

**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**”)

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(Motions Returnable July 13, 2017)

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TO: SERVICE LIST

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TAB 1

Case Name:

Mirant Canada Energy Marketing Ltd. (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act R.S.C. 1985, Chap. C-36, As Amended
AND IN THE MATTER OF Mirant Canada Energy
Marketing, Ltd. and Mirant Canada Energy
Marketing Investments Inc.**

[2004] A.J. No. 331

2004 ABQB 218

36 Alta. L.R. (4th) 87

1 C.B.R. (5th) 252

130 A.C.W.S. (3d) 237

2004 CarswellAlta 352

Docket No. 0301 11094

Alberta Court of Queen's Bench
Judicial District of Calgary

Kent J.

Heard: March 10, 2004.

Judgment: filed March 19, 2004.

(32 paras.)

Counsel:

Brian P. O'Leary, Q.C., for Paramount Resources and NGX.

Tristram J. Mallett and Geraldine Teixeira, for Mirant Corporation.

Frank R. Dearlove and Christopher D. Simard, for Mirant Canada Energy Marketing, Ltd. and Mirant Canada Energy Marketing Investments, Inc.

Alan R. Anderson and Cassandra P. Malfair, for Enron Canada.

William L. Severson, for Robert Schaefer.

Howard A. Gorman and Paul Nigol, for El Paso and Trans Canada Pipeline.

REASONS FOR JUDGMENT

KENT J.:--

FACTS

1 Mirant Canada Energy Marketing, Ltd. and Mirant Canada Energy Marketing Investments Inc. ("Mirant Canada") applied for protection under the Companies' Creditors Arrangement Act (Canada)' ("CCAA") on July 15, 2003. An order (the "Initial Order") was granted on that date.

2 Paragraphs 16(c) and (d) of the Initial Order provide as follows:

- (c) all outstanding (both pre and post the date of filing of the Petition) and future wages, salaries, employee benefits, deferred payments, earned or to be earned, vacation pay (for continuing employees in the normal course), employee severance (subject to approval by the Monitor) and retention payments, statutory deemed trust amounts in favour of the Crown in Right of Canada or of any province thereof which were required to be deducted from employee's wages including without limitation, amounts in respect of employment insurance, Canada Pension Plan, income taxes and other like amounts due or accruing due to employees and present and future directors and the reimbursement of business expenses properly incurred by employees and present and future directors, and payments to operate and fund the payroll accounts (including source deductions) in respect of such employees (the "Employee Obligations"). Sufficient funds to pay the anticipated Employee Obligations may be placed in trust pursuant to a formal Trust Indenture by the Applicants, but only with the approval of the Applicants' shareholders;
- (d) with the consent of the Monitor, all payments, expenses and capital expenditures, whether incurred before or after the making of this Order, reasonably necessary for the economic preservation of the Property;

3 Prior to December 15, 2002, Robert Schaefer ("Schaefer") was employed by Mirant Services LLC in Atlanta, Georgia. In March, 2002, at the request of his employer, Schaefer signed a Retention Agreement. Under the terms of the Retention Agreement, Schaefer was entitled to an "Award Amount" of \$72,800.00 (U.S.) on each of September 30, 2004 and September 30, 2005 provided that he was still employed by Mirant Services LLC and was performing in a satisfactory manner. The Retention Agreement also provided that in the event Schaefer ceased to be employed by Mirant Services LLC and became employed by another Mirant Group company, the Retention Agreement "...shall be assigned to that other Mirant company, which shall accept such assignment." The Retention Agreement was never assigned by Mirant Services LLC to Mirant Canada.

4 Effective December 15, 2002, Schaefer ceased to be employed by Mirant Services LLC and became employed by Mirant Canada in Calgary. The terms of Schaefer's employment with Mirant

Canada were governed by a letter agreement dated December 9, 2002 (the "Letter Agreement") which contained the following statement:

This letter agreement supercedes and replaces any terms of employment, benefits, or entitlements outlined in any and all agreements between you and Mirant Americas Energy Marketing LP and Mirant Services LLC.

The Letter Agreement provided for severance pay based upon a specified formula in the event that Schaefer's employment with Mirant Canada was terminated without cause.

5 Schaefer's position with Mirant Canada was Vice-President, Marketing and Development. In his affidavit sworn November 28, 2003, he deposes that both before and after July 15, 2003, the date of the Initial Order, he was involved in various activities and transactions pertaining to the financial difficulties and CCAA protection of Mirant Canada. He further deposes that Rod Pocza, President of Mirant Canada, represented to him that the CCAA protection of Mirant Canada would in no way affect his employment with Mirant Canada. He relied upon those representations in remaining in Mirant Canada's employ. Schaefer's employment with Mirant Canada was terminated on September 2, 2003.

6 Schaefer submitted a claim in the CCAA proceedings for severance pay pursuant to the Letter Agreement in the amount of \$827,755.20 (Cdn.) The amount of that claim was accepted by PricewaterhouseCoopers (the "Monitor") and Mirant Canada. Schaefer also filed a Proof of Claim for \$145,600.00 (U.S.) pursuant to the Retention Agreement. Schaefer and Mirant Canada have now agreed on an amount of approximately \$73,000.00 (U.S.) in respect of that Retention Agreement.

7 The Monitor's eleventh report dated March 8, 2004 says that Mirant Canada had paid severance to three other employees. The payment to two were amounts determined to be in accordance with Mirant Canada's usual severance guidelines. The amount paid to the third was less than the guideline amount but was an amount agreed to by the employee. The Monitor further says that the guideline amounts would not apply to Schaefer in any event because his severance entitlement was determined pursuant to the Letter Agreement. In a letter attached to the eleventh report, the Monitor says that in deciding whether or not to approve severance pay it based its decision "...principally on the effect which, in its view, non-payment of severance amounts would have upon other employees, and to a lesser extent upon the magnitude of the payments." The only amount which the Monitor approved for payment to Mr. Schaefer was statutory severance of \$18,184.62, being the equivalent of four weeks' pay. The Monitor proposed immediate payment of a compromise amount. Mr. Schaefer refused and brought this application.

ISSUE

8 Is Schaefer entitled to immediate payment of the severance amount of \$827,755.20 and the award amount of \$73,000.00 or is his claim an unsecured claim which must be dealt with in the course of the CCAA proceedings?

APPLICANT'S ARGUMENTS

9 Schaefer put forward four arguments why he was entitled to immediate payment. First, he argues that his job of finding and retaining customers was critical to the continued operation of Mirant Canada because without customers, there would be no business. In essence, he argues that his involvement was crucial to Mirant Canada's ability to carry on business post-CCAA.

10 Secondly, he argues that he is entitled to rely upon representations that he says were made to him by Rod Pocza to the effect that the CCAA proceedings would not affect his employment or compensation including his severance pay.

11 Third, he argues that his claim is like a post-petition claim and that, as a general proposition, post-petition creditors are entitled to be paid in full. His position is that his continued employment with Mirant Canada post-CCAA is equivalent to his having been re-hired after July 15, 2003 and that, in terminating him after that date, Mirant Canada took on the obligation to pay him in full the severance contemplated by the Letter Agreement.

12 Finally, Schaefer argues that there is no principled basis for treating him differently from the two employees referred to in the eleventh report who received their severance payments in full. He argues that the only difference between him and those employees is the quantum of the severance to be paid and that, if fairness of treatment is a goal of the CCAA, the Court should not permit that he be treated differently simply on the basis of the amount owing.

13 Schaefer asks the Court to draw an analogy between his severance payment and the cost of repairs at issue in *Re Smoky River Coal Ltd.*. In that case, *LoVecchio J.* held that monthly rental payments under certain equipment leases entered into post-CCAA should be paid in priority to other claims, but that costs of repair contemplated by the same agreements should not. The Court of Appeal overruled that portion of the judgment, holding that the costs of repair were part of the same contractual obligation and should also be paid in priority. Schaefer asks that the Court treat his monthly salary as analogous to the rental payments in *Smoky River Coal* and his severance pay as analogous to the costs of repair. Schaefer argues that, like the costs of repair in *Smoky River Coal*, his severance entitlement is an obligation which arose during the CCAA period and should be paid in full.

14 In *Smoky River Coal*, *LoVecchio J.* said that to be paid as post petition creditor, it is necessary to find that the services provided or work done was necessary to "keep the lights of the company on" (p. 137). Schaefer, relying on the Court of Appeal's judgment argues that it is sufficient to conclude that the severance, like the costs of repair, is an integral part of the contract. Schaefer also argues that the Court of Appeal in *Smoky River Coal* noted the need to balance equities in CCAA proceedings. There is nothing inequitable in paying his severance notwithstanding the fact that it is an amount larger than that received by other employees.

15 With respect to the payment of the amount under the Retention Agreement, Schaefer argues that since Mirant Canada has agreed to the amount of approximately \$73,000.00 (U.S.), there is no issue as to his entitlement to such payment or as to the amount of such entitlement. Rather, he submits that the only issue is whether he should be paid that amount now or should have to make a claim as an unsecured creditor.

RESPONDENTS' ARGUMENTS

16 Argument on behalf of the Respondents was made principally by Enron Canada Corp. ("Enron"), Mirant Canada's largest unrelated creditor. Enron argues that the governing principles of the CCAA are fairness and reasonableness and as a result all creditors should be treated equally absent a statutory priority or order of the Court. Enron says that in *Smoky River Coal*, *LoVecchio J.* characterized the purpose of the CCAA as allowing a company to carry on business during reorganization and said that any priority given to a creditor must be given in that context. Furthermore, *LoVecchio J.* said that such priorities should not be created lightly.

17 Enron argues that while paragraph 16(c) of the Initial Order gives Mirant Canada the flexibility to pay severance to employees, the employees have no right to such a payment. The Initial Order creates no charge which would create a priority for employee severance claims; therefore, the present case is distinguishable from Smoky River Coal, where a separate charge and fund had been created by Court order. Enron says that had the Initial Order made specific provision for Schaefer's severance, that provision could have been challenged by the other creditors.

18 Enron further says that the determination of Schaefer's severance entitlement pursuant to the terms of the Letter Agreement is merely a question of liquidated versus unliquidated damages and does not affect the question of payment of that amount in priority to other creditors.

19 With respect to the representations made to Schaefer by Rod Pocza, Enron notes that Schaefer claims to have relied upon the Retention Agreement and the Letter Agreement but that there is no evidence of any collateral post-CCAA contract. Enron says that while Schaefer may have a claim against Mirant Canada or Rod Pocza for negligent misrepresentation, that does not affect the question of priority of payments.

20 Enron challenges Schaefer's analogy to the costs of repair in Smoky River Coal and notes that the Court of Appeal in that case held that claims in respect of the cessation or termination of business are not the same. Enron says that the authorities are unanimous in holding that termination of a contract gives rise to an unsecured claim without any special priority.

21 Trans Canada Pipelines ("TCPL"), another major non-related creditor of Mirant Canada, says that Schaefer's claim is for damages for breach of contract that existed pre-CCAA. TCPL acknowledges that parties who agree to continue their contracts post-CCAA should be paid in the ordinary course for goods and services actually received. Schaefer received his salary while he worked for Mirant Canada post-CCAA. With respect to the contractual amounts of severance for breach of his employment contract, TCPL argues that Schaefer is entitled to this amount on the same basis as other creditors rather than receiving it in priority.

22 TCPL says that the Initial Order is permissive, allowing Mirant Canada, with the approval of the Monitor, to pay severance amounts, but not compelling it to do so. Paragraph 17(b) of the Initial Order provides that Mirant Canada can lay-off employees and deal with the consequences of such terminations in the Plan of Arrangement. Once the Plan of Arrangement is filed, if it contemplates payment of Schaefer's severance amount in priority to other creditors, the other creditors would then have the opportunity to approve or disapprove of the Plan and therefore of the proposed priority payment.

23 Paramount, the third major non-related creditor, argues that the Court of Appeal in Smoky River Coal in fact held that the costs of repair as part of the lease payment were necessary to 'keep the lights on'. Severance pay, on the other hand, is not an expense associated with the day-to-day operations of the company. Rather, a severance payment is a penalty or obligation associated with the breach of an employment contract.

24 Finally, the Court heard from the Monitor. The Monitor indicated that its decisions with respect to payment of severance pay were based upon the economic preservation of Mirant Canada's business which is contemplated in paragraph 16(d) of the Initial Order. Its decisions were based on balancing the effect of payment or non-payment on other employees versus the economic effect of payment on the company.

ANALYSIS

25 The starting point for analysis of this issue is the decision in *Smoky River Coal* by the Court of Appeal. There are three passages which I think are relevant to consider. The first is the Court of Appeal's commentary on LoVecchio J.'s analysis of post petition creditors. At para. 14, the Court of Appeal says the following:

The second criteria for eligibility was that the debt in question was incurred in connection with the daily operating activities of Smoky River, as opposed to debts that arose from the cessation or termination of services. As stated by the CCAA judge (*supra*, at para. 40):

The main purpose of the charge was to encourage the creditors who supplied Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping "the lights of the company on". Thus, the costs or expenses incurred must be essential to the continued day-to-day operations of the mine. Penalties or obligations associated with the breach are not expenses associated with continued operations.

We are in substantial agreement with the two eligibility criteria delimited by the CCAA judge.

26 Secondly, the Court of Appeal qualifies what LoVecchio J. said with respect to post petition creditors at para. 19 when it says:

Therefore, while we accept that a CCAA judge's requirement that to qualify, a debt must have been incurred in connection with the daily operating activities of Smoky River, in the circumstances of this case, we interpret that requirement on commercially reasonable terms.

27 Finally, in connection with the specific claim by the equipment leasor which Mr. Schaefer argues is analogous to his situation, the Court of Appeal says the following at para. 24:

Coneco was clearly a post petition trade creditor. The covenant to repair the equipment was just as much a term of the lease and a term of credit as Smoky River's obligation to pay rent. The repair costs were not a damage claim, but a clear contractual obligation that arose during the CCAA period. It is not commercially reasonable that Coneco would lease valuable equipment to Smoky River unless Smoky River maintained it in good operating condition. Had there been no obligation to maintain the equipment, the rental rate would have been considerably higher. This interpretation is consistent with commercial reasonableness.

28 Thus, for me to find the decision of the Court of Appeal in *Smoky River Coal* analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an

obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only his salary which he has been paid falls within that definition.

29 Schaefer says that Mr. Pocza made a new promise to Schaefer that he would be paid the severance pay in consideration for Schaefer continuing to work. However, the Initial Order provides that employee's severance payments can only be made subject to the approval of the Monitor. I am satisfied that the Monitor applied the right test in determining whether or not payment of the full amount of the contractual obligation was appropriate. As indicated above, the Monitor had to balance the effect of non-payment on the continued operation of the business and more specifically the morale of other employees against the economic effect on the company if the payment was made. The Initial Order excludes severance pay from categorization as a post petition creditor; rather it falls within those discretionary payments which the Monitor may pay. The promise made by Mr. Pocza is irrelevant in light of the provisions of the Initial Order.

30 With respect to the second principle argument of Schaefer, namely that it is fair and equitable that he receive his full severance, fairness and equity in the context of CCAA proceedings must be looked at in a broader context. It cannot trump the clear provisions of the Initial Order. Paying severance amounts is discretionary. That discretion must be exercised in accordance with the purpose of the CCAA which is to provide protection to a company while it attempts to reorganize its affairs. The Monitor correctly exercised his discretion.

31 The application by Schaefer for immediate payment of the severance pay is dismissed.

32 With respect to the Award Amount, there was no assignment to Mirant Canada. The application is dismissed.

KENT J.

cp/e/qw/qlmmm

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

2 (2000) 83 Alta. L.R. (3d) 127 (Q.B.), reversed in part (2001) 95 Alta. L.R. (3d) 1 (C.A.) ("Smoky River").

TAB 2

Case Name:

**Communications, Energy, Paperworkers, Local 721G v.
Printwest Communications Ltd.**

Between

**Communications, Energy, Paperworkers,
Local 721G and Local 75G, applicants, and
Printwest Communications Ltd., Mister Print
Productions Ltd., Sentry Press Ltd. and August
Communications Ltd., respondents, and
Saskatchewan Cooperative Financial Services Limited
operating as Cucorp Financial Services, respondent**

[2005] S.J. No. 484

2005 SKQB 331

272 Sask.R. 239

16 C.B.R. (5th) 244

141 A.C.W.S. (3d) 749

2005 CarswellSask 508

Q.B.G. No. 12 of 2005 J.C.R.

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

Matheson J.

July 28, 2005.

(18 paras.)

*Creditors and debtors law -- Legislation -- Companies' Creditors Arrangement Act -- Insolvency
law -- Claims -- Creditors -- Unsecured creditors.*

Application by the union for an order declaring that its claims were not affected by the plan of compromise of the employer, the respondent Printwest Communications. The union asserted monetary and other claims against Printwest. The monetary claims consisted substantially of claims, pursuant to the collective agreement, for severance pay for laid-off employees.

HELD: Application dismissed. If the union's request were accepted such that all claims for severance pay be dealt with outside the plan of compromise and thereby paid in full, such result could not be viewed as fair and reasonable with respect to other unsecured creditors, who would possibly receive only a small fraction of the amounts owing to them.

