

2. The Applicant is a "mutual fund corporation" under the *Income Tax Act* (Canada) and, as a result, is not permitted to own assets (other than equity securities) directly. The Applicant's assets (other than its equity share ownership in its subsidiaries) are owned indirectly through its subsidiaries.

3. The Applicant's principal asset is its interest in Sun-Times Media Group, Inc. (formerly Hollinger International Inc.) ("Sun-Times"), a corporation governed by the laws of the State of Delaware. Sun-Times is a newspaper publisher, the assets of which include the Chicago Sun-Times and a large number of community newspapers in the Chicago area. As of July 31, 2006, the Applicant owned, directly or indirectly 782,923 Class A Common shares of Sun-Times (the "Sun-Times A Shares") and 14,990,000 Class B Common shares of Sun-Times (the "Sun-Times B Shares") (collectively, the "Sun-Times Shares"), being approximately 19.7% of the equity and 70.1% of the voting interest in Sun-Times.

4. The authorized capital of the Applicant consists of an unlimited number of retractable common shares (the "Common Shares"), an unlimited number of Exchangeable Non-Voting Preference Shares Series I (the "Series I Preference Shares"), an unlimited number of Exchangeable Non-Voting Preference Shares Series II (the "Series II Preference Shares") and an unlimited number of Retractable Non-Voting Preference Shares Series III (the "Series III Preference Shares"). As at June 30, 2006, 34,945,776 Common Shares and 1,701,995 Series II Preference Shares were issued and outstanding and there were no Series I Preference Shares or Series III Preference Shares issued and outstanding. The only voting securities of the Applicant are the Common Shares.

5. The outstanding Common Shares and Series II Preference Shares are listed on the Toronto Stock Exchange under the symbols "HLG.C" and "HLG.PR.B", respectively.

6. Each of the outstanding shares of the Applicant is retractable at the option of the holder. The Common Shares are retractable at any time at the option of the holder at their retraction price (which is fixed from time to time) in exchange for Sun-Times A

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Shares of equivalent value or, at the Applicant's option, cash of equivalent value. The retraction price is derived from the fair value of the Applicant's assets less its liabilities.

7. On retraction, the Series II Preference Shares are exchangeable into a fixed number of the Applicant's Sun-Times A Shares or, at the Applicant's option, cash of equivalent value.

8. The Applicant has outstanding US$93.0 million aggregate principal amount of Senior Secured Notes (the "Notes"). The Notes are guaranteed by, among others, Ravelston Management Inc. ("RMI"), a wholly-owned subsidiary of Ravelston Corporation Limited ("RCL"). RCL is a holding company that, prior to being placed into receivership, was controlled by Conrad Black. The principal asset of RCL is its direct and indirect interest in the Applicant. In 2005, RCL and RMI were declared to be insolvent and RSM Richter Inc. ("Richter") was appointed by the Ontario Court of Justice as receiver of their respective assets. The Notes are secured by, among other things, a first priority lien on 14,990,000 Sun-Times B Shares owned, directly or indirectly, by the Applicant. Under the terms of the Notes, the Applicant is subject to certain restrictive covenants and other obligations.

9. The Applicant is currently prevented from honouring retractions of the Common Shares and the Series II Preference Shares as a consequence of it being in default under the terms of the indentures governing the Notes. As of June 30, 2006, there were retraction notices from holders of 160,373 Common Shares at a retraction price of $9.00 per share and 211 Common Shares at a retraction price of $7.25 per share, which the Applicant is unable to complete at the present time.

10. In its financial statements in respect of periods ending on or before September 30, 2003, the Applicant had accounted for its investment in Sun-Times using the consolidation method as it exercised control over Sun-Times as that term is defined in the Canadian Institute of Chartered Accountants Handbook (the "CICA Handbook"). The business and affairs of the Applicant, Sun-Times and their respective subsidiaries were predicated on the fact that, as a majority shareholder of Sun-Times, the Applicant controlled Sun-Times in that it managed, or supervised the management of, the business and affairs of Sun-Times. However, during and following November 2003, certain events occurred that the Applicant submits caused it to cease to control or exercise significant influence over Sun-Times, as those terms are defined in the CICA Handbook. Those events included the following:

(a) the Applicant no longer had a majority of the nominees forming part of the board of directors of Sun-Times (the "Sun-Times Board");

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(b) Sun-Times co-operated in an attempt to obtain an order from a United States court in Chicago affecting the Applicant's right to exercise its ordinary powers as a majority shareholder, including with respect to the composition of the Sun-Times Board;

(c) substantially all of the powers of the Sun-Times Board were delegated to a committee thereof, of which none of the nominees of the Applicant was a member;

(d) Sun-Times commenced litigation against the Applicant and the Applicant made certain counterclaims against Sun-Times in respect of matters which continue to be unresolved;

(e) restrictions were imposed on the Applicant by a United States court order relating to the alienation of its interests in Sun-Times and the alienation of any controlling interest in the Applicant itself;

(f) the Applicant became unable to exercise certain fundamental rights associated with being a majority voting shareholder of Sun-Times, including amending the by-laws of Sun-Times and supervising the overall strategic, business and operating initiatives of Sun-Times;

(g) without the consent or involvement of the Applicant or its nominees on the Sun-Times Board, the Sun-Times Board delegated to a committee thereof the authority to review and evaluate Sun-Times' strategic alternatives, including a possible sale of Sun-Times or one or more of its assets;

(h) the Applicant and its auditors were denied access to the books and records of Sun-Times; and

(i) the relationship between the Applicant and Sun-Times had deteriorated into one in which there was very little mutual co-operation, assistance or regard to the interests of the Applicant and Sun-Times as a group.

11. Prior to May of 2003, the Sun-Times Board was composed of five inside directors (Lord Black, Lady Black, David F. Radler, Daniel W. Colson and Peter Y. Atkinson) and eight outside directors (Richard Burt, Henry Kissinger, Marie-Josee Kravis, Shmuel Meitar, Richard N. Perle, Alfred Taubman, James R. Thompson and Leslie H. Wexner).

12. In May of 2003, Tweedy, Brown Company, LLC, a public shareholder of Sun-Times, wrote to the Sun-Times Board and demanded that the Sun-Times Board undertake an investigation with respect to certain allegations regarding related party transactions.

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13. In May of 2003, three of the outside directors did not stand for re-election and an additional outside director, Gordon Paris, was appointed to the Sun-Times Board, resulting in a total of six remaining outside directors.

14. In June of 2003, the Sun-Times Board established a special committee (the "Special Committee") to examine shareholders' allegations and appointed Mr. Paris to be its Chair. In July of 2003, two additional outside independent directors, Graham Savage and Raymond Seitz, were appointed to the Sun-Times Board and made members of the Special Committee.

15. In early November 2003, the Special Committee reported the preliminary results of its investigation to the Sun-Times Board. The Special Committee determined that approximately US$32.15 million in unauthorized payments had been made by Sun-Times to related parties who included Lord Black, Mr. Radler, Mr. Atkinson and J.A. Boultbee. As a consequence of these investigations, the Special Committee of Sun-Times took steps to secure Sun-Times' ability to act autonomously and independently. Sun-Times made a number of demands of Lord Black which led to an agreement that Lord Black entered into with Sun-Times dated November 15, 2003 (the "Restructuring Proposal") in which Lord Black agreed, in his capacity as Chairman of Sun-Times, that he would devote his principal time and energy to pursuing a range of alternative strategic transactions that Sun-Times' board of directors intended to pursue (the "Strategic Process"). As well, Lord Black agreed, in his capacity as the majority stockholder of the Applicant, that he would not support a transaction involving ownership interests in the Applicant if such transaction would negatively affect Sun-Times' ability to consummate a transaction resulting from the Strategic Process unless it was necessary to enable the Applicant to avoid a material default or insolvency. Lord Black also agreed that a number of personnel changes would be made at Sun-Times including the resignation of a number of the Applicant's nominees from the board of Sun-Times.

16. On November 17, 2003, Lord Black resigned as Sun-Times' Chief Executive Officer. At the same time, Mr. Radler resigned as President and Chief Operating Officer and as a director of Sun-Times and Mr. Atkinson resigned as a director of Sun-Times. In addition, Mark Kipnis resigned as Sun-Times' Vice President and Corporate Counsel and Mr. Boultbee was terminated from his position as Executive Vice-President of Sun-Times. Lord Black, Mr. Radler, Mr. Atkinson and Mr. Boultbee were all nominees of the Applicant at that time.

17. Also, on November 17, 2003, Sun-Times announced the Restructuring Proposal pursuant to which it unilaterally terminated each of the services agreements (the "Services Agreements") between RMI and Sun-Times, effective June 1, 2004.

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Subsequent to December 2003, Sun-Times ceased to make any payments to RMI under the Services Agreements. This termination had an impact on RMI's ability to make its required payments to the Applicant under a support agreement (the "Support Agreement") entered into in March of 2003 between RMI and the Applicant in connection with the Applicant's issuance of the Notes. Among other things, the failure of RMI to make the cash payments to the Applicant as required under the Support Agreement resulted in the Applicant being in default under the terms governing the Notes.

18. Sun-Times also announced on November 17, 2003 that, pursuant to the Restructuring Proposal, the Sun-Times Board had retained a financial advisor to review and evaluate the Strategic Process. The Strategic Process was to be under the direction of the newly reconstituted five member executive committee of the Sun-Times Board (the "Executive Committee"), of which only one member, Lord Black, was a nominee of the Applicant to the Sun-Times Board. By the end of November 2003, the Applicant ceased to exercise any meaningful control over Sun-Times. Without any input from the Applicant, the Sun-Times Board has approved the dispositions of several of Sun-Times' material assets including the Telegraph Group Limited ("Telegraph Group") in July 2004, The Jerusalem Post and its related publications in December 2004 and certain Canadian newspaper operations in December 2005.

19. On December 23, 2003, KPMG LLP ("KPMG Canada") resigned as the auditors of the Applicant. KPMG LLP ("KPMG USA") continue to serve as the auditors of Sun-Times.

20. On January 16, 2004, a court order was issued by the United States District Court for the Northern District of Illinois in the matter of the *United States Securities and Exchange Commission v. Hollinger International Inc.* (the "Sun-Times Consent Order"). The Sun-Times Consent Order provided that, among other things, a special monitor (the "Special Monitor") of the Sun-Times Board would be appointed to oversee the activities of the Sun-Times Board in certain circumstances, including in the event that any of the Applicant's nominees were elected to the Sun-Times Board without its endorsement. The Special Monitor's mandate would be to, among other things, protect the interests of the non-controlling shareholders of Sun-Times to the extent permitted by law.

21. On or about January 16, 2004, Sun-Times commenced an action in the United States District Court for the Northern District of Illinois (Chicago) against the Applicant and others claiming damages in excess of US$200 million in relation to various payments alleged to have been improperly received by the Applicant and others from Sun-Times and others.

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22. On January 17, 2004, Lord Black resigned as Chairman of the Sun-Times Board.

23. On January 18, 2004, Lord Black and RCL entered into an agreement with Press Holdings Sun-Times Limited ("PHIL") whereby Lord Black, RCL and related parties agreed to sell their shares in the Applicant to PHIL (the "PHIL Transaction"). The following related events subsequently transpired:

(a) On January 20, 2004, the Sun-Times Board adopted resolutions creating a committee of the Sun-Times Board known as the Corporate Review Committee (the "CRC"). This committee was composed of all of the members of the Sun-Times Board except the nominees of the Applicant. The CRC was delegated, essentially, all of the strategic powers of the Sun-Times Board.

(b) On January 23, 2004, the Applicant purported to amend the by-laws of Sun-Times to, among other things, disband the CRC and protect its interests as the majority voting shareholder of Sun-Times.

(c) On January 25, 2004, notwithstanding the amendments to the by-laws, the CRC caused Sun-Times to adopt a shareholders' rights plan (the "SRP") which, among other things, effectively prevented Lord Black and RCL from agreeing to sell their shares in the Applicant to PHIL but deferred the implementation of the SRP until a court of competent jurisdiction could determine whether the CRC remained a valid committee of the Sun-Times Board and had the power to adopt the SRP.

(d) On January 26, 2004, Sun-Times commenced an action against the Applicant and others in the Court of Chancery of the State of Delaware. By an Order and Judgment entered on March 4, 2004 (the "Delaware Order"), Vice-Chancellor Strine ruled in favour of Sun-Times and held, among other things, that the by-law amendments referred to above, were ineffective, that the CRC was duly constituted, that the SRP was permissibly adopted and that the Applicant and others be enjoined from taking any steps to pursue or consummate the PHIL Transaction or any other transaction which would frustrate the Strategic Process.

24. On March 12, 2004, the Applicant's new auditors, Zeifman & Company, LLP ("Zeifman" or the "Auditors"), wrote to Sun-Times requesting co-operation by Sun-Times management and by Sun-Times' auditors to the extent necessary in order to permit Zeifman to complete an audit of the Applicant. On March 19, 2004, Sun-Times replied to Zeifman essentially denying the co-operation of Sun-Times management. Both KPMG Canada and Sun-Times' auditors, KPMG USA, also refused to allow Zeifman to rely on their past, and in the case of KPMG USA, present and future, audit work.

