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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA 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., 698874I CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

The Applicants

BRIEF OF AUTHORITIES OF EDWARD S. LAMPERT, ESL INVESTMENTS INC., ESL PARTNERS, L.P. AND RBS PARTNERS, L.P., SPE I PARTNERS, LP, ESL INSTITUTIONAL PARTNERS, L.P., SPE MASTER I, LP, CRK PARTNERS, LLC AND ESL INVESTORS, LLC

(Motion returnable March 2, 2018)

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TO: **THE SERVICE LIST**

INDEX

INDEX

Tab No.	Authority
1	Endorsement of Justice Conway dated November 14, 2017 (CV-17-584138-00CL)
2	*Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014.
3	Tom Cumming, Tony Mersich, & Pierre Grabinski, "Litigation Trusts in CCAA Proceedings" (2017) ANNREVINSOLV 16 (Janis Sarra, Ed.).
4	*Lutheran Church – Canada, (Re)*, 2016 ABQB 419.
5	*Stelco Inc., (Re)*, [2005] O.J. No. 4883.
6	*Ted Leroy Trucking [Century Services] Ltd., (Re),* 2010 SCC 60.
7	*U.S. Steel Canada Inc., (Re)*, 2017 ONCA 99.
8	*Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.
9	*Winalta Inc., (Re),* 2011 ABQB 399.

TAB 1

Court File No. CV-17-584138-00CL

Superior Court of Justice

Commercial List

FILE/DIRECTION ORDER

Wintercorn

Plaintiff

and

Global Learning et al

Defendant

The plaintiffs have commenced a proposed class action against GLGI and the other defendants with respect to their claimed losses in connection with the Global Learning Giving Initiative Program, in which CRA disallowed tax credits for cash and in kind donations. The action has not been certified as yet. There is another proposed class action that has been commenced in Saskatchewan arising from the same factual circumstances. The Plaintiffs in this action now seek the appointment of a receiver over the assets of GLGI and a related trust company GLTSI. While they submit that the receivership is investigative in nature, its primary purpose is for the receiver to commence litigation on GLGI's behalf against some or all of the professional defendants named in the proposed class proceedings. GLGI has been dissolved as a result of its failure to pay almost $4 million in taxes to CRA. The test for appointing a receiver pursuant to s. 101 of the *Courts of Justice Act* is that it appears to the judge that it is just or convenient to do so. The principles at play as set out in the Court of Appeal's decision of *Akagi vs. Synergy Group (2000) Inc.*, 2015 ONCA 368.

In my view, it is not just or convenient to appoint a Receiver in this case, for the following reasons:

1. There are already 2 proceedings against these defendants. Based on the proposed Notice of Action in the materials that contain allegations parallel to those already asserted, I question the utility of introducing a third piece of litigation. I am also not persuaded that any claims over/crossclaims

involving GLGI cannot be dealt with in the context of the existing case managed proceedings.

2. The proposed receiver's role does not appear to be independent or balanced. If the true purpose is to initiate litigation, the Receiver is really aligning itself with the plaintiffs' interests. The Receiver is not being sought to advance defences on the part of GLGI but rather to advance the plaintiffs' interests in the existing litigation.

3. The proposed order itself is broad, sweeping and not reflective of the Receiver's true proposed role.

4. The proposed appointment by pre-certification plaintiffs is premature. I note that in the *Robinson v. Rochester Financial Limited* case (2010 ONSC 5116), the appointment was made post-certification and does not appear to have been contested.

5. I have concerns about the independent and neutrality of Farber, the proposed receiver. Its related company Tax Solutions has been marketing to and working with the proposed class members to assist with tax recovery for quite some time. Further, Farber would be operating on a contingency fee basis in recovering assets through litigation.

In my view, they have "skin in the game" and cannot under these circumstances satisfy the degree of neutrality required of a court-appointed officer. I note that they also seek total costs immunity at this point while claiming compensation on a contingency fee basis.

6. There is little evidentiary support for the plaintiffs' assertion that GLGI could even be revived at this point due to back taxes and costs it owes CRA.

The appointment of a receiver is extraordinary relief. Considering and balancing the interests of such an order on those who may be affected by it, I decline to make such an order and the plaintiffs' motion is dismissed.

As agreed by counsel, plaintiffs to pay the law firm defendants $40,000 all inclusive, to be allocated by the those defendants among themselves. Costs payable w/in 30 days.

Nov. 14/17 Conway, J.