Statutes, Regulations and Rules Cited:

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

Counsel:

R.M. Gillies for the applicants

W.R. Waller for the respondents, Printwest et al.

C.D. Hadubiak for Cucorp. Financial Services

M.W. Milani, Q.C. for the Monitor, KPMG Inc.

FIAT

1 **MATHESON J.:**-- By an order dated January 4, 2005, all proceedings against Printwest Communications Ltd., and its related companies, ("Printwest") were stayed, pursuant to The Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a period of 30 days. The stay period has subsequently been extended to September 30, 2005, and Printwest has presented a plan of compromise which it has been authorized by the court to present to its creditors.

2 The union locals 721G and 75G (the "Union") has asserted monetary, and other, claims against Printwest on behalf of nearly two dozen Union members. The monetary claims total \$248,115.46. However, counsel for the Union stated that the total includes alternative claims, with the result that the total of the claims is only approximately \$160,000.00. Nevertheless, the Union filed a proof of claim which stated that its claim totalled \$248,115.46. The claim was disallowed in its entirety, but it was revised by the claims officer as an unsecured claim of \$44,362.48 and a contingent claim of \$52,906.50.

3 The monetary claims consist substantially of claims, pursuant to the collective bargaining agreement, for severance pay for laid-off employees of Printwest.

4 The portion of the Union claim which was rejected represents claims for severance on behalf of employees who had received layoff notices, were subsequently called back to work, but refused to do so without a guarantee of permanent employment or because they had taken other work.

5 The contingent claims represent severance pay with respect to laid-off employees who were called back to work, and did report for work, but may be laid-off again by the time implementation of the plan of compromise is completed.

6 The Union has applied for an order declaring that the claims of the Union are not affected by the plan of compromise.

UNION SUBMISSION

7 The Union has placed significant reliance on statements made by LoVecchio J. in Smoky River Coal Ltd. (Re) 2000 ABQB 621; [2000] 10 W.W.R. 147 (Alta. Q.B.) such as, at para. 28:

[paragraph]28 The CCAA is a statute that provides protection for companies who are experiencing financial difficulties, enabling them to reorganize their affairs in the hopes of continuing on in business. A broad and liberal interpretation of the Act has been adopted by the Courts in order to achieve the intended mandate ...

8 No issue can be taken with the foregoing statement.

9 As in this case, a special Charge had been established in the Smoky River case for the benefit of post-petition trade creditors. Several creditors had applied to be granted special status and be entitled to participate in the Charge. At para. 40 it was stated:

[paragraph]40 The main purpose of the Charge was to encourage the creditors who supply Smoky with goods and services to continue to deal with Smoky during the reorganization period. The critical characteristic of the service provided by the creditors must have been that it was essential to keeping "the lights of the company on" ...

10 The Union has argued that it should be granted special status because the employees, on whose behalf the Union has asserted claims, were essential in keeping the lights on at Printwest. That submission cannot, however, be accepted.

11 The laid-off employees have been paid all amounts required by statute. The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.

12 In Mirant Canada Energy Marketing Ltd. (Re) 2004 ABQB 218; (2004) 1 C.B.R. (5th) 252 (Alta. Q.B.), an employee of Mirant by the name of Schaefer had applied for an order that he be entitled to immediate payment of severance pay, rather than have his claim dealt with in the course of the CCAA proceeding.

13 One of the arguments advanced by Schaefer was that the agreement to pay him severance pay was an integral part of his employment contract; a necessity for Schaefer to continue his employment. However, it was concluded that an undertaking to pay severance is not an incentive but an obligation arising upon termination of employment services. Thus, the claim for severance pay had to be dealt with in the same manner as other unsecured creditors' claims.

14 As was stated in Alternative Fuel Systems Inc. v. Remington Development Corp. 2004 ABCA 31, [2004] 5 W.W.R. 475 (Alta. C.A.) at para. 55 "What the CCAA requires is that the end result, the plan of arrangement, be fair and reasonable."

15 If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

16 The Union has also requested an order that its non-monetary grievances, relating to grievances, seniority, training, etc., also be dealt with outside the plan of compromise. For the same reasons, that request must be rejected.

17 Finally, the Union requested that it be entitled to vote on the basis of the full amount set out in its proof of claim, or, alternatively, the sum of approximately \$160,000.00, rather than the amounts allowed by the claims officer. No basis was established to support that submission.

18 In the end result, the application of the Union is dismissed in total. There will be no order as to costs.

MATHESON J.

cp/e/qw/qlrds

TAB 3

Case Name:
Nortel Networks Corp. (Re)

**RE: IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as Amended**

[2009] O.J. No. 2558

55 C.B.R. (5th) 68

75 C.C.P.B. 233

2009 CarswellOnt 3583

178 A.C.W.S. (3d) 305

2009 CanLII 31600

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 21, 2009.

Judgment: June 18, 2009.

(89 paras.)

*Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims
-- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore
payments to the employees dismissed -- Nortel was granted protection under the Company's Credi-*

tors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority -- Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

Motion by the union for an order requiring Nortel to recommence payments that was obligated to make under the collective agreement. Motion by former employees for an order requiring Nortel to pay termination pay, severance pay and other benefits. Nortel was granted protection under the Company's Creditors Arrangement Act in January 2009. At that time, Nortel ceased making payments of amounts that constituted unsecured claims, including termination and severance payments. The union took the position that Nortel was obligated to make the payments under the collective agreement. The former employees took the position that it would be inequitable to restore payments to unionized former employees and not non-unionized former employees. However, Nortel took the position that its financial pressure precluded it from paying all of the outstanding obligations.

HELD: Motions dismissed. The employee claims were unsecured claims and therefore did not have any statutory priority. Furthermore, the claims were based mostly on services that were provided pre-filing. As a result, there was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors and Nortel's resources were to be used to attempt restructuring.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.3

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 5

Labour Relations Act, 1995, S.O. 1995, c. 1, Schedule A,

Counsel:

Barry Wadsworth, for the CAW and George Borosh et al.

Susan Philpott and Mark Zigler, for the Nortel Networks Former Employees.

Lyndon Barnes and Adam Hirsh, for the Nortel Networks Board of Directors.

Alan Mersky and Mario Forte, for Nortel Networks et al.

Gavin H. Finlayson, for the Informal Nortel Noteholders Group.

Leanne Williams, for Flextronics Inc.

Joseph Pasquariello and Chris Armstrong, for Ernst & Young Inc., Monitor.

Janice Payne, for Recently Severed Canadian Nortel Employees ("RSCNE").

Gail Misra, for the CEP Union.

J. Davis-Sydor, for Brookfield Lepage Johnson Controls Facility Management Services.

Henry Juroviesky, for the Nortel Terminated Canadian Employees Steering Committee.

Alex MacFarlane, for the Official Unsecured Creditors Committee.

M. Starnino, for the Superintendent of Financial Services.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- The process by which claims of employees, both unionized and non-unionized, have been addressed in restructurings initiated under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") has been the subject of debate for a number of years. There is uncertainty and strong divergent views have been expressed. Notwithstanding that employee claims are ultimately addressed in many CCAA proceedings, there are few reported decisions which address a number of the issues being raised in these two motions. This lack of jurisprudence may reflect that the issues, for the most part, have been resolved through negotiation, as opposed to being determined by the court in the CCAA process - which includes motions for directions, the classification of creditors' claims, the holding and conduct of creditors' meetings and motions to sanction a plan of compromise or arrangement.

2 In this case, both unionized and non-unionized employee groups have brought motions for directions. This endorsement addresses both motions.

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

4 The Union requests an order directing the Applicants (also referred to as "Nortel") to recommence certain periodic and lump sum payments which the Applicants, or any of them, are obligated to make pursuant to the CAW collective agreement (the "Collective Agreement"). The Union also seeks an order requiring the Applicants to pay to those entitled persons the payments which should have been made to them under the Collective Agreement since January 14, 2009, the date of the CCAA filing and the date of the Initial Order.

5 The Union seeks continued payment of certain of these benefits including:

- (a) retirement allowance payments ("RAP");
- (b) voluntary retirement options ("VRO"); and

(c) termination and severance payments.

6 The amounts claimed by the Union are contractual entitlements under the Collective Agreement, which the Union submits are payable only after an individual's employment with the Applicants has ceased.

7 There are approximately 101 former Union members with claims to RAP. The current value of these RAP is approximately \$2.3 million. There are approximately 180 former unionized retirees who claim similar benefits under other collective agreements.

8 There are approximately 7 persons who may assert claims to VRO as of the date of the Initial Order. These claims amount to approximately \$202,000.

9 There are also approximately 600 persons who may claim termination and severance pay amounts. Five of those persons are former union members.

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c. 41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately \$18 million.

11 The TRA and the RAP are both unregistered benefits that run concurrently with other pension entitlements and operate as time-limited supplements.

12 In many respects, the motion of the Former Employees is not dissimilar to the CAW motion, such that the motion of the Former Employees can almost be described as a "Me too motion".

Background

13 On January 14, 2009, the Applicants were granted protection under the CCAA, pursuant to the Initial Order.

14 Upon commencement of the CCAA proceedings, the Applicants ceased making payments of amounts that constituted or would constitute unsecured claims against the Applicants. Included were payments for termination and severance, as well as amounts under various retirement and retirement transitioning programs.

15 The Initial Order provides:

- (a) that Nortel is entitled but not required to pay, among other things, outstanding and future wages, salaries, vacation pay, employee benefits and pension plan payments;
- (b) that Nortel is entitled to terminate the employment of or lay off any of its employees and deal with the consequences under a future plan of arrangement;
- (c) that Nortel is entitled to vacate, abandon or quit the whole but not part of any lease agreement and repudiate agreements relating to leased properties (paragraph 11);
- (d) for a stay of proceedings against Nortel;
- (e) for a suspension of rights and remedies vis-à-vis Nortel;
- (f) that during the stay period no person shall discontinue, repudiate, cease to perform any contract, agreement held by the company (paragraph 16);
- (g) that those having agreements with Nortel for the supply of goods and/or services are restrained from, among other things, discontinuing, altering or terminating the supply of such goods or services. The proviso is that the goods or services supplied are to be paid for by Nortel in accordance with the normal payment practices.

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the Collective Agreement. The obligation is not to the individual beneficiaries.

17 The Union also submits that the difference between the moving parties is that RAP, VRO and other payments are made pursuant to the Collective Agreement as between the Union and the Applicants and not as an outstanding debt payable to former employees.

18 The Union further submits that the Applicants are obligated to maintain the full measure of compensation under the Collective Agreement in exchange for the provision of services provided by the Union's members subsequent to the issuance of the Initial Order. As such, the failure to abide by the terms of the Collective Agreement, the Union submits, runs directly contrary to Section 11.3 of the CCAA as compensation paid to employees under a collective agreement can reasonably be interpreted as being payment for services within the meaning of this section.

19 Section 11.3 of the CCAA provides:

No order made under section 11 shall have the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

20 In order to fit within Section 11.3, services have to be provided after the date of the Initial Order.

21 The Union submits that persons owed severance pay are post-petition trade creditors in a bankruptcy, albeit in relation to specific circumstances. Thus, by analogy, persons owed severance pay are post-petition trade creditors in a CCAA proceeding. The Union relies on *Smokey River Coal Ltd. (Re)* 2001 ABCA 209 to support its proposition.

22 The Union further submits that when interpreting "compensation" for services performed under the Collective Agreement, it must include all of the monetary aspects of the Collective Agreement and not those specifically made to those actively employed on any particular given day.

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

24 The Union contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the Union contends that the Applicants have acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

25 The Union submits that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of the contract between parties and as the court cannot amend the terms of the Collective Agreement, the employer should not be allowed to act as though it had done so.

26 The Union submits that no other supplier of services would countenance, and the court does not have the jurisdiction to authorize, the recipient party to a contract unilaterally determining which provisions of the agreement it will or will not abide by while the contract is in operation.

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and the court should direct the commencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

28 Counsel to the Former Employees submits that the court has the discretion pursuant to Section 11 of the CCAA to order Nortel to recommence periodic and lump-sum payments to Former Employees in accordance with Nortel's statutory and contractual obligations. Further, the RAP payments which the Union seeks to enforce are not meaningfully different from those RAP benefits payable to other unionized retirees who belong to other unions nor from the TRA payable to non-unionized former employees. Accordingly, counsel submits that it would be inequitable to restore payments to one group of retirees and not others. Hence, the reference to the "Me too motion".

29 Counsel further submits that all employers and employees are bound by the minimum standards in the ESA and other applicable provincial employment legislation. Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

31 Further, the Supreme Court of Canada has held that provincial laws in federally-regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered: See *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

32 In this case, counsel further submits that there is no conflict between the provisions of the ESA and the CCAA and that paramountcy is not triggered and it follows that the ESA and other applicable employment legislation continues to apply during the Applicants' CCAA proceedings. As a result counsel submits that the Applicants are required to make payment to Former Employees for monies owing pursuant to the minimum employment standards as outlined in the ESA and other applicable provincial legislation.

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

... if the attempt at a compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay. Hence the powers vested in the court under Section 11 (*Pacific National Lease Holding Corp. (Re)*, *supra*).

34 The Applicants go on to submit that the powers vested in the court under Section 11 to achieve these goals of the CCAA include:

- (a) the ability to stay past debts; and
- (b) the ability to require the continuance of present obligations to the debtor.

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)*, [2004] A.J. No. 331).

36 Furthermore, counsel to the Applicants submits that contractual obligations respecting post employment are obligations in respect of past services and are accordingly stayed.

37 Counsel to the Applicants also relies on the following statement from *Mirant*, *supra*, at paragraph 28:

Thus, for me to find the decision of the Court of Appeal in *Smokey River Coal* analogous to *Schaefer's* situation, I would need to find that the obligation to pay severance pay to *Schaefer* was a clear contractual obligation that was necessary

for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only his salary which he has been paid falls within that definition.

38 Counsel to the Applicants states that post-employment benefits have been consistently stayed under the CCAA and that post-employment benefits are properly regarded as pre-filing debts, which receive the same treatment as other unsecured creditors. The Applicants rely on *Syndicat nationale de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.* [2003] Q.J. No. 264 (C.A.) ("*Jeffrey Mine*") for the proposition that "the fact that these benefits are provided for in the collective agreement changes nothing".

39 Counsel to the Applicants submits that the Union seeks an order directing the Applicants to make payment of various post-employment benefits to former Nortel employees and that the Former Employees claim entitlement to similar treatment for all post-employment benefits, under the Collective Agreement or otherwise.

40 The Applicants take the position the Union's continuing collective representation role does not clothe unpaid benefits with any higher status, relying on the following from *Jeffrey Mine* at paras. 57 - 58:

Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.

The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

41 In addition, the Applicants point to the following statement of the Quebec Court of Appeal in *Syndicat des employées et employés de CFAP-TV (TQS-Quebec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, 2008 QCCA 1429 at paras. 26-27:

[Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.

The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

42 Collectively, RAP payment and TRA payments entail obligations of over \$22 million. Counsel to the Applicants submits that there is no basis in principle to treat them differently. They are all stayed and there is no basis to treat any of these two unsecured obligations differently. The Applicants are attempting to restructure for the final benefit of all stakeholders and counsel submits that its collective resources must be used for such purposes.

Report of the Monitor

43 In its Seventh Report, the Monitor notes that at the time of the Initial Order, the Applicants employed approximately 6,000 employees and had approximately 11,700 retirees or their survivors receiving pension and/or benefits from retirement plans sponsored by the Applicants.

44 The Monitor goes on to report that the Applicants have continued to honour substantially all of the obligations to active employees. The Applicants have continued to make current service and special funding payments to their registered pension plans. All the health and welfare benefits for both active employees and retirees have been continued to be paid since the commencement of the CCAA proceedings.

45 The Monitor further reports that at the filing date, payments to former employees for termination and severance as well as the provisions of the health and dental benefits ceased. In addition, non-registered and unfunded retirement plan payments ceased.

46 More importantly, the Monitor reports that, as noted in previous Monitor's Reports, the Applicants' financial position is under pressure.

Discussion and Analysis

47 The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

48 The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. (*Woodwards Limited (Re)*, (1993), 17 C.B.R. (3d) 236 (S.C.)).

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

50 The Monitor has reported that the Applicants are under financial pressure. Previous reports filed by the Monitor have provided considerable detail as to how the Applicants carry on operations and have provided specific information as to the interdependent relationship between Nortel entities in Canada, the United States, Europe, the Middle East and Asia.

51 In my view, in considering the impact of these motions, it is both necessary and appropriate to take into account the overall financial position of the Applicants. There are several reasons for doing so:

- (a) The Applicants are not in a position to honour their obligations to all creditors.
- (b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.
- (c) The Applicants are in default of certain obligations under the Collective Agreements.
- (d) The Applicants are in default of certain obligations owed to the Former Employees.

52 It is also necessary to take into account that these motions have been brought prior to any determination of any creditor classifications. No claims procedure has been proposed. No meeting of creditors has been called and no plan of arrangement has been presented to the creditors for their consideration.

53 There is no doubt that the views of the Union and the Former Employees differ from that of the Applicants. The Union insists that the Applicants honour the Collective Agreement. The Former Employees want treatment that is consistent with that being provided to the Union. The record also establishes that the financial predicament faced by retirees and Former Employees is, in many cases, serious. The record references examples where individuals are largely dependent upon the employee benefits that, until recently, they were receiving.