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25. On March 24, 2004, Mr. Colson resigned as deputy chairman and chief executive officer of the Telegraph Group and as chief operating officer of Sun-Times, leaving no associates of Lord Black remaining in the management of Sun-Times.

26. During the first quarter of 2004, Sun-Times commenced the process of providing for its own corporate accounting and reporting functions, including computerized consolidation systems, making such systems distinct and separate from those of the Applicant, RMI and RCL. This included hiring its own staff, leasing its own premises and making offers of employment to certain RMI employees. Sun-Times also commenced the process of discontinuing its previous practice of storing detailed financial information on systems shared with the Applicant and ceased sharing any financial information with the Applicant. During 2004, Sun-Times restricted direct access by the Applicant to the Applicant's systems, historical data and servers, a situation that was partially, but not satisfactorily, remedied in June 2005.

27. In March 2004, the Applicant commenced a pre-filing process with OSC Staff indicating that it had lost control of Sun-Times during 2003 and wished to explore possible accounting alternatives going forward.

28. On June 1, 2004, the OSC issued a Management and Insider Cease Trade Order (the "Hollinger MCTO") as a result of the failure of the Applicant in filing, among other things, its annual and first quarter interim financial statements by the required filing dates under applicable Canadian securities laws. The Hollinger MCTO was subsequently varied on March 8, 2005, August 10, 2005, and April 28, 2006. The Hollinger MCTO currently remains in effect. Similar Management and Insider Cease Trade Orders have also been issued by the British Columbia Securities Commission and the Alberta Securities Commission in respect of certain former officers and directors of the Applicant resident in British Columbia and Alberta.

29. In February 2004, Sun-Times commenced an action against the Applicant and others in the Ontario Superior Court of Justice seeking, among other things, the return of documents allegedly the property of Sun-Times. The Applicant and others counterclaimed for, among other things, damages in respect of the failure by Sun-Times to make payments under the Services Agreements.

30. On July 1, 2004, the Applicant filed a complaint in the Delaware Chancery Court seeking to have the court require that Sun-Times submit the sale of its U.K. assets (principally the Telegraph Group) to ratification by its shareholders. On July 29, 2004, the Delaware Chancery Court denied the Applicant's complaint. Sun-Times completed the sale of the Telegraph Group on July 30, 2004.

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31. On September 3, 2004, Mr. Justice Colin L. Campbell ordered that an inspector conduct an investigation of the Applicant. On October 27, 2004, Ernst & Young Inc. (the "Inspector") was appointed as an inspector pursuant to section 229(1) of the CBCA. In making the appointment, Justice Campbell noted that the efforts of the Applicant had been neither sufficient nor timely in addressing the legitimate concerns raised by the public shareholders of the Applicant regarding related party transactions involving the Applicant, which at that time remained under the indirect control and direction of Lord Black.

32. On November 2, 2004, Lord Black resigned as a director and officer of the Applicant. During that same month the Ontario Superior Court of Justice ordered the removal of Lord Black, Lady Black, Mr. Radler and Mr. Boultbee from the board of directors of the Applicant.

33. On November 15, 2004, the United States Securities and Exchange Commission (the "SEC") filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division against Lord Black, Mr. Radler and the Applicant for certain alleged violations of U.S. securities laws. The SEC seeks declaratory and injunctive relief, disgorgement of amounts improperly paid to defendants, a civil monetary penalty, an order barring Lord Black and Mr. Radler from serving as an officer or director of any issuer required to file reports with the SEC, and a voting trust on Sun-Times shares held by Lord Black and the Applicant.

34. Through to the end of 2004, the Applicant continued discussions with Sun-Times in an attempt to reach an agreement regarding Sun-Times' co-operation with the Applicant and Zeifman to facilitate the preparation of the Applicant's audited financial statements, among other things. These discussions failed to result in any definitive agreement between the parties, as the terms upon which Sun-Times was prepared to offer its cooperation were insufficient to facilitate the preparation of the Applicant's audited financial statements.

35. On March 4, 2005, the Applicant released alternative unaudited financial information as at September 30, 2004 in the form of a consolidated balance sheet ("CBS"). The CBS was prepared in accordance with the Applicant's traditional accounting policies with the exception that it had been prepared as though the Applicant had always accounted for its assets and liabilities at their market values.

36. On March 18, 2005, the OSC issued a Notice of Hearing in connection with a hearing (the "Hearing") to consider whether, pursuant to sections 127(1) and 127.1 of the *Securities Act* (Ontario), it is in the public interest for the OSC to make certain orders in respect of the Applicant, Lord Black, Mr. Radler, Mr. Boultbee and Mr. Atkinson.

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The statement of allegations prepared by OSC staff (the "Statement of Allegations") includes allegations relating to the failure by the Applicant to file interim statements (and management's discussion and analysis related thereto) for the three-month period ended March 31, 2004 and subsequent interim filing requirements, and failed to file its annual financial statements (and management's discussion and analysis related thereto) and its Annual Information Form ("AIF") for the year ended December 31, 2003, contrary to the requirements of Ontario securities law. The Applicant acknowledges that the Requested Relief is intended to be prospective in nature and is without prejudice to the matters to be determined at the Hearing. The Hearing is presently scheduled for June 1, 2007, or as soon thereafter as may be fixed by the Secretary to the Commission and agreed to by the parties.

37. On March 21, 23 and 24, 2005, the Commission held a hearing to consider an application by the Applicant under section 144 of the Act for an Order to vary the Hollinger MCTO to permit certain direct or indirect trades of securities of the Applicant that may be required to effect, or that may occur in connection with, the proposed share consolidation going private transaction (the "Going Private Transaction") involving the Applicant, as described in the Hollinger Management Proxy Circular dated March 4, 2005 and filed on SEDAR on March 10, 2005. On March 27, 2005, the OSC released its decision that it was unable to form the opinion that it would not be prejudicial to the public interest to grant the relief sought by the Applicant and others in connection with the Going Private Transaction. As a result, the OSC denied granting the requested relief of varying the Hollinger MCTO and a similar Management and Insider Cease Trade Order made in respect of Sun-Times.

38. On April 20, 2005, Mr. Justice James Farley of the Ontario Superior Court of Justice issued two orders by which RCL and RMI were (i) placed in receivership pursuant to the Courts of Justice Act (Ontario) and (ii) granted protection pursuant to the Companies' Creditors Arrangement Act (Canada) and the Bankruptcy and Insolvency Act (Canada) (collectively, the "Receivership and CCAA Orders"). Pursuant to the Receivership and CCAA Orders:

(a) Richter was appointed receiver and manager of all of the assets and property of RCL and RMI except for certain shares held directly or indirectly by them, including shares of the Applicant and RMI; and

(b) Richter took possession and control of RCL's common shares and, as a result, Richter, at the time, directly or indirectly exercised control or direction over 16.5% of the Common Shares.

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39. On May 18, 2005, Mr. Justice Farley further ordered the Receivership and CCAA Orders be applied to Argus Corporation Limited and five of its subsidiary companies which collectively own, directly or indirectly, 61.8% of the outstanding Common Shares and 3.9% of the Series II Preference Shares. As a result of this further order, Richter exercised control or direction over an aggregate of 78.3% of the Common Shares and 3.9% of the Series II Preference Shares.

40. On July 8, 2005, Justice Campbell of the Ontario Superior Court of Justice approved a consent Order reconstituting the Applicant's board of directors. The consent Order provided for the removal of two of the then remaining four interim directors and the appointment of five new directors. Later that month, the two remaining interim directors resigned from the Applicant's board of directors, and four new directors, namely Stanley Beck, Joseph Wright, Newton Glassman and Randall Benson were appointed to the Applicant's board of directors. Mr. Benson was appointed as the Applicant's Chief Restructuring Officer. The four new directors, together with David Drinkwater and David Rattee, who were appointed in August 2005, formed a new board of directors of the Applicant.

41. On November 14, 2005, the Applicant received the report of the Inspector.

42. Sun-Times called a shareholders' meeting for January 24, 2006 with the selection of the Sun-Times Board scheduled to be voted on at that meeting. The Applicant had previously advised Sun-Times of its desire to obtain representation on the Sun-Times Board proportionate to its equity interest. The Applicant specifically requested that two of its nominees serve on the Sun-Times Board. The slate of proposed new directors issued as part of Sun-Times' proxy statement did not include any nominees of the Applicant. Sun-Times had offered to include one nominee of the Applicant on its board in return for an agreement to restrict the voting rights attached to the Applicant's Sun-Times Shares. The Applicant indicated that this offer was unacceptable.

43. The Applicant nominated two representatives, Messrs. Beck and Benson, to the Sun-Times Board of nine directors. The Applicant's representatives were not endorsed by the Sun-Times Board, and as a result, in accordance with the special court order dated January 16, 2004 issued by a U.S. District Court, the Special Monitor was appointed in January 2006. The Special Monitor's mandate is to, among other things, protect the interests of Sun-Times' non-controlling shareholders to the extent permitted by law. The Applicant supported the slate of other directors proposed by Sun-Times. The two nominees on the Sun-Times Board are not on any committees of the Sun-Times Board.

44. Sun-Times called a further shareholders' meeting for June 13, 2006 with the selection of the Sun-Times Board scheduled to be once again voted on at that meeting. Prior

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to such meeting, Sun-Times initiated a conversation with the Applicant regarding the Applicant's intention to retain seats on the Sun-Times Board. In those conversations, Sun-Times expressed its belief that no member of the Applicant's board of directors should sit on the Sun-Times Board. The Applicant indicated that it sought to nominate two representatives to the Sun-Times Board. Sun-Times ultimately agreed to include two representatives of the Applicant on its slate of nominees so long as they were Messrs. Beck and Benson, and not new nominees of the Applicant.

45. On June 13, 2006, Messrs. Beck and Benson were re-elected as directors of Sun-Times. Following their election, Sun-Times reasserted its view that neither Mr. Beck nor Mr. Benson was independent. Each of them continued not to serve on any committee of the Sun-Times Board.

46. On July 6, 2006, the Applicant filed a counterclaim against Sun-Times in the United States District Court for the Northern District of Illinois, Eastern Division. The Applicant is seeking a judgment against Sun-Times, and compensatory and punitive damages to be determined at trial, for: (a) fraud in connection with the transfer of The Daily Telegraph in 1995 and several Canadian newspapers in 1997 from the Applicant to Sun-Times; (b) conspiracy to defraud the Applicant; (c) unjust enrichment by Sun-Times in its acquisition of assets from the Applicant; (d) unlawful interference with the economic interests of the Applicant; (e) aiding and abetting in fraud against the Applicant; and (f) aiding and abetting a breach of fiduciary duty against the Applicant.

47. At a meeting on July 7, 2006, the Applicant's board of directors determined that it was no longer appropriate for Messrs. Beck and Benson to serve on the Sun-Times Board, as a result of the counterclaim filed by the Applicant against Sun-Times described above. On July 13, 2006, Messrs. Beck and Benson resigned from the Sun-Times Board. As a result of these resignations, the Applicant currently has no nominees serving as directors on the Sun-Times Board.

48. Following the loss of control and significant influence by the Applicant over Sun-Times during November of 2003, the Applicant's investment in Sun-Times becomes subject to the cost method and, under the transitional provisions of certain new accounting standards (the "New Standards"), the fair value method as of January 1, 2004. The Applicant proposes to file financial statements by electing to account for its investment in Sun-Times on the fair value method in accordance with the transitional provisions of the New Standards commencing January 1, 2004. The New Standards are comprised of the following CICA Handbook sections:

(a) Section 3051: Investments;

(b) Section 1530: Comprehensive income;

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(c) Section 3855: Financial instruments - recognition and measurement; and

(d) Section 1590: Subsidiaries (amended to reflect impact of the New Standards).

49. The Applicant has not filed any financial statements, MD&A or certifications by its chief executive officer or chief financial officer of its financial statements, as applicable, since its interim financial statements for the nine months ended September 30, 2003. The Applicant has not filed an annual information form in respect of any financial year subsequent to the financial year ended December 31, 2002.

50. The Applicant is not in default of its obligations under Part 9 of NI 51-102 in respect of the filing of management proxy materials.

51. The Applicant has filed a Form 13-502F1 and paid the related fees under OSC Rule 13-502 - *Payment of Fees* ("OSC Rule 13-502") for each financial year ended on or after December 31, 2003 and, accordingly, is no longer in default of its obligations under Part 2 of OSC Rule 13-502.

52. On April 18, 2006, the Applicant filed on the System for Electronic Document Analysis and Retrieval ("SEDAR") a notice dated March 31, 2006 pursuant to section 4.8 of NI 51-102 announcing its decision to change the Applicant's financial year-end from December 31 to March 31. On March 31, 2006, the Applicant submitted a request to Canada Revenue Agency to approve the change of financial year-end.

53. As set out in the notice, the Applicant sought to change its financial year-end as it proposed to cease reporting its financial results on a consolidated basis with those of Sun-Times and instead present its investment in Sun-Times on a fair value basis. As a result of this change, it would no longer be necessary for the Applicant to have the same year-end as Sun-Times. A change to March 31 would facilitate enhanced discussion and analysis of its investment in Sun-Times.