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Court File Number: CV - 17 - 584138 - 00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Wintercorn
Plaintiff(s)

AND

Global Learning et al
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: ____________________

Counsel	Telephone No:	Facsimile No:
as per counsel sheet		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ____________________
☐ Time Table approved (as follows):

The plaintiffs have commenced a proposed class action against GLGI + the other defendants with respect to their claimed losses in connection with the Global Learning Giving Initiative Program, in which CRA disallowed tax credits for cash + in kind donations. The action has not been certified as yet. There is another proposed class action that has been commenced in Saskatchewan arising from the same factual circumstances. The P in this action now seek the appointment of

Nov 14/17
Date

Conway J.
Judge's Signature

☐ Additional Pages 1 of 5

Court File Number: ______

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

a receiver over the assets of GLGI & a related trust company GLTSI. While they submit that the receivership is investigative in nature, its primary purpose is for the receiver to commence litigation on GLGI's behalf against some or all of the professional defendants named in the proposed class proceedings. GLGI has been dissolved as a result of its failure to pay almost $4 million in taxes to CRA. The test for appointing a receiver pursuant to s.101 of the CofJ Act is that it appears to the judge that it is just or convenient to do so. The principles at play are set out in the CA's decision of Akagi vs Synergy Group (2000) Inc, 2015 ONCA 368.

In my view, its is not just or convenient to appoint a Receiver in this case, for the following reasons:

1. There are already 2 ~~[illegible]~~ proceedings against these defendants. Based on the proposed Notice of Action in the materials that contain allegations parallel to those already asserted, I question the utility of introducing a third piece of litigation. I am also not persuaded that any claims over/cross claims involving GLGI cannot be dealt with in the context of the existing case managed proceedings.

 Judges Initials ______

Court File Number: ______________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

2. The proposed receiver's role does not appear to be independant or balanced. If the true purpose is to initiate litigation, the receiver is really aligning itself with the pl's interests. The receiver is not being sought to advance defences on the part of GLGI but rather to advance the pl's interests in the existing litigation.
3. The proposed order itself is broadsweeping and not reflective of the R's true proposed role.
4. The proposed appointment by pre-certification pl's is premature. I note that in the Robinson v Rochester Financial Limited case (2010 ONSC 5116), the appointment was made post-certif'n & does not appear to have been contested.
5. I have concerns about the independance & neutrality of Farber, the proposed receiver. Its related company Tax Solutions has been marketing to & working with the proposed class members to assist w/ tax recovery for quite some time. Further, Farber would be operating on a contingency fee basis in recovering assets through litigation.

Judges Initials ______________

Court File Number: ______________________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

______________________ Plaintiff(s)

AND

______________________ Defendant(s)

Case Management ☐ Yes ☐ No by Judge: ______________________

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ______________________
☐ Time Table approved (as follows):

(cont'd). In my view, they have "skin in the game" and cannot under these circumstances satisfy the degree of neutrality required of a court-appointed officer. I note that they also seek total costs immunity at this point while claiming compensation on a contingency fee basis.

6. There is little evidentiary support for the pl's assertion that GLG could even be revived at this point due to the back taxes + costs it owes CRA.

______________________ Date

______________________ Judge's Signature

☐ Additional Pages 4 of 5

Court File Number: ____________________

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

____________________ Plaintiff(s)

AND

____________________ Defendant(s)

Case Management ☐ Yes ☐ No by Judge: ____________________

Counsel	Telephone No:	Facsimile No:

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: ____________________
☐ Time Table approved (as follows):

The appt of a receiver is extraordinary relief. Considering & balancing the interests of such an order on those who may be affected by it, I decline to make such an order & the pl's motion is dismissed.

As agreed by counsel, pls to pay defs' the law firm $40,000 all inclusive, to be allocated by the defs among themselves. Costs payable w/in 30 days.

Nov 14/17
Date

Conway J.
Judge's Signature

☐ Additional Pages 5 of 5

TAB 2

2017 ONCA 1014
Ontario Court of Appeal

Ernst & Young Inc. v. Essar Global Fund Limited

2017 CarswellOnt 20162, 2017 ONCA 1014, 286 A.C.W.S. (3d) 658, 54 C.B.R. (6th) 173

Ernst & Young Inc. in its capacity as Monitor of all of the following: Essar Steel Algoma Inc., Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (Plaintiff / Respondent) and Essar Global Fund Limited, Essar Power Canada Ltd., New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., Essar Steel Limited and Essar Steel Algoma Inc. (Defendants / Appellants / Respondent)

R.A. Blair, S.E. Pepall, K. van Rensburg JJ.A.