54 However, the Applicants contend that since all of the employee obligations are unsecured it is improper to prefer retirees and the Former Employees over the other unsecured creditors of the Applicants and furthermore, the financial pressure facing the Applicants precludes them from paying all of these outstanding obligations.

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

56 The Union specifically contends that the court has no jurisdiction to alter the terms of the Collective Agreement.

57 In addressing these points, it is necessary to keep in mind that these CCAA proceedings are at a relatively early stage. It also must be kept in mind that the economic circumstances at Nortel are such that it cannot be considered to be carrying on "business as usual". As a result of the Applicants' insolvency, difficult choices will have to be made. These choices have to be made by all stakeholders.

58 The Applicants have breached the Collective Agreement and, as a consequence, the Union has certain claims.

59 However, the Applicants have also breached contractual agreements they have with Former Employees and other parties. These parties will also have claims as against the Applicants.

60 An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.

61 In addition, there is nothing on the record which addresses the issue of how the claims of various parties will be treated in any plan of arrangement, nor is there any indication as to how the creditors will be classified. These issues are not before the court at this time.

62 What is before the court is whether the Applicants should be directed to recommence certain periodic and lump sum payments that they are obligated to make under the Collective Agreement as well as similar or equivalent payments to Former Employees.

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

64 Counsel to the Union submits that the ordinary meaning of "services" in section 11.3 includes work performed by employees subject to a collective agreement. Further, even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation, and relevant legal norms. Counsel submits that the courts must consider the entire context. As a result, when interpreting "compensation" for services performed under a collective agreement, counsel to the Union submits it must include all of the monetary aspects of the agreement and not those made specifically to those actively employed on any particular given day.

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services, ... provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

67 The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have arisen after the Initial Order but it does not follow that a service has been provided after the Initial Order. Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part, on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

68 The interpretation urged by counsel to the Union with respect to this section is not warranted. In my view, section 11.3 does not require the Applicants to make payment, at this time, of the outstanding obligations under the Collective Agreement.

69 The Union also raised the issue as to whether the court has the jurisdiction to order a stay of the outstanding obligations under Section 11 of the CCAA.

70 The Union takes the position that, with the exception of rectification to clarify the intent of the parties, the court has no jurisdiction at common law or in equity to alter the terms of a contract between parties. The Union relies on *Bilodeau et al v. McLean*, [1924] 3 D.L.R. 410 (Man. C.A.); *Desener v. Myles*, [1963] S.J. No. 31 (Q.B.); *Hiesinger v. Bonice* [1984] A.J. No. 281; *Werchola v. KC5 Amusement Holdings Ltd.* 2002 SKQB 339 to support its position.

71 The Union extends this argument and submits that as the court cannot amend the terms of a collective agreement, the employer should not be allowed to act as though it had been.

72 As a general rule, counsel to the Union submits, there is in place a comprehensive regime for the regulation of labour relations with specialized labour-relations tribunals having exclusive jurisdiction to deal with legal and factual matters arising under labour legislation and no court should restrain any tribunal from proceeding to deal with such matters.

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

74 There is authority for the proposition that, when exercising their authority under insolvency legislation, the courts may make, at the initial stage of a CCAA proceeding, orders regarding matters, but for the insolvent condition of the employer, would be dealt with pursuant to provincial labour legislation, and in most circumstances, by labour tribunals. In *Re: Pacific National Lease Holding Corp.* (1992) 15 C.B.R. (3d) 265 (B.C.C.A.), the issue involved the question whether a CCAA debtor company had to make statutory severance payments as was mandatory under the provincial employment standards legislation. MacFarlane J.A. stated at pp. 271-2:

It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.

...

This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the direc-

tors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

75 The *Jeffrey Mine* decision is also relevant. In my view, the *Jeffrey Mine* case does not appear to support the argument that the Collective Agreement is to be treated as being completely unaffected by CCAA proceedings. It seems to me that it is contemplated that rights under a collective agreement may be suspended during the CCAA proceedings. At paragraphs 60-62, the court said under the heading Recapitulation (in translation):

The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.

Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).

Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

76 The issue of severance pay benefits was also referenced in *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.* 2005 SKQB 331 at paras. 11 and 15. The application of the Union was rejected:

... The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.

...

If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An insolvent debtor is faced with many uncertainties. The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor. Depending on the status of secured claims, these unsecured claims may, subject to benefits arising from the recently enacted *Wage Earner Protection Program Act*, be worth next to nothing.

78 In the days ahead, the Applicants, former employees, both unionized and non-unionized may very well have arguments to make on issues involving claims processes (including the ability of the Applicants to compromise claims), classification, meeting of creditors and plan sanction. Nothing in this endorsement is intended to restrict the rights of any party to raise these issues.

79 The reorganization process under the CCAA can be both long and painful. Ultimately, however, for a plan to be sanctioned by the court, the application must meet the following three tests:

- (i) there has to be strict compliance with all statutory requirements and adherence to previous orders of the court;
- (ii) nothing has been done or purported to be done that is not authorized by the CCAA;
- (iii) the plan is fair and reasonable. *Re: Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.)

80 At this stage of the Applicants' CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

81 It follows that the motion of the Union is dismissed.

82 The Applicants also raised the issue that the Union consistently requested the right to bargain on behalf of retirees who were once part of the Union and that the concession had not been granted. Consequently, the retirees' substantive rights are not part of the bargain between the unionized employees and the employer. Counsel to the Applicants submitted that the union may collectively alter the existing rights of any employee but it cannot negatively do so with respect to retirees' rights.

83 The Union countered that the rights gained by a member of the bargaining unit vest upon retirement, despite the fact that a collective agreement expires, and are enforceable through the grievance procedure.

84 Both parties cited *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)* [1993] 2 S.C.R. 230 in support of their respective positions.

85 In view of the fact that this motion has been dismissed for other reasons, it is not necessary for me to determine this specific issue arising out of the *Dayco* decision.

86 The motion of the Former Employees was characterized, as noted above, as a "Me too motion". It was based on the premise that, if the Union's motion was successful, it would only be equitable if the Former Employees also received benefits. The Former Employees do not have the benefit of any enhanced argument based on the Collective Agreement. Rather, the argument of the Former Employees is based on the position that the Applicants cannot contract out of the ESA or any other provincial equivalent. In my view, this is not a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. In my view, the analysis is not dissimilar from the Collective Agreement scenario. There is an acknowledgment of the applicability of the ESA, but during the stay period, the Former Employees cannot enforce the payment obligation. In the result, it follows that the motion of the Former Employees is also dismissed.

87 However, I am also mindful that the record, as I have previously noted, makes reference to a number of individuals that are severely impacted by the cessation of payments. There are no significant secured creditors of the Applicants, outside of certain charges provided for in the CCAA proceedings, and in view of the Applicants' declared assets, it is reasonable to expect that there will be a meaningful distribution to unsecured creditors, including retirees and Former Employees. The timing of such distribution may be extremely important to a number of retirees and Former Employees who have been severely impacted by the cessation of payments. In my view, it would be both helpful and equitable if a partial distribution could be made to affected employees on a timely basis.

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

89 This decision may very well have an incidental effect on the Collective Agreement and the provisions of the ESA, but it is one which arises from the stay. It does not, in my view, result from a repudiation of the Collective Agreement or a contracting out of the ESA. The stay which is being recognized is, in my view, necessary in the circumstances. To hold otherwise, would have the effect of frustrating the objectives of the CCAA to the detriment of all stakeholders.

G.B. MORAWETZ J.

TAB 4

Case Name:

Windsor Machine & Stamping Ltd. (Re)

**RE:IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C., c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Windsor Machine & Stamping Limited, Lipel Investments Ltd.,
WMSL Holdings Ltd., 442260 Ontario Ltd., Winmach Canada Ltd.,
Production Machine Services Ltd., 538185 Ontario Ltd.,
Southern Wire Products Limited, Pellus Manufacturing Ltd.,
Tilbury Assembly Ltd., St. Clair Forms Inc., Centroy Assembly
Ltd., Pioneer Polymers Inc., G&R Cold Forging Inc., Windsor
Machine De Mexico, Winmach Inc., Windsor Machine Products,
Inc. Wayne Manufacturing Inc. and 383301 Ontario Limited,
Applicants**

[2009] O.J. No. 3195

179 A.C.W.S. (3d) 611

Court File No. CV-08-7672-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 6 and 10, 2009.

Judgment: July 27, 2009.

(53 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Compromises and arrangements -- With unsecured creditors -- Claims -- Priority -- Motion by union for order requiring applicants to pay termination and severance pay dismissed -- Applicants were engaged in CCAA proceedings and had been unable to secure proposal that would provide value to unsecured creditors -- Employees had been terminated subsequent to beginning of CCAA proceedings -- Employees were unsecured creditors and would have been in same position had applicants filed for bankruptcy -- Bank was secured creditor and

allowing motion would inappropriately give special status to employees and reduce bank's claim -- While applicants had some available cash, they were not entitled to use it any way they wished.

Employment law -- Discipline and termination of employment -- Termination by employer, with cause -- Winding-up, receivership, bankruptcy or financial restructuring -- Motion by union for order requiring applicants to pay termination and severance pay dismissed -- Applicants were engaged in CCAA proceedings and had been unable to secure proposal that would provide value to unsecured creditors -- Employees had been terminated subsequent to beginning of CCAA proceedings -- Employees were unsecured creditors and would have been in same position had applicants filed for bankruptcy -- Bank was secured creditor and allowing motion would inappropriately give special status to employees and reduce bank's claim -- While applicants had some available cash, they were not entitled to use it any way they wished.

Motion by the union for an order requiring the applicants to pay termination and severance pay to employees. The employees were owed approximately \$500,000 due to terminations that occurred when the applicants closed plants subsequent to beginning CCAA proceedings. The bank, a secured creditor, opposed the motion, arguing that the employees' claim was subordinate to its claim and not allowed by the initial order. The union argued that CCAA proceedings could not trump civil rights and the applicants had cash available to pay the employees' claim. The applicants had not yet drawn on the DIP Facility. The bank was owed \$16.25 million and various vendors were owed \$6.5 million.

HELD: Motion dismissed. The initial order entitled, but did not require, applicants to pay outstanding pay and entitled them to terminate employees. The applicants had been unable to propose a plan under the CCAA that would provide value to unsecured creditors such as the employees. However, the only alternative for the applicants was bankruptcy, which would not have provided value to unsecured creditors either. Secured creditors were already going to suffer a loss and allowing the motion would further reduce their claim, thus inappropriately providing the employees with special status. While the applicants had some cash available, they were not entitled to use it however they wished.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47, s. 50.4(1)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

Employment Standards Act, 2000, S.O. 2000, c. 41, s. 5

Wage Earner Protection Program,

Counsel:

Andrew Hatnay and Andrea McKinnon, for United Auto Workers Local 251.

Daniel Dowdall and Jane Dietrich, for Bank of Montreal.

Joseph Marin, for the Applicants.

Tony Reyes, for RSM Richter Inc., Monitor.

Raong Phalavong, for Saginaw Pattern.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 International Union, United Automobile Aerospace & Agricultural Implement Workers of America ("United Auto Workers, Local 251" or the "Union") bring this motion for an order requiring the Applicants to pay termination and severance pay that is due and owing to the unionized employees of Tilbury Assembly Ltd. ("Tilbury") and Pellus Manufacturing Limited ("Pellus") under the *Employment Standards Act, 2000* ("ESA") as result of terminations that occurred subsequent to the filing of proceedings by the Applicants under the *Companies' Creditors Arrangement Act* ("CCAA").

2 The motion was opposed by Bank of Montreal (the "Bank"), the secured creditor of the Applicants and by the Applicants.

3 The amount owing to the Tilbury employees for termination pay is approximately \$23,000 and the amount owing for severance pay is approximately \$216,000. These amounts are not in dispute.

4 The amount claimed to be owing to the Pellus employees (assuming that the employees were terminated on February 20, 2009) is approximately \$132,000 and the amount claimed to be owing for severance pay as of that date is approximately \$326,000. This amount is disputed by Pellus.

5 The Union submits that the Applicants should be required to pay the termination pay and severance pay owing to the Tilbury and Pellus employees for the following reasons:

- (a) The ESA sets out a comprehensive code that requires an employer who terminates an employee to give the employee prior notice of termination, or if such notice is not given, pay in lieu of notice (commonly referred to as "termination pay"). The ESA also requires that an additional amount (referred to as "severance pay") be paid to certain long service employees if criteria in the ESA are met.
- (b) The Amended and Restated Initial CCAA Order and the consent orders issued by this Court dated October 29, 2008, do not authorize the company to avoid paying termination pay and severance pay. The October 29, 2008 consent orders state that "the *Employment Standards Act, 2000* continues to apply".
- (c) Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.
- (d) The Supreme Court of Canada has held that federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regu-

- lated property and civil rights, as long as the doctrine of paramountcy is not triggered. In the absence of paramountcy, a provincial law such as the ESA continues to apply in insolvency proceedings.
- (e) For the Tilbury and Pellus employees who continued to work for the Company after it went into CCAA protection and who were subsequently terminated, the payment of termination pay and severance pay is an ordinary course payment by the Company. It is to be paid the same way wages, benefits and other aspects of employee compensation are paid.
 - (f) The payment of termination pay and severance pay in a CCAA proceeding is not a re-ordering of priorities among creditors nor is it giving a higher rank to unsecured employee creditors. Termination pay and severance pay that arises on the termination of employees post-CCAA filing is not pre-filing debt. It is an ordinary course payment.
 - (g) The payment of termination pay and severance pay in the case at bar is within the reasonable expectations of the parties because:
 - (i) Company management represented to the Union employees from the outset of the CCAA proceedings that it would continue to pay all contractual amounts due to employees who worked during the CCAA proceedings, which would include amounts for termination pay and severance pay; and
 - (ii) The Company, the Bank and the Monitor consented to the terms of court orders that expressly state that the "*Employment Standards Act 2000* continues to apply".
 - (h) The employees have no recourse to be compensated for the unpaid termination pay and severance pay. There will be no Plan of Compromise.
 - (i) The *Wage Earner Protection Plan* (WEPP) is not available to the employees because the Company is in CCAA proceedings and the WEPP is only available to terminated employees if their employer is a bankrupt or in receivership.
 - (j) The amount of termination pay and severance pay owing is relatively low.
 - (k) The Company has the cash to pay the termination pay and severance pay that is owing.
 - (l) The payment of termination pay and severance pay will not jeopardize the Company's restructuring which is to be a Proposed Transaction involving a purchase of the company by its controlling shareholders.
 - (m) The Company has not drawn on the DIP Facility throughout the CCAA proceedings.
 - (n) The Company should not be able to use the CCAA to avoid its employee termination pay and severance pay obligations under the ESA.

(Note: In the excerpt from the factum, counsel to the Union references "Applicants", and the "Company". Hereafter, the collective reference is to "Applicants".)

6 The Bank submits that the Union's motion for the payment of termination and severance claims should be dismissed because:

- (a) the termination and severance claims are unsecured obligations of Tilbury and Pellus which are not afforded any priority under the Amended and Restated Initial Order, or any other orders that have been made in the CCAA proceeding, and are therefore unsecured claims subordinate to the claims of the Bank as a secured creditor. Any amount paid in respect of the termination and severance claims is a direct deduction from recoveries for the secured creditors; and
- (b) the provisions of the Amended and Restated Initial Order granted by this Court on September 2, 2009 (the "Amended and Restated Initial Order") do not permit the Applicants to pay termination and severance claims at this time.

7 The Applicants submit that the Union's motion should be dismissed because:

- (a) the provisions of the Amended and Restated Initial Order do not permit the Applicants to pay the termination and severance claims in the circumstances in which the Union is seeking such payment;
- (b) the Union has not sought to amend the Amended and Restated Initial Order at any time during these proceedings to require the Applicants to pay the termination and severance claims; and
- (c) the effect of granting the relief to the Union would be to accord termination and severance claims a special status over the claims of other unsecured creditors of the Applicants and would result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

FACTS

8 The Union represents employees at four facilities of the Applicants: Tilbury, Pellus, G&R Cold Forging Inc. and Pioneer Polymers Inc. The Union represents approximately 180 employees out of the total workforce of 300 employees.

9 On August 1, 2008, Windsor Machine & Stamping Ltd. ("WMSL"), 538185 Ontario Ltd. (Pellus Tool), Pellus, Tilbury, G&R Cold Forging Inc. and 383301 Ontario Limited (the "BIA Proposal Proponents") each filed a notice of intention ("NOI") to make a proposal pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act* ("BIA").

10 On August 6, 2008, the Applicants (including the BIA Proposal Proponents) were granted protection under the CCAA.

11 As of the date of the initial CCAA order on August 6, 2008, the Monitor reported that the Bank was owed approximately \$16.25 million comprised of approximately \$8.1 million under an operating line of credit and approximately \$8.15 million under a term loan. The Bank agreed to make available up to an additional \$2 million to fund the Applicants' operations during the CCAA proceedings under a DIP Loan Agreement.