54. The notice set out the information prescribed by section 4.8 of NI 51-102, including details regarding the financial statements intended to be filed by the Applicant in respect of its old financial year, its transition year and its new financial year.

Proposed Filings

55. The Applicant proposes to file the following documents (the "Proposed Filings"):

(a) December 2003 Financial Statements will be presented on a stand-alone basis, together with the relevant MD&A on Form 51-102F1. The December 2003 Financial Statements will reflect, solely with respect to the Applicant's investment

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in Sun-Times, the fair value basis in accordance with the New Standards, notwithstanding that the New Standards were not effective for that period. GAAP would require that the December 2003 Financial Statements consolidate the results of Sun-Times up to the date on which the Applicant ceased to exercise control or significant influence over Sun-Times and thereafter on a cost basis. The December 2003 Financial Statements will be prepared in accordance with GAAP in all other respects. The December 2003 Financial Statements will be audited in accordance with Canadian GAAS and will be accompanied by an auditor's report that contains an adverse opinion due to the nature of the GAAP departure described above. Although the December 2003 Financial Statements will not be prepared in accordance with GAAP, they will present the same level of disclosure about the Applicant as for subsequent years when the Applicant's investment in Sun-Times may be accounted for on a fair value basis in accordance with the New Standards.

(b) The Auditors will, however, undertake specified procedures in respect of the December 2003 Financial Statements in accordance with section 9100 of the CICA Handbook. The Applicant will provide a copy of the specified procedures report in respect of the December 2003 Financial Statements in accordance with section 9100 of the CICA Handbook to the Decision Makers within 90 days of the issuance of this decision.

(c) Audited December 2004 Financial Statements will reflect the adoption of the New Standards effective January 1, 2004 and be presented in the Multi-Columnar Format. The audit report on the December 2004 Financial Statements will be qualified with respect to the adjustment to retained earnings at January 1, 2004 reflecting the change in the Applicant's investment in Sun-Times from its carrying value (under consolidation up to the date on which the Applicant ceased to exercise control or significant influence over Sun-Times) to its fair value under the New Standards.

(d) The certification required by section 2.1 of Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* ("MI 52-109") will be filed on Form 52-109FT1 in respect of the December 2004 Financial Statements.

(e) Audited December 2005 Financial Statements will be presented as part of, and comparative to, the December 2004 Financial Statements in the Multi-Columnar Format. The audit report on the December 2005 Financial Statements will be unqualified. For the purpose of the requirements of section 4.8 of NI 51-102, the 12 months ended December 31, 2005 will constitute the Applicant's "old financial year".

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(f) The certification required by section 2.1 of MI 52-109 will be filed on Form 52-109F1, as modified by section 5.2(1) of MI 52-109, in respect of the December 2005 Financial Statements.

(g) Audited March 2006 Financial Statements will be presented as part of, and comparative to, the financial statements for the 12 months ended December 31, 2005 in the Multi-Columnar Format. The audit report on the March 2006 Financial Statements will be unqualified, as will the audit report on the comparative December 2005 Financial Statements. For the purpose of the requirements of section 4.8 of NI 51-102, the financial year consisting of the three months ended March 31, 2006 will constitute the Applicant's "transition year" and the financial year ended March 31, 2007 will constitute the Applicant's "new financial year".

(h) The certification required by section 2.1 of MI 52-109 will be filed on Form 52-109F1, as modified by section 5.2(1) of MI 52-109, in respect of the March 2006 Financial Statements.

(i) MD&A relating to each of the December 2004 Financial Statements, the December 2005 Financial Statements and the March 2006 Financial Statements will be prepared in respect of such audited financial statements on a comparative basis, in a manner consistent with the Multi-Columnar Format, and will otherwise be prepared in accordance with Form 51-102F1.

(j) Unaudited interim financial statements for each of the interim periods ending after March 31, 2006 (the "Interim Financial Statements") will be prepared and presented in accordance with NI 51-102 and NI 52-107, together with the relevant MD&A on Form 51-102F1.

(k) The certification required by section 2.1 of MI 52-109 will be filed on Form 52-109F2 in respect of the Interim Financial Statements.

(l) Annual information forms for the financial year ended December 31, 2005 and for the financial year consisting of the three months ended March 31, 2006 will be presented on Form 51-102F2. The annual information forms will include the disclosure required by Item 18 (Additional Disclosure for Companies Not Sending Information Circulars) of Form 51-102F2, in light of the fact that the Applicant has not been required to send a Form 51-102F5 to its shareholders as of yet.

(m) An amended notice will be filed pursuant to section 4.8 of NI 51-102 that will replace and supersede in its entirety the notice dated March 31, 2006 previously filed on SEDAR by the Applicant. The amended notice will contain the information

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prescribed by section 4.8 of NI 51-102 and reflect the information set out in this Order, including the Applicant's: (a) old financial year will be the 12 months ended December 31, 2005; (b) transitional year will be the three months ended March 31, 2006; and (c) new financial year will be the 12 months ended March 31, 2007.

56. The Applicant will use the Multi-Columnar Format to present the March 2006 Financial Statements, the December 2005 Financial Statements and the December 2004 Financial Statements. This will make the process less duplicative and more efficient given the Applicant's limited resources and will enable readers to access all of the relevant financial information in one place. In addition to presenting these financial statements in the Multi-Columnar Format, the Applicant will prepare and file separately (i) the December 2003 Financial Statements on a stand-alone basis, and (ii) the Interim Financial Statements (with comparatives for the corresponding interim periods during 2005, except for the balance sheet which will be presented comparative to the audited balance sheet as at March 31, 2006).

Need for relief

57. The Applicant believes that it is unable to prepare the December 2003 Financial Statements in accordance with GAAP or have the December 2003 Financial Statements or the December 2004 Financial Statements audited in accordance with GAAS and accompanied by an auditor's report that does not contain a reservation since to prepare and audit the financial statements in accordance with the requirements requires that the Applicant and its auditors to have co-operation by Sun-Times management and by Sun-Times' auditors. The co-operation has been refused. Relief is needed because the Proposed Filings do not comply with certain form and content requirements contained in the Legislation, including requirements contained in NI 51-102 and NI 52-107.

Prospective nature of the relief

58. The Applicant acknowledges that the Requested Relief is intended to be prospective in nature and is requested solely to permit the Applicant to make certain filings after the date of the decision that do not meet certain form and content requirements contained in the Legislation, including NI 51-102 and NI 52-107. The Requested Relief will not, if granted, have retroactive effect or alter the default status of the Applicant for the period preceding the date the Applicant makes the Proposed Filings in accordance with this decision.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

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The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that the Applicant makes the Proposed Filings with each of the Decision Makers within 90 days of the issuance of this decision.

Susan Wolburgh Jenah

Vice-Chair

Ontario Securities Commission

Kelly Gorman

Assistant Manager, Corporate Finance

Ontario Securities Commission

Carol S. Perry

Commissioner

Ontario Securities Commission

End of Document

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TAB 6

CITATION: The Cash Store Financial Services Inc. (Re), 2015 ONSC 7253
COURT FILE NO.: CV-14-10518-00CL
DATE: 2015-11-20

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1511419 ONTARIO INC., FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES, 1545688 ALBERTA INC., FORMERLY KNOWN AS THE CASH STORE INC., 986301 ALBERTA INC., FORMERLY KNOWN AS TCS CASH STORE INC., 1152919 ALBERTA INC., FORMERLY KNOWN AS INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD. doing business as "THE TITLE STORE"

BEFORE: Regional Senior Justice G. B. Morawetz

COUNSEL: *Jonathan Foreman and Lindsay Merrifield*, for the Ontario Consumers Class Action

James Harnum, Agent to Harrison Pensa

David Mann and Robert Kennedy, for DirectCash in CCAA Proceedings

Peter Griffin and Matthew Lerner, for Gordon Reykdal

Jeff Galway, for N. Bland

Mark Polley and Eric Brousseau, for National Money Mart Company

Andrew Faith and Jeff Haylock, for 1573568 Alberta Ltd.

Geoff R. Hall and *Stephen Fulton*, for the Monitor (FTI Consulting Canada Inc.)

Eric R. Hoaken, for DirectCash in Class Action Proceedings

Patrick Riesterer, for the Chief Restructuring Officer of the Applicants

Michael Byers, for Craig Warnock

Serge Khallughlian and Charles Wright, for the Ad Hoc Committee of Purchasers of Applicants' Securities, including the Plaintiff in the Ontario Securities Class Action ("Securities Plaintiffs")

Mary Margaret Fox, for ACE Insurance Company

Doug McInnis, for Axis Reinsurance Company

Brendan O'Neill and Carolyn Descours, for the Ad Hoc Committee of Noteholders

Rebecca Wise, for Albert Mondor, Michael Shaw, Ron Chicoyne, William Dunn and Robert Gibson

Ilan Ishai, for the McCann Entities

David Hoffner, U.S. Counsel for the Monitor in Chapter 14 Proceedings

Mark Mounteer

HEARD: November 19, 2015

ENDORSEMENT

[1] 1511419 Ontario Inc., formerly known as The Cash Store Financial Services Inc., and its affiliated companies, 1545688 Alberta Inc., formerly known as The Cash Store Inc., 986301 Alberta Inc., formerly known as TCS Cash Store Inc., 1152919 Alberta Inc., formerly known as Instaloans Inc., 7252331 Canada Inc., 5515433 Manitoba Inc., and 1693926 Alberta Ltd. doing business as "The Title Store" (collectively, the "Applicants" or "Cash Store") moved for an order (the "Plan Sanction Order") approving the plan of compromise or arrangement (including all Schedules thereto) dated October 6, 2015, concerning, affecting and involving the Applicants (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended (the "CCAA") and granting ancillary relief as set out in the proposed Sanction Order.

[2] After hearing oral submissions, I released the following endorsement:

"Dated: November 19, 2015

I am satisfied, having reviewed the record and hearing submissions that

(a) There has been compliance with all statutory requirements;

(b) Nothing has been done which has not been authorized by the CCAA; and

(c) The Plan is fair and reasonable.

The motion is granted and the Plan Sanction Order has been signed. Detailed reasons will follow. Confidential Appendix to Twenty-First Report to be sealed.

Geoff Morawetz, RSJ"

[3] These are the reasons.

[4] Counsel to the Chief Restructuring Officer filed a comprehensive factum. By way of introduction, counsel submits the Plan represents a fair and reasonable compromise with the Applicants secured creditors as evidenced by the overwhelming approval of the Plan by the Affected Creditors: The Senior Secured Lenders have voted unanimously in favour of the Plan and 102 Secured Noteholders with voting claims representing 88% in number and 93% in value of voting claims, have voted in favour of the Plan.

[5] In addition, counsel advises that the Plan is supported by the Monitor, the CRO, the Ad Hoc Committee, the Ontario Consumer Class Action Plaintiffs, the Western Canada Consumer Class Action Plaintiffs, the Ontario Securities Class Action Plaintiffs, DirectCash, the Directors and Officers represented by counsel in these CCAA proceedings (the "D & Os") and the Insurers, who are party to the series of global settlements that may be implemented in connection with the Plan, if approved by the CCAA court and the Class Action courts, and that will bring about significant additional recoveries for a broad range of stakeholders of the Applicants.

[6] Pursuant to the court-to-court protocol, the Consumer Class Action Plaintiffs and the Securities Class Action Plaintiffs simultaneously sought approval of the Settlements by the Class Action Court supervising each of the Class Actions involved in the Settlements. These Settlements were approved and will be the subject of separate endorsements.

[7] Counsel to the CRO also advises that the Monitor considered possible alternatives to the Plan, including liquidation or bankruptcy, and concluded that the Plan is the preferred alternative. The views of the Monitor are set out in the Twenty-First Report dated November 16, 2015. The evidence of the CRO is put forward in the Affidavit of William E. Aziz, sworn November 12, 2015.

[8] The Applicants were engaged in the alternative financial products and services business, providing alternative financial products and services to individuals across Canada, including Payday Loans in applicable jurisdictions, primarily through retail branches under the banners "Cash Store Financial", "Instaloans" and "The Title Store". The Applicants operated 509 retail branches across Canada.

[9] Mr. Aziz stated that Cash Store purported to operate primarily on a third party lender model, serving as a broker of Payday Loans from third party lenders to Payday Loans consumers. On January 31, 2012, Cash Store completed a note offering issuing $132.5 million in Senior Secured Notes, and used the proceeds of the note offering (as to $116.3 million) to purchase the loan book held by its lenders. After the note offering and the loan book acquisition were completed, Cash Store disclosed that the fair value of the loan portfolio acquired was much lower than the purchase price. Cash Store incurred $132.5 million plus interest in liabilities in order to acquire an asset subsequently valued at only $50 million. Mr. Aziz states that this was a financially devastating transaction for Cash Store, which materially contributed to its insolvency.

[10] Prior to applying for relief under the CCAA, the Applicants faced considerable regulatory challenges. On February 12, 2014, this court concluded that the Applicants' basic line of credit

product offered in Ontario (the "Ontario LOC Product") was subject to the *Payday Loans Act*, 2008, S.0 2008, Ch.9 ("The Payday Loans Act") and ordered that the Applicants were prohibited from acting as a loan broker in respect of the Ontario LOC Product without a broker's licence under The Payday Loans Act. On February 12, 2014, the Applicants ceased offering the Ontario LOC Product at all of their Ontario branches.