Heard: August 15-17, 2017
Judgment: December 21, 2017
Docket: CA C63581/C63588

Proceedings: affirming *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); and refusing leave to appeal *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 50 C.B.R. (6th) 148, 2017 ONSC 4017, 2017 CarswellOnt 12508, Newbould J. (Ont. S.C.J.); additional reasons to *Ernst & Young Inc. v. Essar Global Fund Ltd.* (2017), 137 O.R. (3d) 438, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 2017 CarswellOnt 4049, 2017 ONSC 1366, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Patricia D.S. Jackson, Andrew D. Gray, Jeremy Opolsky, Alexandra Shelley, Davida Shiff, for Appellants, Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Respondent, Ernst & Young Inc. in its capacity as Monitor of Essar Steel Algoma Inc. et al.
Eliot N. Kolers, Patrick Corney, for Respondent, Essar Steel Algoma Inc.
Peter H. Griffin, Monique Jilesen, Kim Nusbaum, for Appellants, GIP Primus, L.P. and Brightwood Loan Services LLC

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

APPEAL by certain defendants from judgment reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189, 137 O.R. (3d) 438 (Ont. S.C.J. [Commercial List]), respecting ruling on oppression claim; APPLICATION by arm's length lender for leave to appeal order reported at *Ernst & Young Inc. v. Essar Global Fund Ltd et al* (2017), 2017 ONSC 4017, 2017 CarswellOnt 12508, 50 C.B.R. (6th) 148, 71 B.L.R. (5th) 324 (Ont. S.C.J.), respecting costs.

***S.E. Pepall J.A.*:**

1 This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the

"*CCAA*") restructuring proceedings of the respondent, Essar Steel Algoma Inc. ("Algoma") [1], one of Canada's largest integrated steel mills and the respondent, Ernst & Young Inc., the court-appointed Monitor.

2 The supervising *CCAA* judge authorized the Monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "Port") were conveyed to Portco.

3 Portco is a single purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie Port. Portco obtained control in November 2014 in a transaction between Algoma, Portco, and Essar Global (the "Port Transaction"). The Port Transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The interveners below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively "GIP"), are arm's length lenders who loaned Portco US$150 million to effect the transaction.

4 The trial judge found the Port Transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are first, that the Monitor lacked standing to bring an oppression claim and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

5 For the reasons that follow, I would dismiss the appeal.

A. FACTS

(1) Algoma's Operations

6 The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake Huron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the City since construction of the steel mill in 1901. Not surprisingly, the City's Port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the Port's primary customer and its employees have traditionally run the Port operations. Raw materials used to produce steel are shipped to the Port and the steel that is produced is shipped to market from the Port. The relationship is one of mutual dependence.

7 Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) The Essar Group

8 Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc., and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) Algoma's Recapitalization

9 In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

10 At the time of the discussions relating to the recapitalization, Algoma's Board of Directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the Board of Directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. Algoma personnel had no day-to-day control over the recapitalization project.

11 Although the three independent directors had begun expressing concerns about their roles on the Board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the Board had not been properly taken into account by the other Board members. On January 19, 2014, the three sent a memo to the Board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The Board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the Board.

12 On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's Board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].
>
> . . .
>
> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our responsibilities under such an environment.

13 The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

14 The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

15 The trial judge also found that the recapitalization and the Port Transaction were run by Joe Seifert, Chief Investment Officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the Board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the Port Transaction. As the trial judge noted at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) Restructuring Support Agreement

16 Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its Port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the Port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the Port Transaction.

17 Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a Restructuring Support Agreement (the "RSA") with Essar Global and an *ad hoc* committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in return for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* Plan of Arrangement. As a condition of the RSA and pursuant to an Equity Commitment Letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

18 The Equity Commitment Letter provided a remedy in the event of a breach. The Plan of Arrangement contained a release of any claim arising out of the Equity Commitment Letter in favour of Essar Global, the noteholders, and the other corporations participating in the Arrangement.

19 It was a condition of the proposed Plan of Arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

20 Nonetheless, an application for approval of the Plan of Arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

21 Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the Port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

22 The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global.

23 And so it was that Algoma was left without the cash to repay or refinance its debt.

24 Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the Equity Commitment Letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the Equity Commitment Letter. The releases contained in the original filing were repeated in the amended Plan of Arrangement.

25 As subsequently discussed, in light of the amended RSA, an amended Plan of Arrangement was approved on November 10, 2014.

(5) Port Transaction

26 The Port Transaction closed on November 14, 2014. In summary, Algoma sold to Portco the Port assets consisting of the Port buildings, the plant, and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide Port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the Port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

27 Turning to the details of the Port Transaction, Algoma and Portco entered into a Master Sale and Purchase Agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

- a cash payment by Portco of US$151.66 million; and

- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

28 To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent.

29 Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a Shared Services Agreement, an Assignment of Material Contracts Agreement, and a Cargo Handling Agreement.