12 The amount owing to various vendors as of the date of the NOI Filing was approximately \$6.5 million.

13 The DIP Facility was extended to the Applicants under the terms of a DIP Loan Agreement. The DIP Facility was approved under the terms of the Initial Order at the outset of the CCAA proceedings.

14 The provisions of the DIP Loan Agreement provide that advances from the Bank to WMSL could be loaned to Pellus and Tilbury, (among other Applicants) to fund ordinary course operations of those affiliates. Counsel to the Applicants submits that as Tilbury and Pellus have no funds to pay any termination or severance pay to the employees at Tilbury and Pellus represented by the Union (the "Tilbury Union Employees" and "Pellus Union Employees"), respectively, and they would have to ask that WMSL lend them sufficient funds for that purpose.

15 Under the terms of the Amended and Restated Initial Order, counsel to the Applicants submit that the right of the Applicants to negotiate the terms on which termination and severance payments may be made upon termination of the employment of the Applicants' employees was subject to the covenants which are contained in the DIP Loan Agreement and that the Applicants, with limited exceptions that do not include the making of termination and severance payments, are not permitted to do anything which adversely affects the ranking of the obligations of WMSL to the Bank under either the DIP Loan Agreement or under the Amended and Restated Credit Agreement that governs the terms of loans made by the Bank to the WMSL prior to the commencement of the CCAA proceedings.

16 On October 8, 2008 a sales process was approved by court order. The deadline for submission of offers to the Monitor was November 18, 2008. On November 18, 2008 there were no offers received, however, certain parties continued to express an interest in the Applicants' operations.

17 Orders were made in these proceedings on October 29, 2008 (the "October 29 Orders") at the time that access agreements with two major customers of the Applicants were approved by the court. The October 29 Orders included provisions stating that the notice of one week for termination of the employment of employees on the expiry of the access periods under the Access Agreements would not operate to neutralize or suspend the provisions of the ESA.

18 In September or October, 2008, the Union was informed of the possibility of the closure of the Tilbury facility. The Union advised the Applicants at that time that should the employment of any Tilbury Union Employees be terminated, those employees should be paid termination and severance pay as required under the ESA.

19 The efforts of the Applicants in October and early November, 2008, were directed to securing sources of funding for the Applicants' restructuring initiatives from prospective purchasers, financial institutions and other providers of capital as strategic partners and investors. The Applicants submit that they considered filing a plan of arrangement during that period if their efforts to secure funding had been successful.

20 When no offer was received to purchase the assets of the Applicants, the principals of WMSL (the "Shareholders") negotiated with the Bank and with Export Development Canada ("EDC") to obtain financing from the Bank and from EDC for two newly incorporated corporations ("New Cos") to be controlled by the Shareholders which would purchase the Applicants' assets, properties and undertakings on a going-concern basis (the "Proposed Sale").

21 The Applicants were of the view that the Proposed Sale was the only alternative to a liquidation sale or auction of the Applicants' assets and properties.

22 The Applicants acknowledge that they are not in a position to proceed with a plan of arrangement that would see value paid to their unsecured creditors.

23 At the end of November 2008, the management of Tilbury determined that a transfer of the employment of any of the Tilbury Union Employees was no longer economically feasible because of the decline in current and projected volume for the Applicants. The Union was advised of this decision and effective December 5, 2008, the Applicants terminated 47 Tilbury Union Employees at the Tilbury plant. The Tilbury Union Employees did not receive termination pay and severance pay.

24 On January 21, 2009, the Applicants informed the Pellus Union Employees that the operations of Pellus would be closed down and that their employment would be terminated. The closure date was subsequently extended to late February 2009. The number of Pellus Union Employees whose employment will be terminated as a result of the closure of the Pellus facility is 43, of whom 40 are Pellus Union Employees.

25 Pellus advised the Union of its position that under the provisions of the ESA, the Pellus Union Employees are not entitled to be paid severance pay because each Pellus Union Employee is not one of 50 or more employees who will have had the employment relationship with Pellus severed within a six-month period and Pellus does not have a payroll of \$2.5 million or more. The adjudication of this issue is not before me at this time.

26 In January 2009, the Applicants paid \$2.8 million toward the Bank operating line as a repayment of pre-filing debt. In addition, as a result of asset sales and collections a further \$1.2 million was also paid to the Bank toward its term loan facilities.

27 The Monitor's Sixth Report is dated February 23, 2009 and at that date, the Applicants had approximately \$3.4 million in cash and at the end of April 2009, the Applicants were expected to have \$3 million. The Applicants has not drawn the DIP Facility throughout the CCAA proceedings.

28 Periodically during the CCAA proceedings, the Applicants returned to court and obtained orders extending the CCAA proceedings. Extensions were granted, under s. 11(4) of the CCAA based upon the court making required findings that the Applicants were operating in good faith and with due diligence such as to justify an extension of the stay.

ISSUES AND ANALYSIS

29 The issue to be determined on this motion is: Should the Applicants, in these CCAA proceedings, be required to pay termination pay and severance pay to the Tilbury Union Employees and the Pellus Union Employees.

30 This issue was recently considered in *Nortel Networks Corp., Re*, [2009] O.J. No. 2558, 2009 CanLII 31600 (On. S.C.) in the context of proceedings commenced by Nortel Networks Corp., et al (the "Nortel Applicants") under the CCAA (the "Nortel CCAA Proceedings").

31 In the Nortel CCAA Proceedings, both unionized and non-unionized employees brought motions seeking an order to vary the Initial Order to require the Nortel Applicants to pay, among other things, termination pay and severance pay, in accordance with the applicable collective agreement and/or the *Employment Standards Act*. The motions were dismissed.

32 The initial order in the Nortel CCAA Proceedings (the "Nortel Initial Order") was similar to the Amended and Restated Initial Order. Both were based on the Model Order.

33 The applicable order in each case, (a) entitles but did not require the Applicants to pay outstanding and future wages, salaries, vacation pay, ..., in each case incurred in the ordinary course of business; (b) provides that the Applicants were entitled to terminate the employment or lay off any of its employees and to deal with the consequences in the Plan.

34 Many of the submissions raised by the Union at [5], were considered in the Nortel decision.

35 Included in the conclusions in Nortel were statements to the effect that:

- (i) claims for termination pay and severance pay are unsecured claims. These claims do not have any statutory priority;
- (ii) Section 11.3 of the CCAA is an exception to the general stay provisions authorized by Section 11 and as such should be narrowly construed;
- (iii) Section 11.3 applies to services provided after the date of the Initial Order;
- (iv) the triggering of the payment obligations for termination and severance pay may have arisen after the Initial Order but it does not follow that a service was provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.
- (v) a key factor is whether the employee provided services after the date of the Initial Order. If so, he or she, is entitled to compensation benefits for such services.
- (vi) the court has the jurisdiction to order a stay of outstanding termination pay and severance pay obligations under Section 11 of the CCAA.
- (vii) the failure to pay outstanding termination pay and severance pay obligations does not amount to a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligation.

36 In my view, these conclusions are equally applicable to this motion.

37 The submissions of the Union which are addressed in the Nortel decision are as follows:

- (i) Payment of termination pay and severance pay are subject to the stay provisions.
- (ii) The failure to pay outstanding termination pay and severance pay obligations does not amount to a contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligations.
- (iii) The ESA continues to apply but there is a stay of the enforcement of the payment obligations.
- (iv) The triggering of the payment obligations for termination and severance pay may have arisen after the Initial Order but it does not follow that a service was provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.
- (v) A key factor is whether the employee provided services after the date of the Initial Order. If so, he or see, is entitled to compensation benefits for such services.

38 Two additional points that are not directly addressed in the Nortel decision are as follows:

- (i) Counsel to the Union submitted that the recent case of *Re West Bay SonShip Yachts Ltd.* 2009 BCCA 31 stands for the proposition that claims for termination and severance pay becomes owing to the employees at the point where their employment was terminated during the post-filing period and therefore such claims are post-filing claims. In my view, this case can be distinguished. The claim in *West Bay* involved a common law claim for damages for wrongful dismissal. This type of claim is distinct from a claim for severance pay or termination pay under employment standards legislation, as noted by Levine J.A. at paragraph [14].
- (ii) Tilbury Union Employees and Pellus Union Employees did provide services after the date of the CCAA application. Any incremental increase in termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection may justify treatment as a post-filing claim.

39 This motion raises an interesting question. Should the Applicants be faulted for commencing proceedings under the CCAA, even though it turns out that no plan can be proposed which provides value to the unsecured creditors. In this case, the alternative to filing under the CCAA would have been to continue with the NOI under the BIA. In light of the acknowledgment that no CCAA plan can be presented which would be of benefit for the unsecured creditors, it follows that no viable proposal could have been made under the BIA. The failure to file a proposal under the BIA would have resulted in a bankruptcy and likely a receivership. In a receivership/bankruptcy, the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees would rank as unsecured claims and subordinate to the secured creditors.

40 In turn, this raises a further question. Should the priority status of the Tilbury Union Employees and Pellus Union Employees be different in the context of CCAA proceedings as opposed to a receivership or bankruptcy.

41 In this case, the Monitor reports that certain secured creditors will suffer a loss. Any amount paid in respect of termination and severance pay claims would be as a result of a direct deduction from recoveries for the secured creditors. In my view, the effect of granting the requested relief would be to accord the termination and severance pay claims special status over the claims of other unsecured creditors of the Applicants and would also result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

42 In addition to my conclusions as set out in *Nortel*, I have not been persuaded that the requested relief can be justified in this case on the following grounds.

43 First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for

unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.

44 Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.

45 Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

46 In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank *pari passu* with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL - July 24, 2009 on this point.)

47 I acknowledge that the situation facing the employees is unfortunate and that in Nortel, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

48 Counsel to the Union also submitted that paragraph 11(d) of the Amended and Restated Initial Order only allows the company to terminate employees on terms agreed to by the employees or "to deal with the consequences thereof in the plan". Counsel to the Union submits that there is no agreement in this case and there is no plan and consequently paragraph 11(d) does not authorize the company not to pay termination pay and severance pay.

49 In my view, the Applicants provide a complete response to this argument in their submission summarized at [15] which I accept and at paragraph 32 of their factum by noting that the Applicants could have proposed a Plan that would not have seen value paid to the unsecured creditors and that could have effected the Proposed Sale through a Plan, and to require that the Applicants propose a Plan in order to effect the sale would be an overly technical requirement inconsistent with the CCAA's remedial objective. I also accept these submissions. In my view, this is not a case where the Applicants have used the CCAA to avoid termination and severance pay obligations under the ESA. The fact that these claims will not be paid is a result of legal priorities as opposed to any specific action of the Applicants.

50 I also note the CCAA proceedings are ongoing and the Applicants have brought forth a motion to propose a plan directed only at the secured creditors, but such a plan has been accepted in other cases. (See *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) page 1 (Ont. S.C.J.), aff'd 2002, 34 C.B.R. (4th) 157 (Ont. C.A.)) This motion has yet to be heard.

DISPOSITION

51 In the result, I have not been persuaded that the facts of this case are such that would justify an outcome different from that of *Nortel*. The claims for termination pay and severance pay are unsecured claims and enforcement proceedings are stayed, save and except for any incremental amount of termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection.

52 Counsel to the Bank also raised the issue that Tilbury and Pellus do not have the funds to pay the termination and severance claims as all cash is held by WMSL. Counsel to the Bank submits that if an order were to be made that WMSL were required to pay or to loan money to Tilbury or Pellus so that they could then pay the termination and severance pay claims, such would be equivalent to a common employer finding without a proper trial of such issue. I accept this position and to the extent that I have erred in my conclusions and this issue becomes relevant, it would be necessary, in my view, to have a hearing to determine whether WMSL, Tilbury and Pellus are a common employer. This possibility is recognized at paragraph 38 of the Reply Factum served by counsel to the Union.

53 For the foregoing reasons, subject to the caveat in [51], the motion is dismissed.

G.B. MORAWETZ J.

TAB 5

Case Name:

Canwest Global Communications Corp. (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 Proposed Plan of Compromise or
Arrangement of Canwest Global Communications Corp. and the
other applicants**

[2010] O.J. No. 2544

2010 ONSC 1746

82 C.C.E.L. (3d) 180

321 D.L.R. (4th) 561

2010 CarswellOnt 3948

190 A.C.W.S. (3d) 462

Court File No. CV-09-8396-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

June 14, 2010.

(38 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors -- Companies' Creditors Arrangement Act, s. 11, s. 33.

Creditors and debtors law -- Payment and discharge of debt -- Payment -- Time for payment -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors -- Companies' Creditors Arrangement Act, s. 11, s. 33.

Labour law -- Collective agreements -- Motion by the Union for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with collective agreements dismissed -- The CMI Entities were granted protection under the Companies' Creditors Arrangement Act in October 2006 -- In September and November 2009, CMI Entity employers announced employee layoffs -- The employees were not paid any severance -- However, termination and severance payments were unsecured claims and there was no statutory justification for giving the employees priority over secured creditors -- Companies' Creditors Arrangement Act, s. 11, s. 33.

Motion by the Communications, Energy and Paperworkers' Union (CEP) for an order directing the CMI Entities to satisfy obligations regarding severance and notice of termination payments in accordance with the collective agreements. In October 2006, an initial order granted the CMI Entities protection under the Companies' Creditors Arrangement Act (CCAA). In September and November 2009, CMI Entity employers announced employee layoffs in Kelowna and Saskatoon. The employees were not paid any severance after they were laid off and some employees were also owed money in lieu of notice of termination. The CEP took the position that the employees provided post-filing services and were entitled to severance and termination payments in accordance with the collective agreements. The CMI Entities took the position that the employees' severance entitlements were not converted into post-filing obligations simply because they had provided services following the date of the initial order.

HELD: Motion dismissed. Termination and severance payments were unsecured claims and section 33 of the CCAA did not alter priorities or status. While terminated employees were entitled to such payments, the obligation to make those payments was not immediate. Rather, the obligation was stayed and subject to a compromise. Finally, there was no statutory justification for giving the employees priority over secured creditors.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, s. 6(5), s. 11, s. 11.01, s. 11.01(a), s. 33, s. 33(1), s. 33.1, s. 36

Employment Standards Act, 2000, S.O. c. 41,

Counsel:

Lyndon Barnes and Alex Cobb, for the CMI Entities.

Maria Konyukhova, for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Logan Willis, for the Ad Hoc Committee of Noteholders.

Steve Weisz, for CIT Business Credit Canada Inc.

D. Wray, for the Communications, Energy and Paperworkers' Union.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 On October 6, 2009, I granted the CMI Entities an Initial Order which provided protection under the Companies' Creditors Arrangement Act' (the "CCAA") and stayed all proceedings against them. The Communications, Energy and Paperworkers' Union ("CEP") is the certified bargaining agent for certain employees of the CMI Entities. The CEP and the CMI Entities are parties to certain collective agreements. The CEP requests an order directing the CMI Entities to satisfy all obligations in respect of severance payments and notice of termination and/or notice of layoff payments in accordance with the terms of collective agreements. These payments are alleged to be due to union members who rendered services to the CMI Entities after October 6, 2009, the date of the Initial Order. Payments to two groups of employees are in issue. CEP did not proceed with that part of the motion relating to a third group whose effective layoff date predated the Initial Order. In addition, the parties adjourned on consent CEP's request for the establishment of a financial hardship process.

Factual Background

2 On September 3, 2009, the applicable CMI Entity employer announced nine layoffs of employees at the CHBC Kelowna television station. The effective layoff dates were in mid October or December of 2009. The applicable collective agreement provided for severance payments. Specifically, it stated:

In the event that an employee who has completed their probationary period is laid off, he/she shall receive severance of two (2) weeks pay for each completed year of continuous service up to seven (7) years, and three (3) weeks severance pay for each year of continuous service beyond seven (7) years, to a maximum of fifty-two (52) weeks severance pay. Up to two (2) weeks of the total may be actual notice with the balance paid in a single lump sum or in payments agreeable between the employee and the Company. In the event of a temporary layoff not longer than eight (8) weeks, where the (sic) is guaranteed to be recalled, there shall be no requirement to pay severance pay.

3 In lieu of lump sum severance payments, the CMI Entities proposed to make severance payments by way of "salary continuance". As such, post layoff, the CMI Entities would continue to pay the employees their regular salary until their severance obligations were exhausted. But for the CCAA proceedings and the insolvency of the debtor companies, this salary continuance would have

commenced in mid October or December, 2009. All of the employees worked beyond October 6, 2009 and remained employed until their effective layoff dates. They were paid their ordinary wages and benefits until their effective layoff dates and thereafter nothing was paid.

4 On November 12, 2009, the applicable CMI Entity employer announced nine terminations of employment at Global Saskatoon². The effective termination date was November 30, 2009. The CMI Entities did not pay these employees any severance after they were laid off. Some of these employees are also owed money in respect of pay in lieu of notice of termination. These payments were also not made. While the applicable collective agreement was not filed on this motion, it is acknowledged that it provides for termination and severance payments to employees whose employment has been terminated or severed. Even though they were told that they would not be paid any severance, all of the affected employees continued to work until their effective termination date of November 30, 2009. The employer paid the employees their wages plus a retention bonus if they continued to work until November 30, 2009. For example, one employee was paid a retention bonus of \$5400. Two layoffs were subsequently rescinded.