[11] On April 14, 2014, the Applicants sought and obtained protection from their creditors under the CCAA pursuant to an order of this court (the "Court" or the "CCAA Court") that was amended and restated on April 15, 2015 (the "Initial Order"). The Applicants sought CCAA protection due to immediate challenges to their continued operations based primarily upon regulatory issues affecting their core business, multiple class actions that had been filed against the Applicants requiring defence across Canada and the United States, and cash flow issues, all of which resulted in a significant deterioration of the Applicants' liquidity position and the need to file for creditor protection under the CCAA.

[12] Pursuant to the Initial Order, FTI Consulting Canada Inc. was appointed as Monitor (the "Monitor") of the Applicants in the CCAA proceedings (the "CCAA Proceedings") and William E. Aziz of Blue Tree Advisors Inc. was appointed as Chief Restructuring Officer ("CRO") of the Applicants in the CCAA Proceedings.

[13] At the commencement of the CCAA Proceedings, the Applicants were capitalized mainly by (i) a $12 million Senior Secured Credit Facility (the "Senior Secured Debt"); and (ii) $132.5 million of Second Lien Secured Notes (the "Secured Notes").

[14] Prior to the commencement of the CCAA Proceedings, Rothchild Inc. was retained by the Applicants to act as financial advisor and commenced a mergers and acquisitions process (the "Sale Process") to seek a sale of, or significant investment in the Applicants. The Sale Process continued during the CCAA Proceedings and resulted in a series of asset sale transactions with National Money Mart Company ("NMM"), easyfinancial Services Inc. ("easyfinancial") and CSF Asset Management Ltd. ("CSF Asset Management") pursuant to which the Applicants sold substantially all of their assets (the "Asset Sales"). The three Assets Sales were approved by orders of the CCAA Court on October 15, 2014, January 26, 2015 and April 15, 2015.

[15] The Asset Sales resulted in sales of substantially all of the Applicants' realizable assets and brought approximately $54.3 million into the estate. The proceeds of the Asset Sales (the "Asset Sale Proceeds") are currently held by the Monitor and the remaining Asset Sale Proceeds will be sufficient to pay (i) the remaining amounts outstanding under the DIP Credit Facility; and (ii) the First Lien Lenders in respect of the Senior Secured Debt (the "Senior Secured Lenders") but will not be sufficient to repay (iii) the holders of the Applicants' Second Lien Secured Notes (the "Secured Noteholders").

[16] Mr. Aziz advises that since the completion of the Asset Sales, the Applicants have been engaged in minimal ongoing operational activities with the focus of their efforts being on the orderly wind-down of the remaining business assets and the resolution of outstanding claims asserted (i) against the Applicants by various Stakeholders; and (ii) by the Applicants against certain third party defendants.

[17] Mr. Aziz also advises that during the course of the Applicants CCAA Proceedings, it became clear that the Applicants may have claims against certain of their former directors, officers, advisors and other third parties (the "Estate Claims").

[18] Mr. Aziz further advises that in order to pursue these claims, the Applicants retained litigation counsel, which retainer was approved by court order dated December 1, 2014. The Applicants have commenced a number of Estate Claims against the numbered third party defendants, certain of which have been resolved and certain of which have not been resolved and remain outstanding (the "Remaining Estate Claims"). Pursuant to the Plan, a litigation trustee with authority to instruct litigation counsel will be appointed in order to proceed with the prosecution of the Remaining Estate Claims.

[19] Mr. Aziz further advisees that at the time of the meetings order, certain of the remaining defendants in the Remaining Estate Claims (the "Remaining Defendants") raised certain concerns regarding the Plan and in particular the operation of the Pierringer Provisions under the Plan. These issues were resolved in the context of the amended form of the Plan that was submitted and approved under the Plan Filing Order granted by the Court on October 6, 2015, with the consent of the Remaining Defendants.

[20] Mr. Aziz describes in detail a number of settlement agreements. He advises that, together with the Ad Hoc Committee of Secured Noteholders (the "Ad Hoc Committee") and the Monitor, the Applicants were engaged in ongoing negotiations with various litigation claimants and other interested parties. These negotiations resulted in the following settlement agreements, details of which are set out in his Affidavit:

(a) The Priority Motion Settlement Agreement;

(b) The DirectCash Global Settlement Agreement; and

(c) The D & O/Insurer Global Settlement Agreement

(collectively, the "Settlement Agreements" and the "Settlements").

[21] Mr. Aziz further advises that the Settlement Agreements are supported by the Monitor and that the Settlement Agreements will increase the recoveries available to the Applicants' Stakeholders.

[22] Pursuant to the Settlement Agreements, the following additional recoveries became available:

(a) Under the Priority Motion Settlement – approximately \$3.4 million;

(b) Under the DirectCash Global Settlement Agreement – approximately \$14.5 million; and

(c) Under the D & O/Insurer Global Settlement Agreement – approximately \$19 million.

[23] Mr. Aziz points out that it is a condition precedent to each of the Settlements that the Plan be approved and the sanction order be entered and, without the approval of the CCAA Court and the third party releases contemplated in exchange for the significant settlement payments and other consideration to be provided by the released parties, none of the Settlements can be implemented and the Estate cannot distribute the Asset Sales Proceeds or any other recoveries the Estate may have realized in the Settlements.

[24] If approved by the CCAA Court and the Class Action Courts, the Settlements will resolve 22 proceedings listed on Exhibit "D" of the Aziz Affidavit.

[25] The purpose of the Plan is to, among other things:

(a) Distribute the remaining proceeds of the Asset Sales (after giving effect to the Priority Motion Settlement) and any other available proceeds of the Applicants to the Applicants' Secured Creditors according to their priorities;

(b) Provide a central forum for the distribution of the Settlement Proceeds;

(c) Give effect to the third party releases contemplated for the released parties under the Settlement Agreements, in exchange for the settlement payments and other consideration to be provided by those parties under the Plan and the Settlement Agreements;

(d) Give effect to the full and final release and discharge of the affected creditor claims; and

(e) Position the CCAA Estate of the Applicants to continue to pursue the remaining Estate Claims.

[26] Mr. Aziz is of the view that the Plan provides for an orderly and timely distribution of the Applicants remaining assets.

[27] Pursuant to the Plan, each Senior Secured Lender with an allowed Senior Secured Credit Agreement Claim, being Coliseum and 8028702, shall receive payment in full of the outstanding principal owed to them plus interest, less certain amounts to be paid as part of the Settlements (the "Senior Lender Plan Payment").

[28] Each Secured Noteholder shall be entitled to its *pro rata* share of the Applicants cash on hand following the Secured Lender Plan Payment. Each Secured Noteholder shall also be entitled to its *pro rata* share of any proceeds recovered by the Applicants following the implementation of the Plan.

[29] On September 30, 2015, the court granted the Meetings Order (the "Meetings Order") which, among other things, approved the calling of meetings of the Applicants affected creditors (the "Meetings") for the purpose of voting on the Plan.

[30] The filing of the Plan was approved by court order dated October 6, 2015.

[31] At the Meetings held on November 10, 2015, the Senior Secured Lenders voted unanimously in favour of the Plan and 102 Secured Noteholders with voting claims representing 88% in number and 93% in value voted in favour of the Plan.

[32] Mr. Aziz states that it is the view of the Applicants and the Monitor that the Plan is fair and reasonable and ought to be approved in order to allow the Applicants to make the various distributions contemplated by the Plan and the Settlement Agreements to their Stakeholders as soon as possible. The Ad Hoc Committee and each of the Senior Secured Lenders support this position, as do each of the Ontario Consumer Class Action Plaintiffs, the Western Canada Consumer Class Action Plaintiffs and the Ontario Securities Class Action Plaintiffs.

[33] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the Plan.

[34] The general requirements for court approval of a CCAA plan are well-established:

(a) There must be strict compliance with all statutory requirements;

(b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) The plan must be fair and reasonable.

(See: *Canadian Airlines Corp. (Re)* (2000), 20 C.B.R. (4^{th}) 1 ALTA Q.B. ("Canadian Airlines), leave to appeal refused 2000 ABCA 238, leave to appeal refused (2001) S.C.C.A. No. 60, and *Sino-Forest Corp. (Re)*, 2012 ONSC 7050).

[35] Having reviewed the evidence of Mr. Aziz and the Twenty-First Report of the Monitor, I am satisfied that there has been strict compliance with the statutory requirements.

[36] I am also satisfied that nothing has been done or purported to be done that is not authorized by the CCAA.

[37] With respect to the third part of the test, namely a consideration as to whether the plan is fair and reasonable, it is necessary to keep in mind that the court does not require perfection. Rather, the court will measure the fairness and reasonableness of a plan against the available commercial alternatives, weigh the equities and balance the relative degree of prejudice that would flow from granting or refusing to grant the relief being sought under the CCAA.

[38] Factors considered by courts in considering whether a plan is fair and reasonable have included:

(a) Classification of creditors and creditor approval;

(b) What creditors would receive on liquidation or bankruptcy compared to the plan;

(c) Alternatives to the plan and bankruptcy;

(d) Oppression;

(e) Unfairness to shareholders; and

(f) The public interest.

(See: *Canadian Airlines, supra* and *Sino-Forest, supra*)

[39] I am satisfied that in this case, all of the creditors are treated equally under the Plan, except that, in accordance with the D & O/Insurer Global Settlement Agreement, 424187 Alberta Ltd. will receive no distributions in respect of its Senior Secured Credit Agreement Claim. In accordance with its obligations under the D & O/Insurer Global Settlement Agreement, 424187 Alberta Ltd. voted for the Plan.

[40] Having considered the full record, I am satisfied that the Plan is fair and reasonable in the circumstances given:

(a) The Plan represents a compromise among the Applicants and the affected Creditors resulting from lengthy negotiations;

(b) The Plan provides a global resolution of all claims against the Applicants and numerous class action claims;

(c) The appropriate classes of affected creditor overwhelming voted to approve the Plan;

(d) The funds to be distributed pursuant to the Plan at this time are insufficient to satisfy the Secured Claims of the Secured Noteholders, and as such, unsecured creditors do not receive any distributions;

(e) The Plan provides for an ongoing Litigation Trust to pursue additional claims to the benefit of Stakeholders;

(f) Failure of the Plan would result in detrimental consequences to Stakeholders given that there is no realistic alternative to the Plan which provides for the global resolution of all claims against the Applicants and the numerous class action claims that will be resolved as part of the Plan;

(g) The Plan treats affected creditors fairly and provides for the same distribution within each class;

(h) The releases provided under the Plan are appropriate in the circumstances, as discussed below; and

(i) The Plan is supported by the Monitor, the CRO, Litigation Counsel, the Ad Hoc Committee, the Ontario Consumer Class Action Plaintiffs, the Western

Canada Consumer Class Action Plaintiffs, the Ontario Securities Class Action Plaintiffs, DirectCash, the D & Os and the Insurers.

[41] Turning now to the question of third party releases and whether they are appropriate in the circumstances. Canadian courts have, on occasion, approved plans (and settlement agreements in the context of CCAA proceedings) containing broad third party releases (see, for example: *ATV Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5^{th}) 163 (Ont. C.A.) ("Metcalfe Appeal); leave to appeal refused (2008), 257 OAC 400 (SCC)); *AbitibbeBowater (Re)* (2010), 72 C.B.R. (5^{th}) 80 (Que. S.C.) ("Abitibbe") and *Angiotech Pharmaceuticals Inc.*, *(Re)* (2011), 76 C.B.R. (5^{th}) 210 (B.C.S.C.)).

[42] Counsel to the CRO submits that CCAA Courts have approved third party releases in the context of plans of arrangement and settlement agreements where the releases are rationally related to a resolution of the debtors claims, the releases will benefit creditors generally, and the releases are not overly broad. Factors considered by courts in determining whether to approve third party releases include:

(a) Whether the parties to be released are necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) Whether the plan would fail without the releases;

(d) Whether the parties who are to have claims against them released are contributing in a tangible and realistic way to the plan;

(e) Whether the plan would benefit not only the debtor companies but creditors generally;

(f) Whether the creditors voting on the plan had knowledge of the nature and effect of the releases; and

(g) Whether the releases are fair and reasonable and not overly broad.

(See: *Metcalfe Appeal* and *Nortel Networks Corporation (Re)* (2010), 63 C.B.R. (5^{th}) 44).

[43] In addition, no single factor listed above is considered determinative, and the court's analysis must take into account the circumstances of each applicable claim (see: *Kitchener Frame Limited (Re)* (2012), 86 C.B.R. (5^{th}) 274).

[44] The third party releases provided under the Plan protect the released parties from potential claims that may be made in the future based on conduct prior to the implementation of the Plan.

[45] Having reviewed the evidence, I am satisfied that there is a reasonable connection between the releases contemplated by the Plan and the restructuring could be achieved by the Plan to warrant inclusion of such releases in the Plan.