(i) Promissory Note

30 The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set-off against amounts owing by Algoma to

Portco under the Cargo Handling Agreement: [*Essar Steel Algoma Inc. et al Re*] 2017 ONSC 3930, 53 C.B.R. (6th) 321 (Ont. S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) Lease

31 Under the lease, Portco leased from Algoma the Port lands, roads, and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance, and property taxes.

(iii) Shared Services Agreement

32 Under the Shared Services Agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 percent per annum beginning in 2016.

(iv) Assignment of Material Contracts

33 Under the Assignment of Material Contracts Agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the Port, including the Cargo Handling Agreement except by way of security granted to its other third party lender.

(v) Cargo Handling Agreement

34 Under the Cargo Handling Agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 percent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the Shared Services Agreement, it had to pay Portco at least US$36 million annually under the Cargo Handling Agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the Cargo Handling Agreement, and potentially for 42 years if the Agreement was not terminated.

35 Section 15.2 of the Cargo Handling Agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco — and therefore Portco's parent, Essar Global — a veto over any party acquiring Algoma in the *CCAA* proceedings.

36 Although inclusion of the change of control provision in the Cargo Handling Agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

37 In discussing the financial ramifications of the Shared Services Agreement and the Cargo Handling Agreement, the trial judge observed at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

38 Duff & Phelps assessed the fair value of the Portco Transaction as ranging between US$150.9 million and US $174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the Cargo Handling Agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable. [2]

(6) Final Recapitalization

39 Ultimately the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the Port Transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

40 In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees — one from Essar Global and one from Algoma Port Holding Company Inc. — guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the Port Transaction, were approved unanimously by Algoma's Board of Directors after receiving advice and on the recommendation of Algoma's management. By this time, the Board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on August 24, 2014; the Board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh, and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the Port Transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

41 As mentioned, the approved Plan of Arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* Plan of Arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

42 Based on the materials before this court, it would appear that the Port Transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement. The Port Transaction is not mentioned in that order or in any endorsement.

43 The outcome of the Port Transaction was that all Port assets were transferred from Algoma to Portco, the Port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note, and was obliged to pay Algoma US$11 million per annum under the Shared Services Agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the Cargo Handling Agreement, subject to renewal, netting Portco US$25 million per annum as against the Shared Services Agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) Insolvency Protection Proceedings

44 On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* Applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the Monitor. The order contained various paragraphs addressing the rights and obligations of the Monitor, including a direction to perform such duties as were required by the Court. On November 20, 2015, Morawetz J. granted an Amended and Restated Initial Order that, among other things, directed the Monitor to review and report to the Court on any related party transactions (expressly including the Port Transaction).

45 During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the Court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* Applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
>
> Again please confirm that this has been made clear to prospective bidders.

46 On June 20, 2016, the Monitor filed its Thirteenth Report, which described the Portco Transaction and indicated that there may be grounds for further review of that transaction. The Monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco Transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents."

47 On September 26, 2016, Deutsche Bank AG, who led the Debtor-in-Possession ("DIP") Lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the Monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the Monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the Port Transaction.

48 The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the Monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

49 It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and in particular, Essar Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's Port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the Port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the Port.

50 The Monitor pointed out that the Essar Group obtained its control and equity interest in the Port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the Port Transaction came from third party lenders, namely GIP, and was money raised against the security and value of the Port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The Monitor also stressed that the control obtained by the Essar Group was not only over the Port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the Cargo Handling Agreement.

51 The oppression occasioned was exacerbated by the fact that the borrowed monies raised through the transaction were a substitution for monies Essar Global had promised to contribute as equity in Algoma.

52 The Monitor also argued that s. 15.2 of the Cargo Handling Agreement itself constituted oppression, because it was for the long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The Monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The Monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

53 In addition, the Monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the Cargo Handling Agreement.

54 Essar Global and the remaining defendants filed their defence rejecting the Monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the Port Transaction for the benefit of other bidders under the sales process, including the DIP Lenders. They pleaded that the Monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the Port Transaction was unavailable at law, and in any event there was no oppression, prejudice, or unfairness.

55 Portco's lenders, GIP, were granted intervener status as parties on December 22, 2016. They noted that they were *bona fide*, arm's length, and independent commercial parties and no cause of action or wrongful conduct was asserted by the Monitor against them. Nonetheless, the Monitor was seeking remedies that eviscerated the security held by them. They asserted that the Monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the Port Transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the Monitor, it had no jurisdiction to prejudice the interests of GIP. The Monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

56 Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the Ad Hoc Committee of Algoma's Noteholders; Algoma Retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the Monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the Monitor to give as many particulars as it could regarding the relief it might seek.