5 CEP filed an affidavit of Robert Lumgair, a national representative of the Union. He emphasized the significance of severance payments to employees. He stated that employees consider the promise of severance pay to be part of their total compensation package. He also noted that anticipated severance often serves as an incentive for employees to remain in the employment of the employer.

6 The Initial Order was largely based on the Commercial List Users' Committee Model Order. Paragraph 7(a) of the Initial Order entitles but does not require the CMI Entities: (a) to pay all outstanding and future wages, salaries, and employee benefits (including, but not limited to, employee medical, dental, disability, life insurance and similar benefit plans or arrangements, incentive plans, share compensation plans and employee assistance programs and employee or employer contributions in respect of pension and other benefits), current service, special and similar pension and/or retirement benefit payments, vacation pay, commissions, bonuses and other incentive payments, payments under collective bargaining agreements, and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements.

7 Subject to certain conditions including such requirements as are imposed by the CCAA, paragraph 12 of the Initial Order authorizes the CMI Entities to terminate the employment of such of their employees or lay off or temporarily or indefinitely lay off such of their employees as the relevant CMI Entity deems appropriate on such terms as may be agreed upon between the relevant CMI Entity and such employee, or failing such agreement, to deal with the consequences thereof in the CMI Plan.

8 The CMI Entities sent letters to the affected employees outlining the anticipated payments due to them.

9 Severance payments to sixteen employees totaling approximately \$425,000 are in issue on this motion. Of the sixteen, eleven termination claims amounting to approximately \$6000 are also in issue.³

Issue

10 The parties agree that: (i) the collective agreements provide for severance and termination pay; (ii) the collective agreements remain in force during the CCAA proceeding; and (iii) section 11.01 of the CCAA provides that employees are entitled to immediate payment for services provided to the CMI Entities after the date of the Initial Order. The issue for me to consider is whether as a result of working for some period of time after the granting of the Initial Order, these sixteen employees are entitled to immediate payment of all severance and termination payments owed to them.

Positions of the Parties

11 CEP submits that these groups of employees provided post-filing service to the CMI Entities and are entitled to severance and termination payments in accordance with the terms of the collective agreements. Section 11.01 of the CCAA provides that employees are entitled to payment for post-filing services. The collective agreements provide for severance and termination payments. Pursuant to section 33(1) of the CCAA, collective agreements remain in force during CCAA proceedings. Severance and termination payments are in respect of post-filing service and therefore should be paid. In the alternative, at a minimum, the termination payments are properly characterized as payments in respect of post-filing service. CEP relies on *Jeffrey Mines Inc.*,⁴ *Nortel Networks Corp. (Re)*,⁵ *West Bay SonShip Yachts Ltd. (Re)*,⁶ and *Fraser Papers Inc.*⁷ CEP submits that *Windsor Machine & Stamping Ltd.*⁸ was wrongly decided.

12 The CMI Entities submit that they paid the ordinary wages and benefits of the two groups of employees until the effective date of their layoff, based on the fact that they remained at work until that date and that payment of their salary for such service was required by section 11.01 of the CCAA. The fact that these employees provided services following the date of the Initial Order did not convert their severance entitlements---which take effect upon the termination of their services and are calculated based on tenure of past service---into post-filing obligations. Such a holding would be contrary to the jurisprudence and would have wide spread and unprecedented implications generally for the application of a stay to pre-filing obligations owed to post-filing suppliers. There is a distinction between the conclusion that a collective agreement subsists during the CCAA stay period and the conclusion that any and all amounts owing under the collective agreement can be enforced during that period. The CMI Entities rely on the same cases relied upon by CEP plus *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*,⁹ *Re ICM/Krebsoge Canada Ltd. and International Association of Machinists & Aerospace Workers, Local 1975*¹⁰, *Re Lehndorff General Partner Ltd.*,¹¹ *Re Mirant Canada Energy Marketing Ltd.*,¹² *Providence Continuing Care Centre St. Mary's of the Lake v. Ontario Public Service Employees' Union-Local 483*,¹³ *Re Stelco Inc.*,¹⁴ and *Re Wright Lithographing Co. and Graphic Communications International Union Local 517*.¹⁵

13 The Ad Hoc Committee of Noteholders and CIT Business Credit Canada Inc. both supported the position advanced by the CMI Entities. Counsel for the Ad Hoc Committee also observed that under the proposed Plan, unsecured creditors owed \$5000 or less would be paid in full. As such, approximately one half of the 16 employees would be paid in full provided the Plan is approved, sanctioned and remains unchanged in that regard. The Monitor took no position on the motion.

Discussion

14 To properly assess these issues, it is necessary to examine the relevant provisions of the CCAA, the treatment of termination and severance obligations, and recent case law.

15 The CCAA was amended on September 18, 2009. The relevant provisions of the CCAA are sections 11 and 33. Subject to the restrictions set out in the Act, section 11 provides the court with the power to make any order that it considers appropriate in the circumstances and the power to grant a stay of proceedings. Additionally, section 11.01 states:

No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

Case law on this provision has focused on the provision of services after the Initial Order has been made.

16 Section 33 for the most part incorporates law that has been established and applied for some time¹⁶. It is, however, a new provision in the statute itself. Section 33.1 states:

If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

17 Both termination and severance pay are designed to "cushion the economic dislocation that an employee suffers upon termination of employment and provide support to allow terminated employees to secure new employment: M. Starnino, J-C Killey and C.P. Prophet in *"The Inter Section of Labour and Restructuring Law in Ontario: A Survey of the Current Law"*¹⁷ In discussing the treatment of termination and severance in CCAA proceedings, the same authors note,

"... amounts owing to employees whose employment has been terminated in the course of or at the end of the restructuring proceeding are typically treated as unsecured creditors in the restructuring proceeding and subject to compromise in accordance with the plan of compromise or arrangement....

There are remarkably few cases expressly considering whether post-employment benefits, termination pay and severance pay are subject to compromise. What little authority there is tends to support the treatment of these claims as unsecured claims subject to compromise in the plan of arrangement. The apparent rationale behind this approach is that in bankruptcy these claims would be treated as unsecured claims subject to compensation in accordance with the scheme of distribution set forth in the BIA."¹⁸

18 Turning to the relevant case law, in *Re: Nortel Networks Corp.*¹⁹, two motions were involved. In the first motion, the Union requested a declaration that certain former employees were entitled to post-employment retirement benefits and termination and severance amounts. None of the former employees had provided services to Nortel after the Initial Order. The Union argued that the collective agreement was a bargain that should not be divided into separate obligations and

therefore the compensation for services should include all monetary obligations and not just those owed to active employees.

19 The Court of Appeal rejected the Union's appeal. The Court acknowledged the purpose of the CCAA, namely the facilitation of a compromise or an arrangement between a company and its creditors and stated that the Initial Order stays obligations; it does not eliminate them. The Court reiterated that section 11.3 (now section 11.01(a)) of the CCAA is an exception to the general stay provision and should be narrowly construed. Payment for services provided by the continuing employees did not extend to encompass payments to former employees. The latter were in the nature of deferred compensation for prior, not current services. Furthermore, these were independent vested rights.

20 The ratio of *Re: Nortel Networks Corp* did not address post-filing employees and their rights, if any, to severance and termination payments nor did it address any of the amendments to the CCAA²⁰. The Court of Appeal did state:

"What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the [Initial Order]: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.)."²¹

21 The second motion in the *Re Nortel Networks* case was brought by former non-unionized employees who sought payment of statutory termination and severance claims under the *Employment Standards Act, 2000*²². In addressing their appeal, in a footnote, the Court of Appeal observed that:

"The issue of post-initial order employee terminations, and specifically whether any portion of the termination or severance that may be owed is attributable to post-initial order services, was not in issue on the motion. In *Windsor Machine & Stamping Ltd (Re)* [2009] O.J. 3195, decided one month after this motion, the issue was discussed more fully and Morawetz J. determined that it could be decided as part of a post-filing claim. Leave to appeal has been filed."

22 The leave to appeal proceedings in *Windsor Machine* have been delayed. Although it was a pre-amendment case, the issue was similar to that before me. While it would have been helpful to have the benefit of the Court of Appeal's decision in that case, unfortunately, given timing requirements, I am rendering this decision beforehand.

23 In *Windsor Machine and Stamping Ltd.*²³, the Union sought an order that the CCAA applicants pay termination and severance pay arising from terminations that occurred some time after the CCAA Initial Order. Morawetz J. reiterated and applied certain of his conclusions from *Re: Nortel Networks Corp.* including that the claims for termination and severance pay were unsecured claims and based for the most part on services that were provided pre-filing. A failure to pay did not amount to a contracting out of a payment obligation; rather, during the stay period, there was a stay of the enforcement of the payment obligation.

24 There, as in the case before me, the claims for termination and severance were for the most part based on services that were provided pre-filing. Morawetz J. stated that the court has jurisdiction to order a stay of outstanding termination and severance pay obligations and concluded that the effect of paying termination and severance would be to accord to those claims special status over the claims of other unsecured and secured creditors. He noted that the priority of secured creditors had to be recognized. He also observed that in a receivership or bankruptcy, termination and severance pay claims would rank as unsecured claims.

25 Morawetz J. did order that any incremental increases in termination and severance pay attributable to the post-filing time period were not stayed.

26 The case relied upon by the Court of Appeal in *Re: Nortel Networks Corp. was Mirant Canada Energy Marketing.*²⁴ In that case, a letter agreement provided for severance pay in the event that an employee's employment was terminated without cause. Kent J. held that an obligation to pay severance was an obligation that arose on termination of services, not an obligation that was essential for the continued supply of services. She wrote:

Thus, for me to find the decision of the Court of Appeal in *Smokey River Coal*, [2001] A.J. No. 1006, analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only his salary which he has been paid falls within that definition.²⁵

27 Similarly, in *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*²⁶, the court held that severance pay did not fall within the category of essential services provided during the reorganization period in order to enable the debtor company to function.

28 Other cases of note include *Jeffrey Mines Inc.*²⁷ and *TQS Inc.*²⁸ both of which accepted that an employer is bound by its collective agreement notwithstanding CCAA proceedings, however, both courts concluded that obligations governed by collective agreements may be compromised.

29 Having conducted this review, I have concluded that CEP's request for immediate payment should be dismissed. I do so for the following reasons.

30 As noted by numerous courts including the Court of Appeal in *Re: Nortel Networks Corp.*, the purpose of the CCAA is to facilitate a compromise between a company and its creditors. The Act is rehabilitative in nature. A key feature of this purpose is found in the court's power to stay the

payment of obligations including termination and severance payments. Section 11.01(a) permits payment for services provided after the date of the Initial Order. Consistent with the purpose of the statute, that subsection is to be narrowly construed.

31 Termination and severance payments have traditionally been treated as unsecured claims. There is no express statutory priority given to these obligations. The nub of the issue is whether section 33 of the CCAA dealing with collective agreements alters the treatment of these obligations. In my view, it does not.

32 Consistent with established law, section 33 of the CCAA does provide that a collective agreement remains in force and may not be altered except as provided by section 33 or under the laws of the jurisdiction governing collective bargaining. It does not provide for any priority of treatment though. The section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status. The essential nature of severance pay is rooted in tenure of service most of which will have occurred in the pre-filing period. As established in the *Re Nortel Networks Corp.*, *Windsor Machine*, and *Mirant* decisions, severance pay relates to prior service regardless of whether the source of the severance obligation is a collective agreement, an employment standards statute or an individual employment contract. As such, terminated employees are entitled to termination and severance but payment of that obligation is not immediate; rather it is stayed and is subject to compromise in a Plan. This conclusion is consistent with the case law and with the statute. As noted by the CMI Entities in their factum, the case law affirms that severance pay is the antithesis of a payment for current service.

33 Furthermore, there is no statutory justification for giving these employees priority of payment over secured creditors. As stated by Morawetz J. in *Windsor Machine*, the priority of secured creditors must be recognized. There are certain provisions in the amendments that expressly mandate certain employee-related payments. In those instances, section 6(5) dealing with the sanction of a Plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.

34 The same is true with respect to other unsecured creditors including other non-unionized employees. Quite apart from the priority to which secured creditors are entitled, quere the merits of a priority regime that treated unionized and non-unionized employees differently. Under such a regime, unionized employees would get immediate payment of termination and severance obligations based on section 33 of the CCAA whereas non-unionized employees would not.

35 Additionally, based on CEP's submissions, someone who worked a day after the Initial Order would be entitled to full and immediate payment of termination and severance obligations ahead of all others whereas someone who was terminated the day before the Initial Order would not. This cannot be the scheme contemplated by the statutory amendments.

36 I should say in all frankness that it would be appealing to find in favour of the employees in this case. They are a small group and the quantum in issue is not large relative to the amounts involved in this CCAA proceeding. That said, I have a very serious concern that while such a decision would result in immediate payment for these sixteen employees, the precedent such a decision would establish would have long term and negative consequences for employees generally. Alt-

though case law on a superficial read might cause one to conclude otherwise, in CCAA proceedings, a judge is extraordinarily conscious of the fate of employees. Indeed, one of the primary benefits of a restructuring that sees the continuance of the debtor company as a going concern is the maintenance of jobs for the employees. Acceptance of CEP's submissions could well result in behavior modification that would be an anathema to the interests of employees as a whole. As stated by Morawetz J. in *Windsor Machine and Stamping Ltd.*, the giving of priority to termination and severance payments would result in:

"a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs."²⁹

Other alternatives such as mass pre-filing terminations are even less palatable.

37 As to CEP's alternative submission that termination payments are properly characterized as payments in respect of post-filing service, I am not persuaded that the distinction between severance and termination payments is a meaningful one within the context of this case. The *West Bay* decision supported the conclusion that a claim for damages for wrongful dismissal carried out in the post-filing period gave rise to a monetary claim that was subject to compromise under a plan. The clear inference to be drawn from the case is that the claim had been stayed and there was no immediate requirement to pay. The same is true in the case before me.

38 As in *Windsor Machine*, any incremental amount of termination and severance pay attributable to the period of time after the date of the Initial Order in which services were actually provided is not stayed. Otherwise, for the reasons outlined, I am dismissing CEP's motion.

S.E. PEPALL J.

¹ R.S.C. 1985, c. C-36, as amended.

² Two of these were later rescinded.

³ Of the eleven, four claim 3 months pay in lieu but these claims were not quantified.

⁴ [2003] J.Q. No. 264.

⁵ (2009), 55 C.B.R. (5th) 68 (ont. S.C.J.), aff'd 2009 ONCA 833.

⁶ [2009] B.C.J. No. 120 [B.C. C.A.].

⁷ [2009] O.J. No. 3188.

8 [2009] O.J. No. 3195.

9 2005 SKQB 331.

10 38 L.A.C. (4th) 426.

11 (1993), 9 B.L.R. (2d) 275.

12 2004 ABQB 218.

13 85 C.L.A.S. 149, 2006 C.L.B. 12961.

14 (2005), 75 O.R. (3d) 5 (C.A.).

15 91 L.A.C. (4th) 129.

16 See for example *Jeffrey Mines*, supra note 3.

17 Ontario Bar Association Continuing Legal Education, April 24, 2009.

18 Ibid, at p.27-29. Although logical, the authors state that there is a lack of clarity as to whether the analysis should end there.

19 2009 ONCA 833.

20 The *Nortel* filing predated the CCAA amendments in September, 2009.

21 *Supra* note 19 at paragraph 19.

22 2000, S.O. c. 41.

23 [2009] O.J. No. 3195.

24 2004 ABQB 218.

25 *Supra*, note 11 at para. 28.

26 *Supra*, note 8.

27 2003 CarswellQue 90 (C.A.).

28 [2008] J.Q. no 7151, 2008 CarswellQue 7132 (C.A.).

29 *Ibid* paragraph 43.

TAB 6

Case Name:
Nortel Networks Corp. (Re)

**RE: IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as Amended**

[2009] O.J. No. 3280

53 C.B.R. (5th) 196

2009 CarswellOnt 3028

2009 CanLII 26603

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: July 30, 2009.

Judgment: July 30, 2009.

Released: July 31, 2009.

(15 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- International insolvencies -- Motion by Nortel Companies and others for court approval of call for claims process and mechanism for paying out claims by employees in financial hardship allowed.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Motion by Nortel Companies to extend CCAA stay allowed -- Companies working in good faith and with due diligence to reorganize extensive operations.

Motion by the Nortel Companies and the U.S. debtors for an order implementing a call for claims procedure, requiring most creditors to file their claims by September 30, 2009. The Companies, the Monitor and former employees also moved for an order approving a process for making immediate payments on claims by employees experiencing financial hardship. The Companies also moved for an extension of the CCAA stay period to October 30, 2009.

HELD: Motions allowed. The call for claims procedure would facilitate the moving parties in formulating a plan and reconciling the claims. The mechanism for paying out employee claims was approved. The stay was extended because the court was convinced the Companies were working in good faith and with due diligence to restructure their extensive operations.

Statutes, Regulations and Rules Cited:

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

Counsel:

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation et al.

J.A. Carfagnini, C.G. Armstrong and G. Rubenstein, for Ernst & Young Inc., Monitor.

Arthur Jacques, T. McRae and J. Payne, for the Nortel Continuing Canadian Employees.