[46] I have arrived at this conclusion based on the following:

(a) Full notice and disclosure of the releases was given to the creditors in the Plan, the information statement, the Monitor's Reports and affidavits filed in these proceedings;

(b) Full notice and disclosure of the releases was given to the consumer loan customers through the court approved notice programs in the Consumer Class Action cases;

(c) Full notice and disclosure of the releases was given to shareholders as part of the court approved notice program in the Securities Class Action cases;

(d) The success of the Plan, and each of the Settlement Agreements related thereto, is contingent on the releases being granted;

(e) The releases are sufficiently broad to accomplish their purpose of facilitating the implementation of the Plan and are not, in my view, overly broad of offensive to public policy;

(f) The releases under the Plan do not include a release of any Non-Released Claims, which is defined to include:

i. Any claims under section 5.1(2) of the CCAA;

ii. Any claims under section 19(2) of the CCAA;

iii. Any claims by any of the third party lenders against any of the D & Os; and

iv. Any claim by a person who is not a party to or bound by the D & O/Insurer Global Settlement Agreement or the DirectCash Global Settlement Agreement that is based on a final judgment that a plaintiff suffered damages as a direct result, and solely as a result, of such plaintiff's reliance on an express fraudulent misrepresentation made by the D & Os, the McCann Entities, or by any DirectCash director, officer or employee, when any such person had actual knowledge that the misrepresentation was false;

(g) The Monitor considers the releases contained in the plan to be fair and reasonable in the circumstances.

[47] I accept the evidence of Mr. Aziz that the Settlements are central to the resolution of these CCAA Proceedings and are highly inter-connected.

[48] I am satisfied that the released parties are making significant settlement payments and providing other significant consideration in exchange for the releases and the Plan and the Settlement Agreements cannot be implemented without the releases.

[49] The Applicants request that the Confidential Appendix to the Monitor's Twenty-First Report be sealed on the basis that it contains information about the terms of the Litigation Trustee Retainer which are commercially sensitive and subject to litigation privilege. Having considered the two-part test set forth by the Supreme Court of Canada in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate to grant the sealing order.

[50] The Settlements include the proposed resolution of certain claims that have been asserted by Litigation Counsel, on behalf of the Applicants, against certain third party defendants.

[51] First, as part of the D & O Insurers/Global Settlement, the Applicants propose to settle their Estate Claims against the D & Os for three forms of consideration:

(a) A settlement payment of $2,750,000;

(b) The cancellation of the Senior Secured Credit Agreement held by 424187 Alberta Ltd., a company controlled by a family member of Gordon Reykdal (which claim is equal to $2 million); and

(c) The cooperation of the D & Os in the prosecution of the Applicants Remaining Estate Actions.

[52] Second, as part of the DirectCash Global Settlement Agreement, the Applicants propose to settle their Estate Claim against DirectCash for a settlement payment to the Estate of $4,500,000.

[53] Counsel to the CRO submits that, while these settlements form an integral part of the Plan to be approved, they are also reasonable CCAA Settlements in and of themselves.

[54] When approving a settlement under the CCAA the court must be satisfied that:

i. The transaction is fair and reasonable;

ii. The transaction will be beneficial to the debtor and its stakeholders generally; and

iii. The settlement is consistent with the purpose and spirit of the CCAA.

(See: *Robertson* v. *Proquest Information and Learning Co.*, 2011 ONSC 1647)

[55] Counsel to the CRO submits that the Settlements emerged from hard-fought negotiations and mediations, and are supported by the Monitor and the Ad Hoc Committee.

[56] I accept these submissions and I am of the view that the Settlements should be approved.

[57] The Applicants also request an extension of the Stay Period to and including May 20, 2016. It is clear that although there has been substantial progress in the CCAA Proceedings to date, that much work remains to be done.

[58] I am satisfied that the Applicants have acted and are acting in good faith and with due diligence such that the request to extend the Stay Period to and including May 20, 2016 is appropriate and the request is accordingly granted.

[59] The CRO is to be discharged upon implementation of the Plan. Accordingly, the Applicants are requesting that the Monitor's powers be expanded to assist the Applicants in completing their remaining activities during the course of these proceedings. I am satisfied that it is appropriate to authorize the Monitor to take on this expanded role.

[60] In conclusion, it is my view that this Plan represents a global resolution and the myriad of inter-connected claims and litigation that, through the operation of the Plan and related Settlement Agreements, will serve to maximize available recoveries for the Applicants and various Stakeholders.

[61] The Plan was unanimously approved by the Senior Secured Lenders and overwhelmingly approved by the Secured Noteholders.

[62] The Plan has the support of the Monitor, the CRO, the Litigation Counsel, the Ad Hoc Committee, the Ontario Consumer Class Action Plaintiffs, the Western Canada Consumer Class Action Plaintiffs, the Ontario Securities Class Action Plaintiffs, DirectCash, D & Os and the Insurers.

[63] The statutory requirements under the CCAA have been complied with and I am satisfied that the Plan is fair and reasonable.

[64] Accordingly, the Plan is sanctioned and the requested ancillary relief is also granted. The Sanction Order has been signed in the revised form presented to me at the hearing.

[65] It should also be noted that the court has also granted the Class Action Settlement Approval Orders such that the parties can take the necessary steps to proceed to implement the Plan and the related Settlement Agreements.

[66] I would also like to acknowledge the cooperation and assistance of The Honourable Mr. Justice Kenneth R. Hanssen of the Court of Queen's Bench of Manitoba, during the hearing of this motion.

[67] Finally, I would also like to acknowledge the efforts of all parties who contributed to the global resolution of all matters involved in these proceedings.

Regional Senior Justice G.B. Morawetz

Date: November 20, 2015

TAB 7

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

2016 CarswellAlta 1484, 2016 ABQB 419, [2016] A.W.L.D. 3664, [2016] A.W.L.D. 3694, 269 A.C.W.S. (3d) 218, 38 C.B.R. (6th) 36

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Lutheran Church - Canada, the Alberta - British Columbia District, Encharis Community Housing and Services, Encharis Management and Support Services, and Lutheran Church - Canada, The Alberta - British Columbia District Investments Ltd.

B.E. Romaine J.

Heard: July 15, 2016
Judgment: August 2, 2016
Docket: Calgary 1501-00955

Counsel: Francis N.J. Taman, Ksena J. Court for District Group
Jeffrey L. Oliver, Frank Lamie for Monitor
Chris D. Simard, Alexis E. Teasdale for District Creditors' Committee
Douglas S. Nishimura for DIL Creditors' Committee
Errin A. Poyner for Elvira Kroeger and Randall Kellen
Allan A. Garber for Marilyn Huber and Sharon Sherman
Dean Hutchison for Concentra Trust
Christa Nicholson for Francis Taman, Bishop and McKenzie LLP

Subject: Churches and Religious Institutions; Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPLICATION by creditors to replace monitor when last two plans of arrangement and compromise were approved by requisite double majority of creditors.

***B.E. Romaine J.*:**

I. Introduction

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1 This *CCAA* proceeding has been complicated by some unusual features. There are approximately 2,592 creditors of the Church extension fund with proven claims of approximately $95.7 million, plus 12 trade creditors with claims of approximately $957,000. There are 896 investors in the Church investment corporation with outstanding claims of $22.4 million. Many of these creditors and investors invested their funds at least in part because of their connection to the Lutheran Church. Many of them are elderly. Some of them are angry that what they thought were safe vehicles for investment, given the involvement of their Church, have proven not to be immune to insolvency. Some of them invested their life savings at a time of life when such funds are their only security during retirement. Inevitably, there is bitterness, a lack of trust and a variety of different opinions about the outcome of this insolvency restructuring.

2 A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so. I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

3 On January 23, 2015, the Lutheran Church — Canada, the Alberta — British Columbia District (the "District"), Encharis Community Housing and Services ("ECHS"), Encharis Management and Support Services ("EMSS") and Lutheran Church — Canada, the Alberta — British Columbia District Investment Ltd. ("DIL", collectively the "District Group") obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended. Deloitte Restructuring Inc. was appointed as Monitor and a CRO was appointed for the District and DIL.

4 The District is a registered charity that includes the Church Extension Fund ("CEF"), which was created to allow District members to lend money to what are characterized as faith-based developments. Through the CEF, the District borrowed approximately $96 million from corporation, churches and individuals. These funds were invested by the District in a variety of ways, including loans and mortgages available to congregations to build or renovate churches and schools, real estate investments, and a mortgage on a real estate development known as the Prince of Peace Development.

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5 CEF was managed by the District's Department of Stewardship and Financial Ministries and was not created as a separate legal entity. As such, District members who loaned funds to CEF are creditors of the District (the "District Depositors").

6 ECHS owned land and buildings within the Prince of Peace Development, including the Manor and the Harbour, senior care facilities managed by EMSS. EMSS operated the Manor and Harbour for the purpose of providing integrated supportive living services at the Manor and the Harbour to seniors.

7 The Prince of Peace Development also included a church, a school, condominiums, lands known as the Chestermere lands and other development lands.

8 DIL is a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for annuitants. Concentra Trust acted as the trustee with respect to these investments. Depositors to DIL are referred to as the "DIL Investors". The District Depositors and the DIL Investors will collectively be referred to as the "Depositors".

9 Soon after the initial order, the District and the Monitor received feedback that the District Depositors and the DIL Investors wanted to have a voice in the *CCAA* process. Thus, on February 13, 2015, Jones, J granted an order creating creditors' committees for the District (the "District Creditors' Committee") and DIL (the "DIL Creditors' Committee"), tasked with representing the interests of the District Depositors and DIL Investors. The members of the committees were elected from among the Depositors. By the order that created them, they must act in a fiduciary capacity with respect to their respective groups of creditors. The committees were authorized to engage legal counsel, who have represented them throughout the *CCAA* process, and the committees and their counsel have been active participants in the process.

10 ECHS and EMSS prepared plans of compromise and arrangement that were approved by creditors and sanctioned by the Court in January 2016. Pursuant to those plans, ECHS' interest in the condominiums was transferred to a new corporation that is to be incorporated under the District Plan ("NewCo"). The Chestermere lands were sold. The remainder of the lands and buildings (the "Prince of Peace properties") are dealt with in the District Plan.

11 On 22nd and 23rd of February, 2016, a Depositor and an agent of a Depositor commenced proceedings against Lutheran Church — Canada, Lutheran Church — Canada Financial Ministries, Francis Taman, Bishop & McKenzie LLP, John Williams, Roland Chowne, Prowse Chowne LLP, Concentra Trust, and Shepherd's Village Ministries Ltd., all defendants with involvement in the District Group's affairs, pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 (Alberta). Two other Depositors issued a Notice of

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Civil Claim in the Supreme Court of British Columbia pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c.50 (British Columbia) against the same defendants (together with the Alberta proceeding, the "class action proceedings").

12 On March 3, 2016, DIL submitted a plan of arrangement that had been approved by creditors for sanction by the Court. I deferred the decision on whether to sanction the DIL plan until the District plan had been finalized, presented to District creditors, and, if approved, submitted for sanctioning. At the same time, I stayed the class action proceedings. The DIL and District plans contain similar provisions that are subject to controversy among some Depositors. There is considerable overlap among the DIL Investors and the District Depositors.

13 On July 15, 2016, the District applied for an order sanctioning the District plan. On the same day, the Depositors who commenced the class action proceedings applied for an order replacing the Monitor.

B. The District Plan

14 The District plan has one class of creditors. Pursuant to the claims process, there were 2,638 District Depositors. An emergency fund was implemented prior to the filing date and approved by the Court as part of the initial order, to ensure that District Depositors, many of whom are seniors, would have sufficient funds to cover their basic necessities. Taking into account those payments, District Depositors had proven claims of approximately $96.2 million as at December 31, 2015.

15 Under the plan, each eligible affected creditor will be paid the lesser of $5,000 or the total amount of their claim (the "Convenience Payment(s)") upon the date that the District plan takes effect. This will result in 1,640 District Depositors (approximately 62%) and 10 trades creditors (approximately 77%) being paid in full. The Convenience Payments are estimated to total $6.3 million.

16 The District plan contemplates the liquidation of certain non-core assets. Each time the quantum of funds held in trust from the liquidation of these assets, net of the "Restructuring Holdback" and the "Representative Action Holdback" referred to later in this decision, reaches $3 million, funds will be distributed on a pro-rata basis to creditors.

17 If the District plan is approved, a private Alberta corporation ("NewCo") will be formed following the effective date of the plan. NewCo will purchase the Prince of Peace properties from ECHS in exchange for the NewCo shares. The value of the NewCo shares would be based on the following:

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a) the forced sale value of the Harbour and Manor seniors' care facilities based on an independent appraisal dated November 30, 2015;

b) the forced sale value of the remaining Peace of Peace properties, based on an independent appraisal dated October 15, 2015;

c) the estimated value of the assets held by ECHS that would be transferred to NewCo pursuant to the ECHS plan; and

d) the estimated value of the assets held by EMSS that would be transferred to NewCo pursuant to the EMSS plan.