57 On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

58 The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. TRIAL JUDGMENT

59 The trial judge organized his reasons for decision under six principal headings: the Monitor's standing; who directed the recapitalization and the Port Transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) Monitor's Standing

60 As mentioned, both Essar Global and GIP challenged the Monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

61 He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees, and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the Port Transaction to a group of creditors including trade creditors, pensioners, retirees, and the City of St. Sault Marie.

62 The trial judge acknowledged at para. 34 that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1)(k) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp., Re* (October 3, 2012), Doc. Toronto 09-CL-7950 (Ont. S.C.J. [Commercial List]). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

63 Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action — which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually — should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the Monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

64 To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 40 the trial judge relied on *Rea v. Wildeboer*, 2015 ONCA 373, 126 O.R. (3d) 178 (Ont. C.A.), at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) Essar Global Directed the Recapitalization and the Portco Transaction

65 The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the Port Transaction — if the conduct was oppressive, relief could be granted. Nonetheless, he found at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots."

66 At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the Port Transaction. Nor was either involved in the renegotiation of the RSA.

67 The trial judge relied on other evidence, including Algoma's annual Business Plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found at paras. 56-57 that some of the witnesses

had been evasive, including: Rewant Ruia, the Ruia family's lead in the Essar Group's North American operations; Mr. Seifert,; and Rajiv Saxena, the Executive Director of Essar Steel India Ltd.

68 After reviewing the evidence, the trial judge noted at para. 58 that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the Port Transaction. He concluded at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) Reasonable Expectations and their Violation

69 The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.): (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial, or unfairly disregards a relevant interest?

70 He described the reasonable expectations asserted by the Monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the Cargo Handling Agreement. He stated at para. 64:

> The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

71 At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the Monitor. He noted at para. 73 that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees.

72 He concluded at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

73 The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners, and retirees were violated in two principal ways: first, the Port Transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

74 The Port Transaction was caused by Essar Global's breach of both the RSA and the Equity Commitment Letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the Cargo Handling Agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found at para. 78 that the transfer of the Port assets to Portco was driven by GIP's desire for

a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the Port assets and that was separate from Algoma.

75 The Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the Equity Commitment Letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found at para. 82 that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the Port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

76 The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter made it necessary to carry out the Port Transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's Board of Directors been struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the Port Transaction structure. The Board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

77 Additionally, the long-term value given to Essar Global by the Port Transaction was itself oppressive (although in stating this, the trial judge noted that the Monitor did not pursue its claim that the Port assets were transferred to Portco at an undervalue).

78 As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the Equity Commitment Letter. The trial judge found at para. 100 that the Monitor was not making a claim under that Letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the Port Transaction.

79 The trial judge also observed that when the court approved the amended Plan of Arrangement under the amended RSA, it did not have knowledge of the Port Transaction. There was no reference to the Port Transaction in the affidavits filed in support of the amendment to the Plan of Arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

80 Ultimately he concluded that the Port Transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(4) Change of Control Provision

81 The trial judge determined at para. 104 that the change of control provision gave effective control to Portco (*i.e.* Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the Cargo Handling Agreement so that it could operate the steel mill. Therefore the veto under this clause was effectively a veto over any change of control of the Algoma business.

82 Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out at para. 110, the parties could have included a provision in the Assignment of Material Contracts Agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded

at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/Essar Global a veto.

83 The trial judge concluded at para. 113 that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated at para. 117 that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

84 The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed at para 115 that: "[I]t is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

85 The trial judge also observed that the evidence established that Portco's right to refuse assignment of the Cargo Handling Agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the Port. He concluded that the change of control provision in favour of Portco in the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners, and retirees.

(5) The Business Judgment Rule

86 The trial judge also determined that the business judgment rule, which accords deference to a business decision of a Board of Directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The Board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the Equity Commitment Letter. As the trial judge stated at para. 123, the result of this was the Port Transaction, which was:

> [A]n exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefitted Essar Global at a time that a future insolvency was a possibility.

87 Moreover, there was no evidence that the Board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) Remedy

88 The trial judge stated at para. 136 that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the Port Transaction. He accordingly deleted s. 15.2 of the Cargo Handling Agreement and inserted a provision in the Assignment of Material Contracts Agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

89 He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the Cargo Handling Agreement (with automatic renewal for successive three year periods, barring either party's termination). As the Port was critical to Algoma's operation and survival, Algoma's ability under the Cargo Handling Agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

90 He concluded at para. 144 that the payments under the Cargo Handling Agreement were an unreasonable benefit in favour of Essar Global. If the Agreement lasted only the initial 20-year term, Portco/Essar Global would receive US $300 million after GIP's loan was paid off. If the Agreement was not terminated before the end of its 50 year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

91 Accordingly, the trial judge ordered that the lease, the Cargo Handling Agreement, and the Shared Services Agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

92 The trial judge decided at para. 147 that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result of set-off and for amounts owing under the Cargo Handling Agreement was in the ongoing *CCAA* proceedings.