S. R. Orzy, for the Noteholders.

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

A. MacFarlane, for the Official Committee.

R. Sahni, for the Noteholders' Committee.

Robin B. Schwill, for the Nortel Networks U.K. Limited (in Administration).

Mark Zigler, for the Former Employees.

Tina Lie, for the Superintendent of Financial Services.

B. Wadsworth, for CAW-Canada.

ENDORSEMENT

1 G.B. MORAWETZ J.:-- The motion proceeded unopposed and resulted in two orders for the following reasons:

Claims Procedure Order

2 The Applicants and the U.S. Debtors wish to implement a "call for claims" procedure that will require most creditors of the Applicants and the U.S. Debtors to file their claims by September 30, 2009. The process will allow both the Applicants and the U.S. Debtors to begin the process of reconciling these claims. It should also provide the Applicants and the U.S. Debtors with more definitive information with respect to claims, which information can be used to assist in the formulation of a plan.

3 The Applicants prepared the proposed procedure order with a view to showing certain essential elements with the claims order that will shortly be sought in the Chapter 11 Proceedings.

4 The proposed procedure is described in both Mr. Doolittle's affidavit of July 24, 2009 and in the Sixteenth Report of the Monitor.

5 I am satisfied that it is appropriate to approve the Claims Procedure.

Employee Hardship, Canadian GSPA, Stay Extension Order

6 In response to the endorsement released on June 18, 2009, the Monitor, the Applicants and Koskie Minsky LLP, in its capacity as Representative Counsel for former employees, have considered the issue of hardship being experienced by certain former employees and have developed a mechanism for making immediate payment on account of the claims of those former employees who are experiencing financial hardship. The mechanism is summarized in both Mr. Doolittle's affidavit and in the Monitor's Sixteenth Report. The Eligibility Requirements and Procedure is also set out at page 115(a) of the Motion Record. The proposal has also been reviewed by the Official Committee, the Bondholders and by FSCO, with no party objecting.

7 It was acknowledged by counsel to the Monitor that further issues may arise out of the implementation of the mechanism and for this reason, among others, the Monitor indicated that it would report back to court on this issue by September 30, 2009.

8 Counsel to the CAW also brought to the court's attention that the Union may wish to have the eligibility criteria reviewed at that time.

9 I am satisfied that the proposed process is an appropriate response to the issue as raised in the June 18, 2009 endorsement and the process is approved, subject to further review, if any, after the Monitor reports back to court.

10 I am also satisfied that it is appropriate to approve the extension of the Canadian Group Supplier Protocol Agreement.

11 Finally, the Applicants seek an extension of the Stay Period to October 30, 2009.

12 As indicated in the Record, NNC is the ultimate parent of the Nortel companies, which operate world wide. The Applicants also have significant business operations. The restructuring of the Applicants will take a significant amount of time.

13 The progress to date has been described in various affidavits filed by the Applicants and in the Reports filed by the Monitor. The most recent affidavit of Mr. Doolittle and the Sixteenth Report also outline some of the upcoming steps that the Applicants intend to take in this process. The Monitor has also noted that, based on the key assumptions used in the preparation of the Applicants' July 12 Cash Flow Forecast, the Applicants will have sufficient cash resources available during the Forecast Period to permit the Applicants to make further progress in these proceedings. The Monitor supports the request for the extension.

14 Having reviewed the Record and having heard submissions, I am satisfied that the Applicants continue to work in good faith and with due diligence such that the request to extend the Stay Period to October 30, 2009 is warranted. The Stay Period is therefore extended to October 30, 2009.

15 Orders to give effect to the foregoing have been signed by me.

G.B. MORAWETZ J.

TAB 7

Case Name:
Target Canada Co. (Re)

**RE: IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C., 1985,
c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise
or Arrangement of Target Canada
Co., Target Canada Health Co., Target
Canada Mobile GP Co., Target Canada
Pharmacy (BC) corp., Target Canada Pharmacy
(Ontario) Corp., Target Canada
Pharmacy Corp., Target Canada Pharmacy
(SK) Corp., and Target Canada
Property LLC.**

[2015] O.J. No. 247

2015 ONSC 303

2015 CarswellOnt 620

248 A.C.W.S. (3d) 753

22 C.B.R. (6th) 323

Court File No.: CV-15-10832-00CL

Ontario Superior Court of Justice

G.B. Morawetz R.S.J.

Heard: January 15, 2015.

Judgment: January 16, 2015.

(85 paras.)

Counsel:

Tracy Sandler and Jeremy Dacks, for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario)

Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants").

Jay Swartz, for the Target Corporation.

Alan Mark, Melaney Wagner, and Jesse Mighton, for the Proposed Monitor, Alvarez and Marsal Canada ULC ("Alvarez").

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed Employee Trust.

Susan Philpott, for the Proposed Employee Representative Counsel for employees of the Applicants.

ENDORSEMENT

- 1** G.B. MORAWETZ R.S.J.:-- Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.
- 2** TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".
- 3** In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.
- 4** Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.
- 5** After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.
- 6** Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under

the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks

café. Each store typically employs approximately 100 -- 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Prizm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 50 ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993)*, 17 CBR (3d) 24 (Ont. Gen. Div.); *Re Prizm Income Fund*, 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("*Canwest Publishing*") and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency

of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)*], and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corpora-

tion and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;

- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*(2002), 211 D.L.R (4th) 193, [2002] 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

G.B. MORAWETZ R.S.J.

TAB 8

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT
OF CINRAM INTERNATIONAL INC., CINRAM INTERNATIONAL INCOME
FUND, CII TRUST AND THE COMPANIES LISTED IN SCHEDULE "A"

Court File No. CV12-9767-00CL

Oct 19-12

Applicants

M. Wagner + C. Descours

for Applicants.

D. Ayres + T. Pomykhova for Trustees.

M. Sternis + T. Liu for Ad the Committee
of Former Canadian Airman Employees

Sheweny -> for J. P. Pogue.

The note was not opposed. Counsel to
the Applicants advised that the requested
relief was requested by the Trustees and the
Severed Debtors and was consented to by
the Ad Hoc Committee of Former Canadian
Airman Employees.

I am satisfied having reviewed the
record that it is both just and equitable

to appoint F.T.I. Counselors

Charles McLean as Receiver

of listed property of CII

as set out in the

Order.

October 19, 2012. ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

Proceeding commenced at Toronto

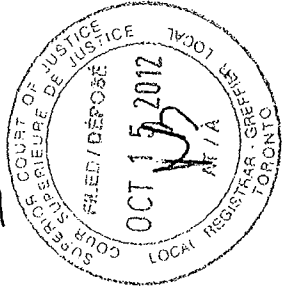
MOTION RECORD
(Appointment Order)
(Returnable October 19, 2012)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
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Lawyers for the Applicants

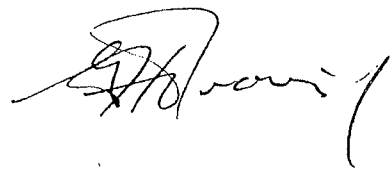


draft order.

The Record establishes that one of the purposes of the Review is to clarify the positions of employees with respect to WEPPA claims. For this purpose, it is specifically noted that a declaration is to issue that the Review is a review within the meaning of § 243(2)(b) of the B.A.

The Superintendent of Buby's has been made aware of the review, notes and takes ~~no~~ no position with respect to the form of proposed order.

MDE quoted and order signed is the form presented.



TAB 9

Case Name:

Victorian Order of Nurses for Canada (Re)

**IN THE MATTER OF the Companies' Creditors
Arrangement Act, R.S.C. 1985, c.
C-36 as amended**

**AND IN THE MATTER OF Section 101 of the
Courts of Justice Act, R.S.O. 1990
c. C-43 as amended**

**AND IN THE MATTER OF a Plan of Compromise
or Arrangement of Victorian Order
of Nurses for Canada, Victorian Order of
Nurses for Canada - Eastern Region,
and Victorian Order of Nurses for Canada - Western Region**

[2015] O.J. No. 6581

2015 ONSC 7371

261 A.C.W.S. (3d) 517

32 C.B.R. (6th) 236

2015 CarswellOnt 19150

Court File No.: CV-15-11192-00CL

Ontario Superior Court of Justice

M.A. Penny J.

Heard: November 25, 2015.

Judgment: November 27, 2015.

(57 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Order -- Appointment of Receiver -- Application by VON Canada, VON East and VON West for order for court protection of Victorian Order of Nurses for Canada entities allowed -- Initial order under Companies' Creditors Arrangement Act was signed, and order appointing receiver of certain of VON group's assets was

made -- Introduction of cash management was both necessary and appropriate -- Quantum and nature of remuneration to be paid to Chief Restructuring Officer was fair and reasonable -- Director's charge was appropriate -- Key employee retention plan was approved -- It was just and convenient to appoint receiver over goodwill and intellectual property of applicants -- Bankruptcy and Insolvency Act, s. 243(2); Companies' Creditors Arrangement Act, ss. 11.02, 11.51, 11.52, 11.7; Courts of Justice Act, s. 101.

Application by VON Canada, VON East and VON West for an order for court protection of Victorian Order of Nurses for Canada ("Victorian") entities. The Victorian Order of Nurses for Canada and the other entities in the VON group provided home and community care services to Canadians in various locations across the country on a not-for-profit basis. The VON group had, for a number of years, suffered liquidity problems. Current liabilities consistently exceeded current assets by a significant margin. Financial analysis of the VON group revealed that VON Canada, VON East and VON West accounted for a disproportionately high share of the VON group's overall losses and operating cash shortfalls relative to the revenues generated from these entities. VON Canada, VON East and VON West sought protection from their creditors under the Companies' Creditors Arrangement Act ("CCAA"). The applicants also sought certain limited protections for VON Ontario and VON Nova Scotia. The goal of the contemplated restructuring was to modify the scope of the VON group's operations and focus on its core business and regions. This would involve winding down the non-viable operations of VON East and VON West in an orderly fashion and restructuring and downsizing the management services provided by VON Canada in order to have a more efficient and cost-effective operating structure.

HELD: Application allowed. Initial order under the CCAA was signed, and an order appointing a receiver of certain of the VON group's assets was made. Required payment of outstanding and future wages as well as fees and disbursements for any restructuring assistance, fees and disbursements of the monitor, counsel to the monitor, the chief restructuring officer, the applicants' counsel and counsel to the boards of director were necessary measures for the conduct of the restructuring. Introduction of the new cash management was both necessary and appropriate in order to segregate the cash operations of the VON group entities which were subject to the CCAA proceedings from the VON group entities which were not, and to allow the applicants in the CCAA proceedings to pool their cash inputs and outputs, which was necessary in order to avoid liquidity crises in respect of VON East and VON West operations during the wind down period. Both the VON group and the monitor believed that the quantum and nature of the remuneration to be paid to the Chief Restructuring Officer ("CRO") was fair and reasonable. It was appropriate for the court to approve the CRO's engagement letter. The administration charge was required and reasonable in the circumstances to allow the debt or to have access to necessary professional advice to carry out the proposed restructuring. The director's charge was appropriate. The proposed monitor reviewed and raised no concerns about the proposed directors' charge. The director' charge contemplated by the initial order expressly excluded claims that arose as a result of gross negligence or willful misconduct. The key employee retention plan was approved. The amount was relatively modest given the size of the operation and the number of employees. It was just and convenient to appoint a receiver over the goodwill and intellectual property of the applicants. The evidence was that no stakeholder would be prejudiced by the proposed receivership order.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, s. 243(2)

Companies' Creditors Arrangement Act, s. 11.02, s. 11.51, s. 11.52, s. 11.7

Courts of Justice Act, s. 101

Counsel:

Evan Cobb and Matthew Halpin for the Applicants.

Joseph Bellissimo for the Bank of Nova Scotia.

Mark Laugesen for Collins Barrow Toronto Limited (Proposed Monitor).

Kenneth Kraft for the Board of Directors of the Applicants.

ENDORSEMENT

M.A. PENNY J.:--

Overview

1 On November 25, 2015 I heard an application for an initial order under the *Companies' Creditors Arrangement Act* for court protection of certain Victorian Order of Nurses entities. I treated the application as essentially *ex parte*. In a brief handwritten endorsement, I granted the application and signed an initial order under the CCAA and an order appointing a receiver of certain of the VON group's assets, with written reasons to follow. These are those reasons.

Background

2 The Victorian Order of Nurses for Canada and the other entities in the VON group have, for over 100 years, provided home and community care services which address the healthcare needs of Canadians in various locations across the country on a not-for-profit basis.

3 The VON group delivers its programs through four regional entities:

- (1) VON -- Eastern Region
- (2) VON -- Western Region
- (3) VON -- Ontario and
- (4) VON -- Nova Scotia.

VON Canada does not itself provide direct patient service but functions as the "head office" infrastructure supporting the operations of the regional entities.

4 The VON group has, for a number of years, suffered liquidity problems. Current liabilities have consistently exceeded current assets by a significant margin; current net losses from 2012 to 2015 total over \$13 million; and cash flows from operations from 2012 to 2015 were similarly neg-

ative in the amount of over \$8 million. The VON group faces a significant working capital shortfall. A number of less drastic restructuring efforts have been ongoing since 2006 but these efforts have not turned the tide. Current forecasts suggest that the VON group will face a liquidity crisis in the near future if restructuring steps are not taken.

5 Financial analysis of the VON group reveals that VON Canada, VON East and VON West account for a disproportionately high share of the VON group's overall losses and operating cash shortfalls relative to the revenues generated from these entities.

6 As a result of these circumstances, VON Canada, VON East and VON West seek protection from their creditors under the *Companies' Creditors Arrangement Act*. The applicants also seek certain limited protections for VON Ontario and VON Nova Scotia, which carry on a core aspect of the VON group's business but are not applicants in these proceedings. The applicants also seek the appointment of a receiver of certain of the VON group's assets.

7 The goal of the contemplated restructuring is to modify the scope of the VON group's operations and focus on its core business and regions. This will involve winding down the non-viable operations of VON East and VON West in an orderly fashion and restructuring and downsizing the management services provided by VON Canada in order to have a more efficient and cost-effective operating structure.

Jurisdiction

8 The CCAA applies to a "debtor company" with total claims against it of more than \$5 million. A debtor company is "any company that is bankrupt or insolvent." "Insolvent" is not defined in the CCAA but has been found to include a corporation that is reasonably expected to run out of liquidity within the period of time reasonably required to implement a restructuring.

9 In any event, based on the affidavit evidence of the VON group's CEO, Jo-Anne Poirier, the applicants are each unable to meet their obligations that have become due and the aggregate fair value of their property is not sufficient to enable them to pay all of their obligations.

10 The corporate structure of the applicants does not conform to the parent/subsidiary structure that would be typically found in the business corporation context. I am satisfied, however, that VON East and VON West are under the control of VON Canada from a practical perspective. They are all affiliated companies with the same board of directors. Accordingly, while VON East and VON West do not, on a standalone basis, face claims in excess of \$5 million, the applicants, as a group, clearly do. The applicants have complied with s. 10(2) of the CCAA. The application for an initial order is accompanied by a statement indicating on a weekly basis the projected cash flow of the applicants, a report containing the prescribed representations of the applicants regarding the preparation of the cash flow statement and copies of all financial statements prepared during the year before the application.

11 I am therefore satisfied that I have the jurisdiction to make the order sought.

Notice

12 The VON group is a large organization with over 4,000 employees operating from coast to coast. I accept that prior notice to all creditors, or potential creditors, is neither feasible nor practical in the circumstances. The application is made on notice to the VON group, the proposed monitor/receiver, the proposed chief restructuring officer and to the VON group's most significant secured creditor, the Bank of Nova Scotia.

13 There shall be a comeback hearing within two weeks of my initial order which will enable any creditor which had no notice of the application to raise any issues of concern.

Stay

14 Under s. 11.02 of the CCAA, the court may in its initial order make an order staying proceedings, restraining further proceedings or prohibiting the commencement of proceedings against the debtor provided that the stay is no longer than 30 days.

15 The CCAA's broad remedial purpose is to allow a debtor the opportunity to emerge from financial difficulty with a view to allowing the business to continue, to maximize returns to creditors and other stakeholders and to preserve employment and economic activity. The remedy of a stay is usually essential to achieve this purpose. I am satisfied that the stay of proceedings against the applicants should be granted.

16 Slightly more unusual is the request for a stay of proceedings against VON Ontario and VON Nova Scotia, neither of which are applicants in these proceedings. However, the evidence of Ms. Poirier establishes that VON Canada is a cost, not a revenue, center and that VON Canada is entirely reliant upon revenues generated by VON Ontario and VON Nova Scotia for its own day-to-day operations. There is a concern that VON Canada's filing of this application could trigger termination or other rights with respect to funding relationships VON Ontario and VON Nova Scotia have with various third party entities which purchase their services. Such actions would create material prejudice to VON Canada's potential restructuring by interrupting its most important revenue stream.

17 In the circumstances, I am satisfied that the stay requested in respect of VON Ontario and VON Nova Scotia, which is limited only to those steps that third party entities might otherwise take against VON Ontario and VON Nova Scotia *due to the applicants being parties to this proceeding*, is appropriate.