18 ECHS will then transfer the NewCo shares to the District in partial satisfaction of the District — ECHS mortgage. The NewCo shares will be distributed to eligible affected creditors of the District on a pro-rata basis. The Monitor currently estimates that creditors remaining unpaid after the Convenience Payment will receive NewCo shares valued at between 53% and 60% of their remaining proven claims. The cash payments arising from liquidation of non-core assets and the distribution of shares are anticipated by the Monitor to provide creditors who are not paid in full by the Convenience Payments with distributions valued at between 68% and 80% of their remaining proven claims, after deducting the Convenience Payments. Non-resident creditors (8 in total) will receive only cash.

19 Distributions to creditors will be subject to two holdbacks:

a) the "Restructuring Holdback", to satisfy reasonable fees and expenses of the Monitor, the Monitor's legal counsel, the CRO, the District Group's legal counsel and legal counsel for the District Creditors' Committee, the amount of which will be determined prior to the date of each distribution based on the estimated professional fees required to complete the administration of the *CCAA* proceedings; and

b) the "Representative Holdback", an amount sufficient to fund the out-of-pocket costs associated with the "Representative Action" process described later in this decision, and to indemnify any District Depositor who may be appointed as a representative plaintiff in the Representative Action for any costs award against him or her. The Representative Action Holdback will be determined prior to any distribution based on guidance from a Subcommittee appointed to pursue the Representative Action and retain representative counsel.

20 The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through

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any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

21 NewCo's bylaws will include a clause requiring that 50% of the board of directors must be comprised of District Depositors or their nominees. Although NewCo is being created with the object of placing the NewCo assets in the hands of a professional management team with appropriate business and real estate expertise, the District Creditors' Committee wanted to ensure that affected Creditors will have representation equal to that of the professional management team on the NewCo board. The members of the NewCo board may change prior to NewCo being formed, subject to District Creditors' Committee approval. Subsequent changes to the NewCo board would be voted on at future shareholder meetings.

22 The articles of incorporation for NewCo will be created to include the following provisions, which are intended to provide additional protection for affected creditors:

a) NewCo assets may only be pledged as collateral for up to 10% of their fair market value, subject to an amendment by a special resolution of the shareholders of NewCo;

b) a redemption of a portion of the NewCo shares would be allowed upon the sale of any portion of the NewCo assets that generates net sale proceeds of over $5 million;

c) NewCo would establish a mechanism to join those NewCo shareholders who wished to purchase NewCo shares with those NewCo shareholders who wished to sell them;

d) a general meeting of the NewCo shareholders will be called no later than six months following the effective date of the plan for the purpose of having NewCo shareholders vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation or all or a portion of the NewCo assets or a joint venture to further develop the NewCo assets; and

e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

23 The District plan establishes a Representative Action process whereby a future legal action or actions, which may be undertaken as a class proceeding, can be undertaken for the benefit of those District Depositors who elect or are deemed to elect to participate. The Representative Action would include only claims by District Depositors who are not fully paid under the District plan and specifically includes the following:

a) claims related to a contractual right of one or more of the District Depositors;

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b) claims bases on allegations of misrepresentation or wrongful or oppressive conduct;

c) claims for breach of any legal, equitable, contractual or other duty;

d) claims pursuant to which the District has coverage under directors' and officers' liability insurance; and

e) claims to be pursued in the District's name, including any derivative action or any claims that could be assigned to a creditor pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, if such legislation were applicable.

24 District Depositors may opt-out of the Representative Action process, in which case they would be barred from further participation. Evidently, some Depositors are precluded by their religious beliefs from participating in this type of litigation.

25 The District Depositors who elect to participate in the Representative Action process will have a portion of their cash distributions from the sale of assets withheld to fund the Representative Action Holdback. It will only be possible to estimate the value of the Representative Action Holdback once representative counsel has been retained. At that point, the Monitor will send correspondence to the participating Depositors with additional information, including the name of the legal counsel chosen, the estimated amount of the Representative Action Holdback, the commencement date of the representative action, the deadline for opting out of the Representative Action and instructions on how to opt out of the Representative Action should they choose to do so.

26 A Subcommittee will be established to choose legal counsel to represent the participating District Depositors. The Subcommittee will include between three and five individuals and all members of the Subcommittee will be appointed by the District Creditors' Committee. The Subcommittee is not anticipated to include a member of the District Committee.

27 The duties and responsibilities of the Subcommittee will include the following:

a) reviewing the qualifications of at least three lawyers and selecting one lawyer to act as counsel;

b) with the assistance of counsel, identifying a party(ies) willing to act as the Representative Plaintiff;

c) remaining in place throughout the Representative Action with its mandate to include:

(i) assisting in maximizing the amount available for distribution;

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(ii) consulting with and instructing counsel including communicating with the participating District Depositors at reasonable intervals and settling all or a portion of the Representative Action;

(iii) replacing counsel;

(iv) serving in a fiduciary capacity on behalf of the participating District Depositors;

(v) establishing the amount of Representative Action Holdback and directing that payments be made to counsel from the Representative Action Holdback; and

(vi) bringing any matter before the Court by way of an application for advice and direction.

28 The Representative Action process will be the sole recourse available to District Depositors with respect to the Representative Action claims.

29 The District plan releases:

a) the Monitor, the Monitor's legal counsel, the District Group's legal counsel, the CRO, the legal counsel for the District Committee and the District Committee members, except to the extent that any liability arises out of any fraud, gross negligence or willful misconduct on the part of the released representatives, to the extent that any actions or omissions of the released representatives are directly or indirectly related to the *CCAA* proceedings or their commencement; and

b) the District, the other *CCAA* applicants, the present and former directors, officers and employees of the District, parties covered under the D&O Insurance and any independent contractors of the District who were employed three days or more on a regular basis, from claims that are largely limited to statutory filing obligations.

30 The following claims are specifically excluded from being released by the District plan:

a) claims against directors that relate to contractual rights of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors as set out in Section 5.1(2) of the *CCAA*;

b) claims prosecuted by the Alberta Securities Commission or the British Columbia Securities Commission arising from compliance requirements of the *Securities Act* of Alberta and the *Financial Institutions Act* of British Columbia;

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c) claims made by the Superintendent of Financial Institutions arising from the compliance requirements of the *Loan and Trust Corporations Acts* of Alberta and British Columbia; and

d) any Representative Action claims, whether or not they are insured under the District's directors and officers liability insurance, that are advanced solely as part of the Representative Action.

C. The District Meeting

31 On March 21, 2016, I granted an order authorizing the District to file the District plan of compromise and arrangement and present it to the creditors. A draft version of the Monitor's Report to District Creditors was provided to both the Court and counsel for the class action plaintiffs ahead of the District meeting order being granted. Neither class action counsel voiced specific concerns with the disclosure provided therein.

32 The first meeting of District creditors was held on May 14, 2016. Counsel for the BC and Alberta class action plaintiffs were in attendance and able to make submissions to the meeting and to question the Monitor. A number of attendees made submissions and asked questions. Certain documents that had been referenced in a Monitor's FAQ report on the issue of future potential development of the Prince of Peace properties (described later in this decision) were discussed in detail and questions with respect to these documents were answered by the Monitor. The meeting lasted approximately six hours. It was adjourned at the request of the representative of a Depositor who wanted more time to consider the Prince of Peace development disclosure and obtain further instructions from his congregation.

33 After making inquiries and being satisfied that congregations who wished further consultation had time to do so, the Monitor posted a notice on its website on May 20, 2016 that the reconvened meeting was to be held on June 10, 2016. The notice was sent by email to those creditors who are congregations on May 20, 2016 and sent by regular mail to all creditors on May 24, 2016. The notice advised creditors that they had additional time to change their vote on the District plan, should they choose to do so. Four congregations asked the Monitor for further information before the reconvened meeting.

34 The Monitor received a total of 1,294 votes on the District plan from eligible affected creditors with claims totalling approximately $85.1 million. Of these votes, 1,239 were received by way of election letters and 55 were received by way of written ballots submitted in person or by proxy at the District meeting. In total, 50% of eligible affected creditors voted and the claims of those creditors who voted represented 88% of the total proven claims of eligible affected creditors.

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35 Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

36 The DIL plan includes only one class of affected creditors consisting of DIL Investors. The DIL Investors reside in eight provinces and territories in Canada and in three U.S. states. Most of the accounts held by DIL Investors are RRSP and RRIF accounts.

37 Following the release of the original DIL package of meeting materials, based on discussions with DIL Investors, the Monitor prepared two documents entitled "Answers to frequently asked questions" (the "FAQs"), one of which was dated December 24, 2015 and the other dated January 18, and amended January 20, 2015.

38 The DIL plan contains provisions for the orderly transition of the registered accounts from Concentra to a replacement trustee and administrator. As part of this transition, the cash and short-term investments held by DIL will be transferred, net of holdbacks outlines in the DIL plan, to the replacement fund manager. The mortgages held by Concentra and administered by DIL will be converted to cash over time and paid to the fund manager.

39 Pursuant to previous order, DIL was authorized to distribute up to $15 million to the DIL Investors. For those DIL Investors who held registered retirement savings plan, tax free savings accounts or locked-in retirement accounts with DIL, their pro-rate share of the first DIL Distribution was transferred into accounts that had been established with the replacement fund manager. For those DIL Investors who held RRIFs or LIFs, their pro-rate share of the first DIL distribution was transferred upon their request, to an alternate registered account of their choosing. A second distribution of up to $7.5 million was made in April, 2016.

40 In addition to this these interim distribution, statutory annual minimum payment to RRIF holders were made for 2015. Selected DIL Investors also received payments pursuant to the emergency fund. Taking into account these payments, pre-filing distributions to DIL Investors totalled approximately $15.6 million, 41% of their original investment without taking into account any estimated write-downs on the value of the assets held by DIL.

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41 The DIL plan contains substantially the same provisions with respect to limited releases and a Representative Action process as the District plan.

42 The Monitor estimates that, prior to any recovery under the Representation Action, DIL Investors will recover between 77% and 83% of their original investment as of the filing date.

E. The DIL Meeting

43 The DIL meeting of creditors was held on January 23, 2016.

44 There were 87 attendees at the DIL meeting. The Monitor received a total of 472 votes from DIL Investors with claims totalling approximately $14.5 million. In total, 53% of DIL Investors voted and the claims of those DIL Investors who voted represented 65% of the total proven claims of DIL Investors.

45 Of the 472 DIL Investors who voted, 434, or approximately 92%, voted in favour of the DIL plan and 38 DIL Investors, or approximately 8%, voted against the DIL plan. Those DIL Investors who voted in favour of the DIL plan had claims totalling approximately $12.7 million, or approximately 87% of the claims, and those DIL Investors who voted against the DIL plan had claims totalling approximately $1.8 million, or approximately 13% of the claims and a majority in number of voting DIL Investors. Therefore, the DIL plan was approved by the required double majority.

III. The Applications

A. Application to Remove the Monitor

46 The Depositors who commenced the British Columbia class action proceedings, Elvira Kroeger and Randall Kellen, apply:

a) to remove the Monitor and replace it with Ernst & Young LLP; or alternatively

b) to appoint Ernst & Young as a "Limited Purpose Monitor" to review the Representative Action provisions of the District plan and render its opinion to the Court with respect to whether the plan is fair and reasonable to the District Depositors;

c) to authorize Ernst & Young to retain legal counsel to assist it in rendering its opinion to the Court if it considers it reasonable and necessary to do so; and

d) to secure Ernst & Young's fees and those of its counsel to a maximum amount of $150,000.00 plus applicable taxes under the current Administration Charge or under

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a second Administration Charge to rank *pari passu* with the current Administration Charge.

47 They are supported in their application by the Alberta class action plaintiffs, collectively the "opposing Depositors". The opposing Depositors submit that the Monitor is unable by reason of conflict of interest to provide the Court with a neutral and objective opinion with respect to the Representative Action provisions of the District plan. They also submit that the Monitor has breached its fiduciary duty to the Court and to the District creditors by failing to disclose certain municipal planning documents relating to the Prince of Peace Development.

1. Overview

48 It is trite law that the Monitor in *CCAA* proceedings is an officer of the Court and that its duty is to act in the best interests of all stakeholders. Monitors are required to act honestly and fairly and to provide independent observation and oversight of the debtor company.

49 The Monitor is expected and required to report regularly to the Court, creditors and other stakeholders, and has a statutory obligation to advise the Court on the reasonableness and fairness of any plan of arrangement proposed between the debtor and its creditors: section 23(1) of the *CCAA*. Courts accord a high level of deference to decisions and opinions of the Monitor.

50 The opposing Depositors submit that the Monitor is acting as an advocate of the debtor, without a sufficient degree of neutrality. They submit, by implication, that I should give the Monitor's recommendations on the plans little or no deference for that reason.