(7) Costs

93 Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the Monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the Monitor or by or to GIP.

C. ISSUES

94 There are eight issues to be addressed:

1. Did the Monitor lack standing to be a complainant under s. 238 of the *CBCA*?

2. Could the claim of the Monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

3. Did the trial judge err in his analysis of reasonable expectations?

4. Did the trial judge err in his analysis of wrongful conduct and harm?

5. Did the trial judge err in tailoring a remedy?

6. Was there procedural unfairness?

7. Should the fresh evidence be admitted?

8. Should leave to appeal costs be granted to GIP and the costs award varied?

D. ANALYSIS

(1) Standing of the Monitor

95 Essar Global submits that the Monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the Monitor could avoid conflicts.

96 GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the Monitor's oppression claim against it. Also,

Algoma can be directed to make the Cargo Handling Agreement payments to GIP directly and therefore the Monitor owed a fiduciary duty to GIP.

97 In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the Monitor could have standing to bring an oppression action.

(a) The Purpose of CCAA Restructurings

98 As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

99 As outlined by Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], the *CCAA* fell into disuse after amendments in 1953 that limited its application to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 336-337; and *Century Services*, at para. 13.

100 The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially-distressed corporations without forcing them to first declare bankruptcy: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at p. 661.

101 The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-339. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

102 The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

103 To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Reuters, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

104 It is against this background that the role of a monitor must be considered.

(b) The Role of the Monitor

105 Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.). In that case, an interim receiver was appointed whose role was described at p. 277 as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq www.mondaq.com. The monitor was thus a court-appointed officer.

106 The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(k) directs that a monitor shall carry out "any other functions in relation to the company that the court may direct." Its express duties under s. 23(1)(c) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

107 Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008) 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor — taking on larger mandates, often times involving complex, cross-border restructurings.

108 Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd., Re* (1992), 67 B.C.L.R. (2d) 385 (B.C. C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd., Re* (1993), 77 B.C.L.R. (2d) 332 (B.C. S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

109 Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy, and as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed it is required by statute to do so. See for example s. 23 of the *CCAA* that describes certain duties of a monitor.

110 Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) A Monitor as Complainant in an Oppression Action

111 Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather they simply argue that the Monitor has no standing.

112 Section 238 of the *CBCA* defines a complainant as:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
>
> (c) the Director, or
>
> (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(d) is the relevant subsection.

113 Section 241of the *CBCA* describes the oppression remedy:

> (1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
>> (a) any act or omission of the corporation or any of its affiliates effects a result,
>>
>> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>>
>> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

114 The question here is whether the trial judge erred in concluding that the Monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the Monitor have been a complainant in this case? I would answer both questions affirmatively.

115 As is clear from s. 238(d) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's length party. As this court said in that case at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

116 Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

117 Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(k) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(c) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

118 Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 39 C.B.R. (6th) 173 (Ont. C.A.), at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

119 Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

120 However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

121 Here, in para. 37(c) of the Amended and Restated Initial *CCAA* Order dated November 20, 2015, the Monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the Monitor to commence proceedings under s. 241 of the *CBCA*. The Monitor proceeded with the oppression action in the interests of the restructuring consistent with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The Monitor took the action as an "adjunct to its role in facilitating a restructuring".

122 Moreover, it cannot be said that the Monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

123 It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether:

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

124 In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

125 Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to supervise all parties including the Monitor to ensure that no unfairness or unwarranted impartiality occurred.

126 Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the Monitor to exercise any powers properly exercisable by a Board of Directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the Boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the Monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

127 In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the Monitor standing to pursue an action for oppression.

(2) Derivative or Oppression Action

128 In addition to attacking the standing of the Monitor to bring the action, the appellants also submit that the Monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that *Act*. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the Monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

129 In support of their submission, the appellants rely heavily on the decision of this Court in *Wildeboer*. This case is not *Wildeboer*, however.

130 In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]."

131 The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly re-affirmed the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata* [*Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee* [*Jabalee v. Abalmark Inc.*, [1996] O.J. No.

2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.).

132 Or, as Armstrong J.A. put it in *Malata Group (HK) Ltd. v. Jung* [2008 CarswellOnt 699 (Ont. C.A.)], at para. 30:

> [T]here is not a bright line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

133 In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion — unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation — this case falls into the overlapping category.