Payment of Pre-filing and Other Obligations

18 The initial order authorizes, but does not require, payment of outstanding and future wages as well as fees and disbursements for any restructuring assistance, fees and disbursements of the monitor, counsel to the monitor, the chief restructuring officer, the applicants' counsel and counsel to the boards of directors. These are all payments necessary to operate the business on an ongoing basis or to facilitate the restructuring.

19 The initial order also contemplates payment of liabilities for pre-filing charges incurred on VON group credit cards issued by the Bank of Nova Scotia. The Bank is a secured creditor. It is funding the restructuring (there is no DIP financing or DIP charge). It has agreed to extend credit by continuing to make these cards available on a go forward basis, but conditioned on payment of the pre-filing credit card liabilities. I am satisfied that these measures are necessary for the conduct of the restructuring.

Modified Cash Management System

20 Historically, net cash flows were not uniform across the VON group entities. This resulted in significant timing differences between inflows and outflows for any particular VON organization. To assist with this lack of uniformity, the VON group entered into an agreement with the Bank of Nova Scotia whereby funds could be effectively pooled among the VON group, outflows and inflows netted out and a net overall cash position for the VON group determined and maintained. At

the date of the commencement of these proceedings, the cash balance in the VON Canada pooled account was approximately \$1.8 million. These funds will remain available to the applicants during the CCAA proceedings.

21 Immediately upon the granting of the initial order, however, the cash management system will be replaced with a new, modified cash management arrangement. Under the new arrangement, the VON Ontario and VON Nova Scotia cash inflows and outflows will take place in a segregated pooling arrangement pursuant to which the consolidated cash position of only those two entities will be maintained.

22 The applicants will establish their own arrangement under which a consolidated cash position of the applicants will be maintained. Thus, VON Canada, VON East and VON West will continue to utilize their own consolidated cash balance held by those entities collectively.

23 The segregation of the VON Ontario and VON Nova Scotia cash management is necessary because they are not applicants.

24 A consolidated cash management arrangement is, however, necessary for the applicants, *inter se*, in order to ensure that the applicants continue to have sufficient liquidity to cover their costs during these proceedings. Without this arrangement, during the proposed CCAA proceedings VON East and VON West would face periodic cash deficiencies to the detriment of the group as a whole and which would put the orderly wind down of the critical services offered by VON East and VON West at risk.

25 I am satisfied that the introduction of the new cash management is both necessary and appropriate in order to:

- (a) segregate the cash operations of the VON group entities which are subject to the CCAA proceedings from the VON group entities which are not; and
- (b) allow the applicants in the CCAA proceedings to pool their cash inputs and outputs, which is necessary in order to avoid liquidity crises in respect of VON East and VON West operations during the wind down period.

Proposed Monitor

26 Under s. 11.7 of the CCAA, the court is required to appoint a monitor. The applicants have proposed Collins Barrow Toronto Limited, which has consented to act as the court-appointed monitor. I accept Collins Barrow as the court appointed monitor.

Chief Restructuring Officer (CRO)

27 Section 11 of the CCAA provides the court with authority to allow the applicants to enter into arrangements to facilitate restructuring. This includes the retention of expert advisors where necessary to help with the restructuring efforts. March Advisory Services Inc. has worked extensively with VON Canada to date with its pre-court endorsed restructuring efforts and has extensive background knowledge of the VON group's structure and business operations. The VON group lacks internal business transformation and restructuring expertise. VON Canada's "head office" personnel will be fully engaged simply running the business and implementing necessary changes. I am satisfied that March Advisory Services Inc.'s engagement is both appropriate and essential to a successful restructuring effort and that its appointment as CRO should be approved.

28 Both the VON group and the monitor believe that the quantum and nature of the remuneration to be paid to the CRO is fair and reasonable. I am therefore satisfied that the court should approve the CRO's engagement letter. I am also satisfied that the CRO's engagement letter should be sealed. This sealing order meets the test under the SCC decision in *Sierra Club*. The information is commercially sensitive, in that it could impair the CRO's ability to obtain market rates in other engagements, and the salutary effects of granting the sealing order (enabling March Advisory Services Inc. to accept this assignment) outweigh the minimal impact on the principle of open courts.

Administration Charge

29 Section 11.52 of the CCAA enables the court to grant an administration charge. In order to grant this charge, the court must be satisfied that notice has been given to the secured creditors likely to be affected by the charge, the amount is appropriate, and the charge extends to all of the proposed beneficiaries.

30 Due to the confidential nature of this application and the operational issues that would have arisen had prior disclosure of these proceedings been given to all secured creditors, all known secured creditors were not been provided with notice of the initial application. The only secured creditor of the applicants provided with notice is the Bank of Nova Scotia.

31 For this reason, the proposed initial order provides that the administration charge shall initially rank subordinate to the security interests of all other secured creditors of the applicants with the exception of the Bank of Nova Scotia. The applicants will seek an order providing for the subordination of all other security interests to the administration charge in the near future following notice to all potentially affected secured creditors.

32 The amount of the administration charge is \$250,000. In the scheme of things, this is a relatively modest amount. The proposed monitor has reviewed the administration charge and has found it reasonable. The beneficiaries of the administrative charge are the monitor and its counsel, counsel to the applicants, the CRO, and counsel to the boards of directors.

33 The evidence is that the applicants and the proposed monitor believe that the above noted professionals have played and will continue to play a necessary and integral role in the restructuring activities of the applicants.

34 I am satisfied that the administration charge is required and reasonable in the circumstances to allow the debtor to have access to necessary professional advice to carry out the proposed restructuring.

Directors' Charge

35 In order to secure indemnities granted by the applicants to their directors and officers and to the CRO for obligations that may be incurred in connection with the restructuring efforts after the commencement of the CCAA proceedings, the applicants seek a directors' charge in favor of the directors and officers and the CRO in the amount of \$750,000.

36 Section 11.51 of the CCAA allows the court to approve a directors' charge on a priority basis. In order to grant a directors' charge the court must be satisfied that notice has been given to the secured creditors, the amount is appropriate, the applicant could not obtain adequate indemnification for the directors or officers otherwise and the charge does not apply in respect of any obligation incurred by a director or officer as a result of gross negligence or willful misconduct.

37 As noted above, all known secured creditors have not been provided with notice. For this reason, the applicants propose that the priority of the directors' charge be handled in the same manner as the administration charge.

38 The evidence of Ms. Poirier shows that there is already a considerable level of directors' and officers' insurance. There is no evidence that this insurance is likely to be discontinued or that the VON group can not or will not be able to continue to pay the premiums. However, given the size of the VON group's operations, the number of employees, the diverse geographic scope in which the group operates, the potential for coverage disputes which always attends on insurance arrangements and the important fact that this board is composed entirely of volunteers, additional protection for the directors to remain involved post-filing is warranted, *Prism Income Fund (Re)*, 2011 ONSC 2061 at para. 45.

39 The amount of the charge was estimated by taking into consideration the existing directors' and officers' insurance and potential liabilities which may attach including employee related obligations such as outstanding payroll obligations, outstanding vacation pay and liability for remittances to government authorities. This charge only relates to matters arising after the commencement of these proceedings. It also covers the CRO.

40 The proposed monitor has reviewed and has raised no concerns about the proposed directors' charge.

41 The director' charge contemplated by the initial order expressly excludes claims that arise as a result of gross negligence or willful misconduct.

42 For these reasons, I am satisfied that the directors' charge is appropriate in all the circumstances.

Key Employee Retention Plan

43 The applicants seek approval of a key employee retention plan in the amount of up to \$240,000, payable to key employees during 2016.

44 This is a specialized business. The experience and knowledge of critical employees is highly valuable to the applicants. These employees have extensive knowledge of and experience with the applicants. The applicants are unlikely to be able to replace critical employees post-filing. Under the contemplated restructuring, the employee ranks of the applicants will be significantly downsized. As a result, there is a strong possibility that certain critical employees will consider other employment options in the absence of retention compensation.

45 The KERP was approved by the board of directors of the applicants. Provided the arrangements are reasonable, decisions of this kind fall within the business judgment rule as a result of which they are not second-guessed by the courts.

46 The amount is relatively modest given the size of the operation and the number of employees. I am satisfied that the KERP is reasonable in all the circumstances. I am also satisfied that the specific allocation of the KERP is reasonably left to the business judgment of the board.

47 Because the KERP involves sensitive personal compensation information about identifiable individuals, disclosure of this information could be harmful to the beneficiaries of the KERP. I am satisfied that the *Sierra Club* test is met in connection with the sealing of this limited information.

Receivership Order

48 The *Wage Earner Protection Program Act* was established to make payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership. The amounts that may be paid under WEPPA to an individual include severance and termination pay as well as vacation pay accrued.

49 In aggregate, over 300 employees are expected to be terminated at the commencement of these proceedings. These employees will be paid their ordinary course salary and wages up to the date of their terminations. However, the applicants do not have sufficient liquidity to pay these employees' termination or severance pay or accrued vacation pay.

50 The terminated employees would not be able to enjoy the benefit of the WEPPA in the current circumstances. This is because the WEPPA does not specifically contemplate the effect of proceedings under the CCAA.

51 A receiver under the WEPPA includes a receiver within the meaning of s. 243(2) of the *Bankruptcy and Insolvency Act*. A receiver under the BIA includes a receiver appointed under the *Courts of Justice Act* if appointed to take control over the debtor's property. Under the WEPPA, an employer is subject to receivership if any property of the employer is in the possession or control of the receiver.

52 In this case, the applicants seek the appointment of a receiver under s. 101 of the *Courts of Justice Act* to enable the receiver to take possession and control of the applicants' goodwill and intellectual property (i.e., substantially all of the debtor's property *other than* accounts receivable and inventory, which must necessarily remain with the debtors during restructuring).

53 In *Cinram (Re)* (October 19, 2012), Toronto CV-12-9767-00CL, Morawetz R.S.J. found it was just and convenient to appoint a receiver under s. 101 over certain property of a CCAA debtor within a concurrent CCAA proceeding where the purpose of the receivership was to clarify the position of employees with respect to the WEPPA.

54 In this case, the evidence is that no stakeholder will be prejudiced by the proposed receivership order. To the contrary, there could be significant prejudice to the terminated employees if there is no receivership and former employees are not able to avail themselves of benefits under the WEPPA.

55 In the circumstances, I find it is just and convenient to appoint a receiver under s. 101 over the goodwill and intellectual property of the applicants.

Further Notice

56 I am satisfied that the proposed notice procedure is reasonable and appropriate in the circumstances and it is approved.

Comeback Hearing

57 In summary, I am satisfied that it is necessary and appropriate to grant CCAA protection to VON Canada, VON East and VON West. There shall be a comeback hearing at 10 a.m. before me on Wednesday, December 9, 2015.

M.A. PENNY J.

TAB 10

Case Name:

Futura Loyalty Group Inc. (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
The Futura Loyalty Group Inc., Applicant**

[2012] O.J. No. 5362

2012 ONSC 6403

223 A.C.W.S. (3d) 14

99 C.B.R. (5th) 128

2012 CarswellOnt 14263

Court File No. CV-12-9882-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: November 13, 2012.

Judgment: November 13, 2012.

(26 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- With unsecured creditors -- Monitors -- Powers, duties and functions -- Motion by debtor company for orders permitting it to honour pre-payments for Aeroplan miles made by customers prior to initial order and varying initial order to defer giving notice of it to customers allowed in part -- It was appropriate to grant order respecting pre-payments, given importance of ongoing re-sale of Aeroplan miles to viability of company as going concern, benefit to re-organization efforts of trying to maintain customers and absence of opposition to motion -- There was no basis upon which to excuse monitor from giving notice.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.02(2), s. 11.2, s. 23, s. 23(1)(a)(ii)(B)

Counsel:

S. Reid, for the Applicant.

G. Azeff and A. Iqbal, for the Monitor, Harris & Partners Limited.

J. Desjardins, for DirectCash Payments Inc.

D. Pearlman, for Aimia Canada Inc.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Overview of orders sought under the CCAA

1 By Initial Order made October 16, 2012, the applicant, The Futura Loyalty Group Inc., obtained the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. By order made October 26, 2012, another judge of this Court approved a proposed Sale and Investor Solicitation Process and granted other relief. Futura now moves for orders (i) extending the Stay Period until January 18, 2013, (ii) increasing the DIP Facility from \$175,000 to \$300,000, (iii) permitting it to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers, and (iv) varying the Initial Order to defer giving notice under section 23 of the *CCAA* to Prepaying Merchant Customers.

II. Extending the Stay Period and increasing the DIP Facility

2 Futura seeks an extension of the Stay Period in order to enable it to work on the SISP which, it hopes, will result in either a going-concern sale or new investment implemented through a plan of compromise or arrangement. The Monitor supports the request and, in its Second Report dated November 9, 2012, expressed the view that Futura has acted and continues to act in good faith and with due diligence. DirectCash Payments Inc., which holds first ranking secured debt of about \$300,000, also supported the extension, as did Aimia Canada. I am satisfied that the evidence disclosed that Futura has acted, and is acting, in good faith and with due diligence and the requested extension is necessary to implement the SISP. The updated cash flow forecast filed by Futura shows that with the increase in the DIP Facility, the applicant has sufficient cash to carry on its operations until January 18, 2013. Pursuant to *CCAA* s. 11.02(2) I grant the extension of the Stay Period until January 18, 2013.

3 As to the proposed increase in the DIP Facility, Futura has demonstrated the need for such an increase in order to maintain its operations until the end of the Stay Period. The parties present, including the secured creditor, supported the proposed increase. The evidence filed by the applicant and the Monitor satisfies the requirements of *CCAA* s. 11.2, and I approve the requested increase in the DIP Facility.

III. Prepaying Merchant Customers: request to honour prepayments made prior to the Initial Order

4 As described by David Campbell, Futura's CEO, in his affidavit sworn November 9, 2012, Futura provides "loyalty solutions" for its customers. Its major customer reward program involves selling Aeroplan Miles to merchants under an Aeroplan Coalition Program. Over 75% of the applicant's revenues are generated by the resale of Aeroplan Miles pursuant to the Aeroplan Coalition Program.

5 Under that Program, Merchant Customers of Futura typically pay the applicant monthly, in arrears, for Aeroplan Miles they have issued to their customers in that month. However, prior to the filing of its application under the *CCAA*, Futura on occasion offered Merchant Customers the opportunity of buying Aeroplan Miles at volume discounts. The Merchant Customers would purchase those discounted Aeroplan Miles by pre-paying Futura.

6 Mr. Campbell deposed that as of the date of the Initial Order ten (10) Prepaying Merchant Customers had prepaid to Futura approximately \$108,000 for 2.5 million Aeroplan Miles. Futura has calculated that it pays out approximately \$20,000 a month to Aeroplan on account of those pre-paid Miles.

7 Futura seeks an order of this Court permitting it to honour prepayments made for Aeroplan Miles by those Prepaying Merchant Customers. Mr. Campbell deposed:

Although payment to Aeroplan on behalf of Prepaying Merchant Customers for prepayments made prior to the date of the Initial Order could be considered to be payment for the benefit of the Prepaying Merchant Customers as unsecured creditors of the Applicant, such payments are necessary in order to maintain the *status quo* and to ensure the continuous ongoing operations of the Applicant's business and the preservation of the Applicant's brand in the marketplace. This would enhance the likelihood of a going-concern sale by the Applicant that would maximize value for the benefit of all creditors.

Mr. Campbell also pointed out that Futura had made a similar request in its October 26 motion to allow the continuous payment of Futura Reward Payments; the court approved that request in its October 26 Order.

8 In its Second Report the Monitor supported Futura's request for an authorization order:

Futura and the Monitor share the view that such payments are necessary in order to maintain the *status quo*, ensure the continuous ongoing operations of Futura's business and preserve its brand in the marketplace.

9 DirectCash and Aimia Canada supported the relief sought by Futura.

10 Section 11 of the *CCAA* authorizes a court to "make any order that it considers appropriate in the circumstances", "subject to the restrictions set out in this Act". As Morawetz J. observed in *Re Nortel Networks Corp.*, the "*CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives ..." Although counsel could not point me to a case in which a court had permitted an applicant to satisfy a pre-filing credit or claim enjoyed by a custom-

er outside of the *CCAA* claims process, some precedent exists for permitting the payment of pre-filing obligations in the case of non-critical suppliers.

11 In both *Eddie Bauer of Canada Inc.*² and *EarthFirst Canada Inc.*³ the courts considered requests to approve payments to creditors in respect of pre-filing obligations. In the *Eddie Bauer* case Morawetz J. granted the approval writing:

[22] The proposed order also provides that the Applicants shall be entitled but not required to pay amounts owing for goods and services actually supplied to the Applicants prior to the date of the Order. The RSM Report comments on this point. *The Eddie Bauer Group is of the view that operations could be disrupted and its vendor relationships adversely impacted if it does not have the ability to pay pre-filing obligations to certain vendors and it further believes that the value of its business will be maximized if it can pay its pre-filing creditors. RSM has reviewed this issue and is supportive of this provision as the Eddie Bauer Group believes it is a necessary provision and the DIP Lenders are supportive of the Restructuring Proceedings. The relief requested in these proceedings is consistent with the relief sought in the Chapter 11 Proceedings. This provision is unusual but, in the circumstances of this case, appears to be reasonable. (emphasis added)*

12 In *EarthFirst Canada* Romaine J. approved the creation of a "hardship fund" to pay pre-filing obligations owed to certain suppliers and contractors of the applicant. The evidence in that case revealed that some suppliers and contractors in a remote community had become quite dependent upon the applicant's wind farm project and, if they were not paid, they would "face immediate financial difficulty". Romaine J. wrote:

[7] While the nature of payments from the hardship fund is different from the issue that was before Farley, J. in *Re Air Canada*, [2003] O.J. No. 5319, 2003 CarswellOnt 5296 (at para. 4), and while EarthFirst is not suggesting that recipients of the fund are "critical suppliers" in the usual sense of the term, it appears to be the case that, as in *Air Canada*, the potential future benefit to the company of these relatively modest payments of pre-filing debt is considerable and of value to the estate as a whole. The decision to allow the hardship fund thus outweighs the prejudice to other creditors, justifying a departure from the usual rule.