51 An attack on the Monitor is an attack on the integrity of the *CCAA* process, and must be taken seriously.

2. Conflict of Interest

52 The opposing Depositors allege that the Monitor has a conflict of interest on the following bases:

a) In its Pre-Filing Report to the Court, the Monitor disclosed that it had provided consulting services to the District between February 6, 2014 and the date of the initial order, including:

(i) on February 6, 2014; to provide an independent evaluation of the potential options relating to the Prince of Peace Development and to create a plan for executing the option that was ultimately chosen;

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(ii) on June 30, 2014; to provide an evaluation of the debt structure of the CEF as it related to the District, the members of the District, ECHS, EMSS and the Prince of Peace Development; and

(iii) on July 25, 2014; to act as a consultant regarding the informal or formal restructuring of the District Group.

b) In its Fourth Report dated June 24, 2015, the Monitor advised that it had recently determined that a related professional accounting firm, Deloitte & Touche (now Deloitte LLP) had acted as auditor for the District from 1990 to 1998 or 1999. While the Monitor had performed a conflicts check prior to agreeing to act as Monitor, this check failed to flag the previous audit engagement. The Monitor further stated that, while its former role as auditor to District did not preclude it from acting as Monitor in these proceedings, it might be precluded from conducting a preliminary review of the District's expenditures in relation to the Prince of Peace development for the period during which it had acted as auditor. However, as the District had been unable to produce supporting documentation with respect to funds expended on the Prince of Peace development prior to 2006, and Deloitte did not act as auditor subsequent to 1999, the Monitor took the position that "it was not conflicted from completing the Review to the extent that they can for the period for which documentation is available".

c) On March 8, 2016, the Monitor advised the Court and the parties that Deloitte & Touche had completed the DIL audit for the years ended January 31, 1998 and January 31, 1999, the first two years during which DIL operated the registered fund. Again, the reason for the late disclosure appears to be that the engagements were recorded under different names those now used by the District.

53 These previous services do not, on their face, disqualify the Monitor from acting as Monitor. With respect to the audit services, it is not a conflict of interest for the auditor of a debtor company to act as Monitor in *CCAA* proceedings. In this case, the sister company of the Monitor has not been the auditor of either the District or DIL for over 16 years, The Monitor does not suffer from any of the restrictions placed on who may be a Monitor by Section 11.7(2) of the *Act*. While the late disclosure of the historical audits was unfortunate, audits performed more than 16 years ago by a sister corporation raise no reasonable apprehension of bias, either real or perceived.

54 It is also not a conflict of interest, nor is it unusual, for a proposed Monitor to be involved with the debtor companies for a period of time prior to a *CCAA* filing. The Monitor made full disclosure of that involvement prior to being appointed, more than a year before this application was brought.

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55 This is not a case where a Monitor was involved in or required to give advice to the Court on the essential issue before it, such as a pre-filing sales process. The issues with respect to the plans before the Court arise from details of the plans that have been the subject of negotiation and consultation among the District Group, the Creditors' Committees and the Monitor post-filing.

56 The opposing Depositors, however, point to certain representations that were made by the District in letters to some of Depositors in the months prior to the *CCAA* filing, which they say were untrue and misleading. They submit that the Monitor must have known about these letters, and thus condoned, if not participated in, misrepresentations made to the Depositors.

57 The Monitor responds that it did not act in a management capacity with respect to the District nor did it prepare or issue communications pre-filing. It did not control the District Group.

58 There is no realistic indication of conflict arising from these allegations. The attempt to taint the Monitor with knowledge of letters sent by the District to the Depositors is speculation unsupported by any evidence.

59 The opposing Depositors also submit that the prior audit engagements create a potential conflict for the Monitor in the event that the Subcommittees of the Creditors' Committees decide to bring a claim against Deloitte & Touche as former auditor of the District or DIL. In that respect, Ms. Kroeger and Mr. Kellen have by letter dated March 4, 2016 demanded that the District commence legal proceedings against the District's auditors, including Deloitte & Touche. Given the stay, the District took no action, and the opposing Depositors concede that they did not expect the District to act during the *CCAA* proceedings.

60 It is not appropriate for this Court to determine or to speculate on whether the Depositors have a realistic cause of action against an auditor sixteen years after the final audit engagement, but assuming that the Representative Action provisions of the plans could result in an action against a sister corporation of the Monitor, the proposed ongoing role of the Monitor in those proceedings should be examined to determine whether such role could give rise to a real or perceived conflict of interest.

61 As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of

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the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

62 The Monitor will aid in making distributions under the plans, including with respect to the release of any unused portion of the Representative Action Holdback, which it anticipates will be determined on a global basis and communicated by the Subcommittees to the Monitor on a global basis. The Monitor will have no knowledge of the considerations or calculations that so into establishing the Representative Action Holdback. Further, the Monitor does not need to be, and will not under any circumstances be, privy to any information regarding the strategy that the representative counsel chooses to communicate to Depositors, including the parties to be named in the Representative Action.

63 In the circumstances, the Monitor is the most appropriate party to be involved in communication with Depositors in the early stages of the Representative Action process, as it has the information and experience necessary to ensure that such communication is done quickly, effectively, and at the lowest possible expense.

64 The mere possibility of a decision to proceed against the Monitor's sister corporation does not justify the expense and disruption of bringing in a new Monitor to perform these administrative tasks. If the Subcommittees determine that an action can be commenced against the historical auditors that is not barred by limitations considerations, the issue of a real, rather than a speculative conflict, can be raised before the Court for advice and direction in accordance with the plans. The possibility that the Subcommittees may decide not to proceed against the historical auditors does not imply undue influence from the Monitor. The members of the Subcommittees will be fiduciaries, bound to act in the best interests of the remaining creditors.

65 There is no persuasive argument nor any evidence that they would act other than in those best interests.

66 The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released

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from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

67 The opposing Depositors submit that there are "substantive and procedural benefits" from its continuing position that the Monitor may take advantage of. On closer examination, those alleged advantages are insignificant.

68 In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

69 A more serious charge against the Monitor than conflict of interest is the opposing Depositors' allegation that the Monitor breached its fiduciary duty to the Court and to District Depositors by failing to disclose certain municipal planning documents.

70 The documents at issue are:

> a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and
>
> b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

71 The MSDP identifies several prerequisites to development of the Prince of Peace properties, including a connection to the municipal water supply, the upgrading of the sanitary sewer lift station and work on a storm water management infrastructure. The Monitor notes the MSDP was prepared specifically for the development contemplated by EHSS in 2012, being medium density residential and additional assisted living capacity, ground floor retail and a parkade structure. As such, it is likely outdated and may not align with future development. A more recent appraisal of the properties in 2015 assumed low density development. The 2015 appraisal of the properties takes into account the work that

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would need to be undertaken by any third party who wished to further develop the Prince of Peace properties.

72 The opposing Depositors submit that the infrastructure projects identified by the MSDP would be costly and would likely pose barriers to development. They presented hearsay evidence of a conversation Mr. Kellen had with a Rocky View official that is of limited relevance apart from its hearsay nature, because future development would likely be different from what was contemplated in 2012.

73 The Conrich ASP stipulates that no development may occur within the Hamlet of Conrich until the kinds of infrastructure requirements identified in the MSDP are met. The ASP is being appealed by the City of Chestermere.

74 The Monitor became aware of these documents during its pre-filing services to the District Group. When a Depositor raised a question about these reports on April 28, 2016 at an information meeting, the Monitor prepared a QFA document dated April 29, 2016 regarding the future subdivision and development of the Prince of Peace properties and referencing the documents. This QFA was posted on the Monitor's website on April 29, 2016 and mailed to all affected creditors with claims over $5,000 on May 3, 2016, more than a month before the meeting at which the District plan was approved.

75 The issue is whether the Monitor breached its duty to the Court and creditors by failing to disclose these reports earlier. The answer to this question must take into account the context of the District plan and the nature of the Monitor's recommendations.

76 The District plan does not contemplate that any further development of the Prince of Peace properties would occur pursuant to the *CCAA* proceedings. The possibility that NewCo shareholders would pursue further development is one of the options available to NewCo or to a third party purchaser of the Prince of Peace properties if NewCo shareholders decide to sell the properties, as recognized in the plan materials. The plan gives NewCo shareholders the opportunity to consider their options.

77 As the Monitor notes, a vote on the District plan is not a vote in favour of any particular mandate for NewCo. The District plan contemplates that a NewCo shareholders' meeting will be held within six months of the District plan taking effect, at which time the NewCo shareholders will vote on a proposed mandate for NewCo, which may include the expansion of the Harbour and Manor seniors' care facilities, the subdivision and orderly liquidation of all or a portion of the assets held by NewCo, a joint venture to further develop the Prince of Peace properties or other options. These options will need to be investigated and reported on by NewCo's management team ahead of the NewCo shareholders' meeting.

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78 It was in this context that the Monitor considered the content of its reports to Depositors on the District plan and did not disclose the two plans, which in any event may be dated and of little relevance to a future development. I do not accept the opposing Depositors' allegation that the Monitor "concealed" this information.

79 In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

80 A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit <u>from the ability to liquidate</u> the Prince of Peace Properties at a time when market conditions are more favourable <u>or the ability to benefit from potential upside opportunities</u> that may be available <u>such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture</u> to further develop the Prince of Peace Properties <u>or through other options</u>
>
> (emphasis added).

81 Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

82 The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

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83 The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

84 As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

85 The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

86 The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

87 They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

88 A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

89 The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

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90 One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

91 The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

92 The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

93 The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor. A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

94 These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

95 The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote.

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It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

96 The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

97 I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

98 The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

99 The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

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100 Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

101 The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

102 It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffat v. Wetstein*, [1996] O.J. No. 1966 (Ont. Gen. Div.) at para 131.

103 While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

104 I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

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105 Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

106 I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

107 At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

108 I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

109 The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

110 The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

111 There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

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1. Overview

113 As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

114 The general requirements for court approval of a *CCAA* plan are well established:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done that is not authorized by the *CCAA;* and
>
> (c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at para 17; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 14.

115 It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

116 They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;

(b) the plans compromise third party claims;

(c) the plans provide no benefit to Depositors within the purpose of the CCAA;

(d) the plans contravene section 5.1(2) of the *CCAA*;

(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and

(f) the plans are not fair and reasonable.

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1. Do the plans contain provisions that are not within the scheme and purpose of the CCAA?

117 The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

118 The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

120 This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432 (S.C.C.)] for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

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> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

122 The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

123 The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

124 Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church — Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

125 There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

126 The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

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127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

129 If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

130 It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

131 While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

132 The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;

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(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and

(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

133 The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services], the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

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4. Do the plans contravene section 5.1(2) of the CCAA?

136 Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

137 As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

138 As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

139 The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

140 The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

141 Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

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142 Farley, J. in *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> ... is the Plan fair and reasonable? 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. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved — subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

143 The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

144 Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para 18 commented:

> It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business

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aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

145 The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Gold Texas Resources Ltd., Re*, [1989] B.C.J. No. 167 (B.C. S.C. [In Chambers]) at page 4, to the effect that the court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority.... (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

146 The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

147 I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 $^{1}/_{2}$ months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

149 As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

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150 I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

151 The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

152 Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

153 Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

154 Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

155 The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contech*

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Enterprises Inc., Re, 2015 BCSC 129 (B.C. S.C.); *Target Canada Co., Re*, 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]); *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750 (Ont. S.C.J.).

156 As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

157 The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

158 This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

159 The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

160 The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed

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real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

161 The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

162 This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

163 In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

164 The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty Trustco Ltd., Re* [1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List])] at paras 3&4; *Muscletech* at para 18.

165 The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

166 However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable

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to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

167 It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

168 The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

169 Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

170 As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

171 The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> 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

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> 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.

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

> 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 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.

173 In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

174 The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

175 Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

176 The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

177 The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* "in insolvency restructuring proceedings almost

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everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

178 The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Application dismissed.

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TAB 8

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 286 A.C.W.S. (3d) 658, 54 C.B.R. (6th) 173

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.

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Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPEAL by certain defendants from judgment reported at *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]), respecting ruling on oppression claim; APPLICATION by arm's length lender for leave to appeal order reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 4017, 2017 CarswellOnt 12508, 50 C.B.R. (6th) 148 (Ont. S.C.J.), respecting costs.

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1] , one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked

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standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

5 For the reasons that follow, I would dismiss the appeal.

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

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10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].

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> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad*

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hoc committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

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24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US $300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and
- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

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(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016.

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Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US $25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US$174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

> (a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

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(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US $19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum

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under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300

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million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US $150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

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52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017.

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On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court

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confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

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> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do

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significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

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78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

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84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of

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Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US$300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN $1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN $1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

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4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also, Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after

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amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the

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corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

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108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*. [5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings. [6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

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(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.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241***o***f the *CBCA* describes the oppression remedy:

(1) A complainant may apply to a court for an order under this section.

(2) If, on 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 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, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an

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oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party

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transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

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126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

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> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do

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> significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and negatively impact creditors. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.
>
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is

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> intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

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145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) 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?

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152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> 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. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> 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 relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." 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 the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

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> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

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162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . 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.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for

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> minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the triaI judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction

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being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US $250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

- US$150 million in cash from Essar Global under the amended RSA;
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and
- US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US $250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

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180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

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186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US $2 million had to be used to reduce Algoma's debt.

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193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> 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 . . . 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.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

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200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as

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those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required.

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Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

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217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar

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> Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

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> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the

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provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory

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note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully

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canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

242 I would not give effect to this ground of appeal.

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to

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have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

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257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

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

I agree.