134 For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the Monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted at para. 31, the Monitor initially cast quite widely the net of stakeholders affected by the Port Transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners, and retirees.

135 In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the *Act*) *of the interests of the claimant*: see *BCE*. The Monitor asserted at the hearing, and the trial judge found at para. 75:

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

136 It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the Port Transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

137 The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process <u>and negatively impact creditors</u>. [Emphasis added]

138 On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the Monitor was asserting "that the personal interests of the creditors ha[d] been affected."

139 The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

140 For example, the appellants rely on certain aspects of the following comments by this court at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants.
>
> . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea — the only director plaintiff — does not plead that the Improper Transactions have impacted his interest *qua* director.
>
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

141 While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders — for example, trade creditors, employees, retirees, or pensioners — simply because each of them, separately, may have suffered the same type of individualized harm.

142 Instead, I read the reference at para. 29 to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole."

143 Were the appellants correct in their submissions, as counsel for the Monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), at para. 153. Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

144 The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests "have been compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, 41 B.L.R. (4th) 51 (Ont. C.A.), at para. 66. See also: *Fedel v. Tan*, 2010 ONCA 473, 101 O.R. (3d) 481 (Ont. C.A.), at para. 56.

145 The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

146 Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the Monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees, and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

147 I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the Port Transaction, including the Cargo Handling Agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

148 In conclusion, at law, the Monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) Reasonable Expectations

149 Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

150 The Monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees, and trade creditors held expectations that had been violated and that those expectations were objectively reasonable.

151 In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

152 In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
>
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another. [Citations omitted.]

153 As also stated in *BCE* at para. 71:

> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

154 Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

155 The Monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.* the Port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations were stated by the Monitor to include commercial practice, the nature of Algoma, and past practice. These particulars would all feed an expectation of fair treatment.

156 Based on the reasonable expectations particularized by the Monitor, as already noted, the trial judge found at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

157 There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the Port Transaction and would not have expected an outcome in which Algoma no longer had full control over the Port facility.

158 The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the Monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

159 Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

160 The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global — particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors, and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

161 Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the Plan of Arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

162 The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable

> having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

163 Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include: i) general commercial practice; ii) the nature of the corporation; iii) the relationship between the parties; iv) past practice; v) steps the claimant could have taken to protect itself; vi) representations and agreements; and vii) the fair resolution of conflicting interests between corporate stakeholders.

164 The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2017), at]§17.47.

165 Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical asset, as in the Port Transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

166 As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the Monitor found at para. 80 of its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

167 This was essentially a factual exercise. There was conflicting evidence before the trial judge. However it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

168 I therefore reject the appellants' submissions on reasonable expectations.

(4) Wrongful Conduct and Harm

169 Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

170 First, Essar Global submits that the trial judge inappropriately relied on the Equity Commitment Letter. It argues that the court approved the amended Plan of Arrangement that released Essar Global from any claim relating to the Equity Commitment Letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

171 I disagree. I can state no more clearly than the trial judge did at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor

contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

172 An amended Plan of Arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful, and the Port Transaction was the only available means to generate sufficient cash for Algoma.

173 I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended Plan of Arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the Port Transaction being part of the Plan of Arrangement, nor was there any mention of it in any endorsement or the order approving the amended Plan of Arrangement.

174 In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the Equity Commitment Letter. Rather, he found that the totality of Essar Global's conduct regarding the Recapitalization and Port Transaction satisfied the wrongful conduct requirement.

175 Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

176 Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the Port Transaction when it was not. They also complain that he erred in granting an oppression remedy when the Equity Commitment Letter provided for a limited remedy in the event of a breach.

177 The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million." Reading that paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization.

178 The relevant contributions made to Algoma in November 2014 consisted of:

- US$150 million in cash from Essar Global under the amended RSA;
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to members of the Essar Group under the amended RSA; and
- US$150 million in cash generated from the Port Transaction.

179 Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

180 Algoma, the Monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the Port Transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert — which the trial judge considered in great detail — clearly sets out Essar Global's cash contribution to Algoma and the

US$150 million in cash paid by Portco to Algoma under the Port Transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

181 The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma — one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the Port Transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

182 Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the Equity Commitment Letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250-$300 million required. He obviously understood that there was to be a cash component to Essar Global's contribution separate and apart from the proceeds of the Port Transaction.