13 In those two cases the courts were prepared to countenance the payment of pre-filing obligations to suppliers in order to prevent disruption to the operations of the applicant and to maximize the value of the business for purposes of the re-organization or realization process. In the *EarthFirst Canada* case the court engaged in a form of proportionality or cost-benefit analysis, weighing the cost of the pre-payments against the benefit to the estate as a whole.

14 The present case does not involve a request to make payments to suppliers for pre-filing obligations, but concerns a somewhat analogous request to make payments which would satisfy pre-filing credits enjoyed by some important customers. The kind of cost-benefit reasoning undertaken in the *Eddie Bauer* and *EarthFirst* cases offers some guidance. My Reasons granting the Initial Order stated that the book value of Futura's assets was approximately \$1.35 million. The most recent cash-flow projection filed by the applicant made allowance for "payments to loyalty currency providers", which included the payments in respect of the Prepaying Merchant Customers. When

compared against projected inflows from the collection of receivables through to January 18, 2013 of approximately \$440,000 (the only source of cash apart from the increased DIP Financing), the honouring of \$108,000 in pre-paid Aeroplan Miles for the Prepaying Merchant Customers is not an insignificant amount. However, on the other side of the scale is the evidence from Futura that 75% of its revenue comes from the resale of Aeroplan Miles and under its SISF it is seeking to secure a going-concern sale of the company's business.

15 Given the importance of the ongoing resale of Aeroplan Miles to the viability of Futura as a going-concern, the benefit to the company's re-organization efforts of trying to maintain the Prepaying Merchant customers as continuing customers, and the absence of any opposition to the order sought, I conclude that it is appropriate in the circumstances to grant an order "permitting the Applicant to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers" prior to the making of the Initial Order, as requested in paragraph 5 of Futura's notice of motion. Such authorization, in my view, is consistent with and fosters the objectives of the *CCAA*.

16 Futura submitted a draft order which contained different language of authorization. I informed counsel that the revised language was vague and imprecise, and I would not approve it. Paragraph 5 of Futura's notice of motion was short, sweet and to the point, so the language of the draft order Futura submits for my consideration must reflect that precision.

IV. Dispensing with notice to Prepaying Merchant Customers

17 The Prepaying Merchant Customers were not given notice of this motion. I have made the order authorizing the honouring of their prepayments in any event because it is to their benefit. Futura requests that I vary the *CCAA* s. 23 notice provision in my Initial Order in order to "defer notice to Prepaying Merchant Customers". Again, the Monitor, DirectCash Payments and Aimia Canada support the applicant's request.

18 Section 23(1)(a)(ii)(B) of the *CCAA* requires a monitor, within five days after the making of an initial order, to send, in the prescribed manner, "a notice to every known creditor who has a claim against the company of more than \$1,000 advising them that the order is publicly available". In this case the Monitor has not sent such notice to the Prepaying Merchant Customers.

19 Why is that so? No explanation was offered by the Monitor in its Second Report. I am disappointed that none was. In oral submissions Monitor's counsel stated that the Monitor only learned from the applicant on October 27, 2012 that the Prepaying Merchant Customers were creditors of the applicant. Mr. Campbell, in his affidavit, did not explain why it took the applicant almost two weeks after the Initial Order to recognize the Prepaying Merchant Customers as creditors and to so inform the Monitor.

20 Why does the applicant not want the Monitor to give *CCAA* s. 23 notices to the creditor Prepaying Merchant Customers? In his affidavit Mr. Campbell deposed:

Direct notification of the *CCAA* Proceedings to the Prepaying Merchant Customers could cause them to cancel their participation in the Aeroplan Coalition Program, which would have a detrimental effect on the ongoing operation and value of the Applicant's business.

Since the Applicant is seeking an order allowing it to continue to honour prepayments made under the Aeroplan Coalition Program in the ordinary course,

and since a going concern sale of this business may be achieved, it is not currently necessary, and could be detrimental to the Applicant's business, to provide such merchants with direct notice of the CCAA Proceedings at this time. If a going concern sale of its Aeroplan Coalition Program cannot be achieved, such that the Prepaying Merchant Customers may be affected by this proceeding, the Applicant will give notice to such merchants at the relevant time.

In its Second Report the Monitor echoed the position of Futura.

21 I recognize that the October 26 Order contained a variation of the paragraph 43 Initial Order notice provision to exempt, from the Monitor's statutory duty to give notice of this proceeding, "claimants under the Futura Rewards Program". No reasons accompanied that order, so I am unable to understand the basis for the granting of that variation.

22 I am not prepared to vary the Initial Order to excuse the Monitor from providing the requisite creditor notice to the Prepaying Merchant Customers under section 23(1)(a)(ii)(B) of the CCAA. Transparency is the foundation upon which CCAA proceedings rest - a debtor company encounters financial difficulties; it seeks the protection of the CCAA to give it breathing space to fashion a compromise or arrangement for its creditors to consider; in order to secure that breathing space, the CCAA requires the debtor to provide its creditors, in a court proceeding, with the information they require in order to make informed decisions about the compromises or arrangements *of their rights* which the debtor may propose. As a general proposition, open windows, not closed doors, characterize CCAA proceedings.

23 In the present case the Monitor published, as ordered, a notice in the Globe and Mail shortly after the Initial Order was made and, as ordered, established a website to which the Initial Order was posted. Given that the Monitor has given general public notice of these proceedings as ordered by this Court, I cannot see any principled basis upon which to excuse the Monitor from giving specific notice to one group of creditors - the Prepaying Merchant Customers.

24 Mr. Campbell deposed that giving notice to the Prepaying Merchant Customers "could cause them to cancel their participation in the Aeroplan Coalition Program". Initiating CCAA proceedings always carries some risk that the applicant's suppliers or customers may re-think doing business with the debtor. One of the tasks of a debtor's management is to persuade suppliers or customers that in the long-run it would be better to hang in with the debtor than to abandon it. Such persuasion must be done in every CCAA proceeding; this one is no different.

25 For those reasons I decline to grant the applicant's request to vary the notice provisions of the Initial Order.

V. Summary

26 By way of summary, I grant the applicant an extension of the Stay Period until January 18, 2013, an increase in the DIP Facility to \$300,000, and permission to honour prepayments made for Aeroplan Miles by Prepaying Merchant Customers. I also approve the First and Second Reports of the Monitor and the actions and activities of the Monitor described therein.

D.M. BROWN J.

cp/e/qlqs/qlpmg/qlcas/qljac

1 (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 47.

2 2009 CanLII 32699 (ONSC).

3 2009 ABQB 78.

TAB 11

**** Preliminary Version ****

Case Name:
Century Services Inc. v. Canada (Attorney General)

Century Services Inc., Appellant;
v.
Attorney General of Canada on behalf of Her Majesty The Queen
in Right of Canada, Respondent.

[2010] S.C.J. No. 60

[2010] A.C.S. no 60

2010 SCC 60

[2010] 3 S.C.R. 379

[2010] 3 R.C.S. 379

2011 D.T.C. 5006

409 N.R. 201

296 B.C.A.C. 1

12 B.C.L.R. (5th) 1

2010 CarswellBC 3419

326 D.L.R. (4th) 577

EYB 2010-183759

2011EXP-9

J.E. 2011-5

2011 G.T.C. 2006

[2011] 2 W.W.R. 383

72 C.B.R. (5th) 170

[2010] G.S.T.C. 186

196 A.C.W.S. (3d) 27

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;

Judgment: December 16, 2010.

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

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Compromises and arrangements -- Where Crown affected -- Effect of related legislation -- Bankruptcy and Insolvency Act -- Appeal by Century Services Inc. from judgment of British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies allowed -- Section 222(3) of the Excise Tax Act evinced no explicit intention of Parliament to repeal s. 18.3 of CCAA -- Parliament's intent with respect to GST deemed trusts was to be found in the CCAA -- Judge had the discretion under the CCAA to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit debtor company to make an assignment in bankruptcy.

Appeal by Century Services Inc. from a judgment of the British Columbia Court of Appeal reversing a judgment dismissing a Crown application for payment of unremitted GST monies. The debtor company commenced proceedings under the Companies' Creditors Arrangement Act (CCAA), obtaining a stay of proceedings with a view to reorganizing its financial affairs. Among the debts owed by the debtor company at the commencement of the reorganization was an amount of GST collected but unremitted to the Crown. The Excise Tax Act (ETA) created a deemed trust in favour of the Crown for amounts collected in respect of GST. The ETA provided that the deemed trust operated despite any other enactment of Canada except the Bankruptcy and Insolvency Act (BIA). However, the CCAA also provided that subject to certain exceptions, none of which mentioned GST, deemed trusts in favour of the Crown did not operate under the CCAA. In the context of the

CCAA proceedings, a chambers judge approved a payment not exceeding \$5 million to the debtor company's major secured creditor, Century Services. The judge agreed to the debtor company's proposal to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. After concluding that reorganization was not possible, the debtor company sought leave to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the Bankruptcy and Insolvency Act (BIA). The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. The judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal found two independent bases for allowing the Crown's appeal. First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the ETA to allow payment to the Crown. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes.

HELD: Appeal allowed. Section 222(3) of the ETA evinced no explicit intention of Parliament to repeal CCAA s. 18.3. Had Parliament sought to give the Crown a priority for GST claims, it could have done so explicitly, as it did for source deductions. There was no express statutory basis for concluding that GST claims enjoyed a preferred treatment under the CCAA or the BIA. Parliament's intent with respect to GST deemed trusts was to be found in the CCAA. With respect to the scope of a court's discretion when supervising reorganization, the broad discretionary jurisdiction conferred on the supervising judge had to be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. The question was whether the order advanced the underlying purpose of the CCAA. The judge's order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the CCAA's objectives to the extent that it allowed a bridge between the CCAA and BIA proceedings. The order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that was common to both statutes. The breadth of the court's discretion under the CCAA was sufficient to lift the stay to allow entry into liquidation. No express trust was created by the judge's order because there was no certainty of object inferable from his order. Further, no deemed trust was created.

Statutes, Regulations and Rules Cited:

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, s. 69, s. 128, s. 131

Bank Act, S.C. 1991, c. 46,

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-, s. 67, s. 86

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23

Cities and Towns Act, R.S.Q., c. C-19,

Civil Code of Québec, S.Q. 1991, c. 64, art. 2930

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.4, s. 18.3, s. 18.4, s. 20, s. 21

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36,

Employment Insurance Act, S.C. 1996, c. 23, s. 86(2), s. 86(2.1)

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4), s. 227(4.1)

Interpretation Act, R.S.C. 1985, c. I-21, s. 2, s. 44(f)

Personal Property Security Act, S.A. 1988, c. P-4.05,

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency -- Procedure -- Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts -- Express trusts -- GST collected but unremitted to Crown -- Judge ordering that GST be held by Monitor in trust account -- Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Court Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an

amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J., Binnie, LeBel, **Deschamps**, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed

trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision *creating* the trust and a *CCAA* or *BIA* provision explicitly *confirming* its effective operation. The *Income Tax Act*, the *Canada Pension Plan Act* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not *confirm* the continued op-

eration of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Per Abella J (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18(3) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R.

(4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, affg (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bank Act, S.C. 1991, c. 46.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 86 [am. 2005, c. 47, s. 69].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Cities and Towns Act, R.S.Q., c. C-19.

Civil Code of Québec, S.Q. 1991, c. 64.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.4, 18.3, 18.4, 20 [am. 2005, c. 47, ss. 128, 131], 21 [am. 1997, c. 12, s. 126].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5 Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2, 44(f).

Personal Property Security Act, S.A. 1988, c. P-4.05.

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, p. 15:15.

- Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.
- Canada. Senate. *Debates of the Senate*, vol. 142, 1 Sess., 38 Parl., November 23, 2005, p. 2147.
- Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.
- Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation*. Ottawa: Information Canada, 1970.
- Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3 ed. Scarborough, Ont.: Carswell, 2000.
- Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.
- Driedger, Elmer A. *Construction of Statutes*, 2 ed. Toronto: Butterworths, 1983.
- Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report*. (2002).
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55*. (2005).
- Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.
- Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.
- Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Thomson Reuters, 1996 (loose-leaf updated 2010, release 1).
- Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461.
- Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.
- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.
- Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3 ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

Mary I.A. Buttery, Owen J. James and Matthew J.G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

1 **DESCHAMPS J.**-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides

that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of

insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the *CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent

before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s. 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid

to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222...

...

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ...

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in

trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 ...

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*...

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 ...

...

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ...

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it.

Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senator s* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen

for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of

the CCAA's override provision. Viewed in its entire context, the conflict between the *ETA* and the CCAA is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that CCAA s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the CCAA as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a CCAA reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the CCAA helps in understanding how the CCAA grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he CCAA is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the CCAA's purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282
, at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In

addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST

deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the en-

forcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J.:-

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under

this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*

102 Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11' of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except the BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails

over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(f) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed with costs, ABELLA J. dissenting.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

- (i) the expiration of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or arrangement,
- (iv) the default by the company on any term of a compromise or arrangement, or
- (v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

- (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
 - (iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or
- (b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under
- (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
 - (iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

- (a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
- (i) subsection 224(1.2) of the *Income Tax Act*,

- (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
- (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

- (i) subsection 224(1.2) of the *Income Tax Act*,
- (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
- (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum
 - (A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
 - (B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province

establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Department of Justice, Vancouver.

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB 12

Case Name:
Grant Forest Products Inc. (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
Grant Forest Products Inc., Grant Alberta Inc., Grant Forest
Products Sales Inc. and Grant U.S. Holdings GP, Applicants**

[2009] O.J. No. 3344

57 C.B.R. (5th) 128

2009 CarswellOnt 4699

179 A.C.W.S. (3d) 517

Court File No. CV-09-8247-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: August 6, 2009.

Judgment: August 11, 2009.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Compromises and arrangements -- With unsecured creditors -- Claims -- Priority -- Motion by GE Canada Leasing Services Co. for an order deleting the Key Employee Retention Plan provisions in the June 25, 2009 initial order in these Companies' Creditors Arrangement Act proceedings, dismissed -- It was clear on the record that the KERP agreement and charge contained in the order were appropriate and ought to be maintained -- The Monitor and other parties supported the agreement and charge in order to retain Lynch, a seasoned executive, as his continued presence was important for the stability of the business and to enhance the effectiveness of the marketing process -- Companies' Creditors Arrangement Act.

Motion by GE Canada Leasing Services Company for an order deleting the Key Employee Retention Plan provisions in the initial order of June 25, 2009 in these Companies' Creditors Arrangement Act proceedings. A KERP agreement between Grant Forest Products Inc. and a Mr. Lynch was approved, and a KERP charge on all the property of the applicants as security for the amounts that could be owing to Lynch under the agreement was granted to Lynch, ranking after the administration charge and the investment offering advisory charge. GE argued that these KERP provisions had the effect of preferring the interest of Lynch over the interest of the other creditors, including itself. Under the terms of the KERP agreement, if at any time before Lynch turned 65 a termination event occurred, he was to be paid three times his then base salary.

HELD: Motion dismissed. It was clear on the basis of the record that the KERP agreement and charge contained in the initial order were appropriate and ought to be maintained. The Monitor supported the agreement and charge. Lynch was a very seasoned executive, and the Monitor expected he would consider other employment options if the agreement were not secured by the charge, and that his doing so could only distract from the marketing process that was underway with respect to the applicants' assets. Lynch's continuing role as a senior executive was important for the stability the business and to enhance the effectiveness of the marketing process. The concern of the Monitor and of Stephen, the Chief Restructuring Advisor, that Lynch might consider other employment opportunities if the KERP provisions were not kept in place was not an idle concern. A three-year severance payment was not so large on the face of it to be unreasonable, or unfair to the other stakeholders. The first lien security holders owed approximately \$400 million also supported the KERP agreement and charge.

Statutes, Regulations and Rules Cited:

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

Counsel:

A. Duncan Grace for GE Canada Leasing Services Company.

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP.

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank.

Stuart Brotman for the Independent Directors.

ENDORSEMENT

1 **F.J.C. NEWBOULD J.:**-- KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial

Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

6 Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are

aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis -- Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Re Warehouse Drug Store Ltd.*, [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp.* [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good

reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(1) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *Re MEI Computer Technology Group Inc.* (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

F.J.C. NEWBOULD J.

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 SERVICERS INC., INITIUM LOGISTICS SERVICE 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

BOOK OF AUTHORITIES OF
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(Returnable July 13, 2017)

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