***K. van Rensburg J.A.*:**

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

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6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

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TAB 9

2017 ONSC 7649
Ontario Superior Court of Justice

Urbancorp Cumberland 2 GP Inc., (Re)

2017 CarswellOnt 20265, 2017 ONSC 7649, 287 A.C.W.S. (3d) 16

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP CUMBERLAND 2 GP INC., URBANCORP CUMBERLAND 2 L.P., BOSVEST INC., EDGE ON TRIANGLE PARK INC., AND EDGE RESIDENTIAL INC.

F.L. Myers J.

Heard: December 13, 2017
Judgment: December 20, 2017
Docket: CV-16-11541-00CL

Counsel: Robert J. Drake, Lori Goldberg, for Monitor, Fuller Landau Group Inc.
Mark van Zandvoort, Timothy Jones, for Cooltech Air Systems Ltd., Cooltech Home Comfort Ltd., Genesis Home Services Inc., AEM Capital Corp., and Icarus Holdings (Milton) Inc.
Clifton P. Prophet, for Alvarez & Marsal Canada Inc., receiver, manager and construction lien trustee of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc.

Subject: Corporate and Commercial; Insolvency

MOTION by Monitor seeking advice and directions regarding *Companies' Creditors Arrangement Act* proceedings.

***F.L. Myers J.*:**

Outcome

1 The Monitor moves for advice and directions on whether payments in kind made by the *CCAA* debtors Edge on Triangle Park Inc. and Edge Residential Inc. to creditors of other Urbancorp affiliates were oppressive. The Monitor argues that using the currency of condominium units owned by Edge to satisfy debts of the other affiliates to their trade

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creditors amounts to oppression that should result in a monetary award against the trade creditors who received the units.

2 In my view, even if the Monitor had been empowered to bring this proceeding and if it is entitled to discretionary recognition as a complainant under the oppression remedy provisions of the *OBCA*, it still has not proved that, at the time that Edge transferred its property, any creditor or "the creditors," collectively, had any particular expectations, that any such expectations as might have been held were reasonable, or that anyone relied on any such reasonable expectations as he, she, it, or they might have held. Neither has the Monitor proved that the breach of any such reasonable expectations met any of the three qualitative assessments of oppression.

3 The motion is therefore dismissed.

The Basic Facts

4 The responding parties, whom I will refer to collectively for convenience as Cooltech, were creditors of Edge on Triangle Park Inc., other Urbancorp affiliates, and Urbancorp's owner Alan Saskin personally. Cooltech was a plumbing and HVAC contractor on several Urbancorp projects. It had a long history of satisfactory business dealings with Mr. Saskin and his businesses.

5 The Monitor challenges approximately $2.3 million paid by Edge to Cooltech, in July and August 2015, by means of the transfer of condominium units, parking spots, and storage lockers, transferred at or near fair market value, to pay off debts of other Urbancorp entities and a debt of $500,000 owed to Cooltech by Alan Saskin personally.

6 The transfers were made more than one year prior to the commencement of insolvency proceedings by Urbancorp. The Monitor does not challenge the transfers as fraudulent conveyances. It does not rely on any badges of fraud surrounding the transactions.

7 The Monitor no longer challenges the payments in kind made by Edge to Cooltech in respect of Edge's own debts. It does not challenge them under even the enhanced powers available in insolvency proceedings to remedy unjust preferences or transfers at undervalue for example.

8 In return for paying Cooltech, Edge received intercompany book entries from the affiliates whose loans it paid and other inter-company credits to account for the payment of Mr. Saskin's personal debt. The Monitor says that replacing hard assets with what have subsequently turned out to be impaired loans from insolvent entities prejudiced creditors' recovery in these proceedings and therefore was oppressive.

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The Position of Cooltech

9 Cooltech was am arm's length, third party creditor with a cash-flow strapped customer with whom it had dealt for 20 years. Mr. Saskin approached it and offered to pay Urbancorp's bills by transferring property in kind. Cooltech knew Mr. Saskin to run asset-rich but cash-poor businesses. When Mr. Saskin offered units in kind to pay Cooltech's outstanding invoices, Cooltech agreed.

10 Tthe Monitor does not claim that the value of the units was amiss. Cooltech received value commensurate with what it was owed. There was no gift component to the transaction. Rather, the source of the Monitor's complaints is not the sales *per se*, but the fact that the inter-company loans advanced to compensate Edge have subsequently turned out to be impaired. That had nothing to do with Cooltech. There is no basis in the evidence to suggest that it did anything wrong for which it should be held liable for recovery under an oppression remedy aimed at Triangle or Urbancorp. Cooltech is not alleged in this proceeding to have induced or procured a tort or a breach of fiduciary duty for example.

The Evidence

11 The Monitor has been able to show, from the books and records of various Urbancorp entities, that in mid-2015, when the transfers in kind occurred, Cooltech had been owed money by various Urbacorp entities for many months. There is no evidence as to whether this was unusual for these parties. There was no discussion in the evidence of the implication, if any, of the timing in the condominium development business cycle - just before the buildings were completed - when a developer's cash and credit might be expected to be near exhaustion perhaps. Was this normal for these parties? Was anyone particularly fussed? Payments in kind are not unknown in the industry. Were they unusual between these parties? Without knowing some of these answers, I cannot draw any inference about what Cooltech might have known about the state of Urbancorp's finances if anything.

12 I also do not know what Mr. Saskin thought or knew about the status of his business at the time. There is simply no evidence before me other than (a) the fact that Urbancorp had outstanding debts to Cooltech for many months on different projects or loans; and (b) Urbancorp failed in late 2016. The financial statements are not particularly instructive. A snapshot of a moment in time based on depreciated book values does not provide a real time assessment of cash flows and realizable values or allow an inference that the business had failed or inevitably would be failing shortly so as to suggest that other creditors' interests ought to have been top-of-mind at the time.

13 In fact, in January, 2016, many months *after* the property transfers occurred, Urbancorp raised a very substantial amount of money by issuing bonds in Israel. That transaction may

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be challenged by the Israeli bondholders and their legal representative. I am not suggesting that it was not also problematic. But, the simple fact that Urbacorp was having cash flow problems that were then followed by a successful public financing also does not lead to any ready inference that Urbancorp or Cooltech knew or ought to have known that, in the summer of 2015, Urbancorp was so near failure that by accepting units in kind Cooltech was stealing a march on other creditors - some of whom (e.g. the Israeli bondholders) did not even exist as yet.

14 Apparently, Mr. Saskin offered units to other creditors too. Some took them and others did not. Cooltech's principal spoke to some of the other creditors prior to agreeing to take units. That fact, on its own, does not allow me to infer anything nefarious or any particular state of knowledge in Cooltech.

15 Neither does the fact that Cooltech accepted units from Edge on indebtedness from other entities establish any entitlement to relief against Cooltech. A creditor is indifferent as to which entity pays the bills in a wholly-owned group. Absent complicity in a tort or breach of trust, the pocket from which Mr. Saskin chooses to pay is no business of Cooltech. Mr. Saskin owned the whole outfit 100%. Absent insolvency, you are not robbing Peter to pay Paul if you are Peter.

The Role of the Monitor

16 Trustees in bankruptcy can be recognized as complainants in oppression proceedings. *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.). The recognition is discretionary. At para. 45 of *Olympia & York Realty Corp.*, Goudge JA explained:

> . . . s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly [page 556] oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

17 In *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366 (Ont. S.C.J. [Commercial List]), the *CCAA* court specifically empowered the Monitor to bring oppression

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proceedings against a party whom the Monitor alleged was impairing the company's ability to restructure by its oppressive conduct. See paras. 34 and 37.

18 In the case at bar, the Monitor has not been empowered to bring proceedings on behalf of the *CCAA* debtors. Mr. Drake points to the Monitor's authority to seek advice and directions in its initial order. In my view, that power ought to have been used *before* the Monitor purported to act on behalf of the debtor corporations in claiming relief against a creditor. Until empowered to sue, the Monitor is a neutral with duties to all interested parties. See *Essar*, at para. 30.

19 The Monitor is not truly seeking advice and directions in this motion. It has sued Cooltech for monetary relief under the banner of a motion for advice and directions. It seeks judgment holding Cooltech liable. It is not asking for the court's input or advice other than to adjudicate the complaint.

20 Monitors can certainly be empowered to bring legal proceedings and to act on behalf of *CCAA* debtors in appropriate circumstances. Under s. 23 (1)(k) of the *CCAA* the court has broad discretion to empower the Monitor to take steps to facilitate the restructuring or to advance the goals of the *CCAA*. *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) (CanLII) at para. 70. Mr. Drake submits that when the court appointed a creditors' committee in this case, a sealed report from the Monitor made reference to the Monitor bringing proceedings in the interests of creditors. However, the order itself grants no such authority to the Monitor. A reference in a Monitor's report that is not adopted into an order is not approval for the Monitor to take steps. There are no steps delineated. There are no parameters for the exercise established.

21 The Monitor is not a trustee in bankruptcy. The creditors know how to bankrupt a debtor if they believe doing so is appropriate. In the interim, I do not see how, in this liquidating *CCAA* process, the Monitor bringing proceedings in place of the creditors who stand to gain from it can be said to facilitate the restructuring. In *Essar* there was a particular roadblock to a fair and proper restructuring affecting all interested parties. Here, by contrast, the Monitor pits the current creditors against a group of creditors who were paid over one year before the proceedings commenced. Why is this a fight for the Monitor rather than the creditors who stand to benefit from the claim? There is no evidence before me concerning the existing creditor body. Perhaps there are tens of thousands of powerless or involuntary creditors who need representation as in the *CCAA* proceedings for *Nortel Networks Limited.* Or is there, perhaps, one legal representative of a body of similarly situated creditors who is well able to bring proceedings if he should wish to do so?

22 I accept that if proceedings are available, they can be brought summarily within the procedural context of this case as was done in *Essar* and as approved expressly in *Stelco Inc.,*

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Re [2006 CarswellOnt 3050 (Ont. C.A.)], 2006 CanLII 16526. But, I am not convinced in the utility of empowering the Monitor to drop its cloak of neutrality to bring what are really inter-creditor proceedings or that doing so facilitates this restructuring process.

23 Moreover, the Monitor asserts that the creditors generally held a reasonable expectation that they would be treated fairly and lawfully by Edge. It asks to be recognized as a complainant under the oppression remedy on the creditors' behalves. However, in *Lord v. Clearspring Spectrum Holdings L.P.*, 2017 ONSC 2246 (Ont. S.C.J. [Commercial List]) (CanLII), I explained:

> . . . before a person can claim an oppression remedy, he or she must actually, subjectively, i.e. personally, hold an expectation. For example, at para. 63 of [*BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560] the Court wrote:
>
>> [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), 1999 CanLII 14946 (ON SC), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
>>
>> [56] That is, a stakeholder must personally (i.e. subjectively) have an expectation and actually rely on it before it even gets to the question of whether that expectation is also objectively reasonable.

24 I accept that the Monitor does not have to hold the expectation that it asserts. Moreover, as discussed in *Lord* at para. 56, the expectation may be proved by inference. In this case though, I know absolutely nothing about the creditors in existence in July and August 2015 or what they might have known or expected. I have no facts on which to assess whether any expectation that they might have held was reasonable. I have no evidence that anyone relied or ought reasonably to have relied on whatever expectation they may have held or from which to infer that fact. It is trite to say that any creditor expects fair and legal treatment. In the summer of 2015, did they receive fair and legal treatment? There is no suggestion that the payments made by Edge were unlawful. How do I know if they were fair? Were they offered to all equally? What effect did the payments have on the company when made? Did the payments, perhaps, stave off a group failure for long enough to allow the refinancing of the enterprise to occur in January, 2016? Was that refinancing a good, bad, or indifferent thing *vis-à-vis* Edge and its creditors as at mid-2015?

25 In short, there is no evidence before me to allow me to assess whether there is a reason for the Monitor to be entitled to the exercise of discretion to (a) allow it to sue; or (b) allow it to qualify as complainant. Absent evidence that can lead to an inference of the existence of

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reasonable expectations, reliance, and oppression, the Monitor is unsuited to act for creditors in this case.

26 If there is no actual creditor with a sufficient stake to sue or to support the Monitor with evidence in a suit, then I again question the utility of empowering the Monitor to bring a claim that pits creditors against each other. It is not the Monitor's role to "try one on" to see if it can increase recovery for the current creditor body. Creditors are free to spend their money and face the consequences. The Monitor, by contrast, acts with the *imprimatur* the Court. It is far more constrained in its activities and ought typically to consider seeking court approval before undertaking litigation on behalf of particular interests.

Costs

27 The Monitor initially brought the case challenging the value of the transferred units and also challenging the transfers of units by Edge in respect of its own debt. It trimmed back its allegations as it realized it lacked evidence and a legal basis to make those claims. That should have been determined before the Monitor put the respondents to the cost of responding to those broad, meritless claims. Mr. Drake agreed that the respondents' request for $40,000 was a reasonable quantum for costs if they succeeded.

Order

28 The motion for advice and directions is dismissed. The Monitor shall pay costs to the respondents fixed at $40,000 all-in forthwith.

Motion dismissed.

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

Court File No.: CV-17-11846-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each an "**Applicant**", and collectively, the "**Applicants**")

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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