183 In addition, at para. 88, the trial judge noted that the Port Transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the Port Transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the Port Transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

184 Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

185 No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the Port Transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

186 In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

187 As mentioned, Essar Global also asserts that the remedy for breach contained in the Equity Commitment Letter precluded any oppression remedy. No one was suing for breach of the Equity Commitment Letter. Rather, it formed part of the context that included a failure to explore alternatives, the Port Transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees, and trade creditors.

188 Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the Equity Commitment Letter did not cause Algoma to enter the Port Transaction.

189 Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's equity commitment and the Port Transaction. It argues that the Port Transaction was a key component of the recapitalization before the execution of the Equity Commitment Letter.

190 At trial, the trial judge rejected Essar Global's argument, finding at para. 87 that the Port Transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty.

He accurately noted that the first Plan of Arrangement that was approved by the Court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the Equity Commitment Letter and that the Port Transaction was not a part of that plan. He found that the Port Transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter.

191 The causal connection between Essar Global's equity commitment and the Port Transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

192 Furthermore, the Port Transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

193 I am not persuaded that the trial judge made any palpable and overriding error in his finding.

194 Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the Board's decisions.

195 The trial judge correctly described the business judgment rule relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

196 Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (Ont. Gen. Div. [Commercial List]), at pp. 150-151.

197 Second, the rule's protection is available only to the extent that the Board of Directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

198 In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the Board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's Board formed an independent committee in February 2014, events may have evolved differently, and the Board may have accepted the advice to hold Essar Global to its commitment.

199 Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's Board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh — who cast the deciding vote in that decision — was not free to vote as he chose.

200 Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted at para. 15 that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly

when considered alongside his extensive comments at paras. 43-60 finding that the critical decisions regarding Algoma's recapitalization and the Port Transaction were made not by Algoma's Board, but by Essar Global and Essar Capital as led by Mr. Seifert.

201 Specifically, the trial judge made findings of fact at paras. 51-53 regarding the limited role played by Algoma's Board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the Port Transaction. He also accepted the evidence of Mr. Ghosh that the Transaction was approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

202 Essar Global maintained before the trial judge, as they do before this court, that the Algoma Board's decisions were nonetheless shielded from court intervention because the Board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the Board elected not to follow.

203 At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the Board that unsecured noteholders would not react well to the Port Transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the Equity Commitment Letter. Mr. Schrock said that the Board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

204 Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's Board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

205 Essar Global also submits that the trial judge should not have gone on to censure the activities of the Board in November 2014 (when the Board approved the transactions) by relying on the Board's February 2014 decision regarding the independent committee.

206 The trial judge did not censure the decisions of the Algoma Board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated that the Board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

207 Specifically, the trial judge found at para. 123 that, if the Board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that:

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

208 Additionally, the trial judge found that the Board had accepted the inclusion of the contentious change of control provision in the Cargo Handling Agreement without considering alternatives. If the provision was truly for the benefit

of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

209 All this evidence speaks to the Board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma Board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the Board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

210 Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

211 It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the Board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the Board's lack of independence, the Board's failure to follow its advisors' advice, the Board's failure to consider alternatives, and the Board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the totality of the evidence supports the Board's lack of good faith, and renders the business judgment rule inapplicable.

212 There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

213 Here, the minutes of the Board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the Board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

214 To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the Board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

215 I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The Board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

216 Fifth, Essar Global submits that the involvement of Algoma's management and Board in the Port Transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the Monitor failed to attack the Board's process in its pleading. I do not accept these arguments.

217 Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.).

218 Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's Board and management played a limited role in the Port Transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual

background demonstrates why it was open for the trial judge to conclude that the Port Transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

219 On the pleadings issue, I note that the Monitor pleaded that the Port Transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the Port Transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's Board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the Board's process were not properly before the trial judge.

220 Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the Port Transaction to Algoma and the impairment of Algoma's ongoing restructuring.

221 In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the Port Transaction did not provide sufficient value to Algoma.

222 Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the Port Transaction.

223 Moreover, it was an exercise in self-dealing. As the trial judge stated at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

224 The trial judge also concluded that the mismatched terms of the Cargo Handling Agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the Port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the Cargo Handling Agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

225 The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the Cargo Handling Agreement served no practical purpose to GIP and the same rights could have been provided for in the Assignment of Material Contracts.

226 As the trial judge concluded at para. 138:

> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

227 There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

228 On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

229 Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights."

230 I see no error in the trial judge's conclusion.

(5) The Remedy

231 Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the Cargo Handling Agreement and in granting Algoma the option of terminating the Port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the reasonable expectations of the stakeholders and instead, he should have considered a nominal damages award.

232 GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy, and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the Monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

233 I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

234 Second, the trial judge properly identified the need to avoid an overly broad remedy, stating at para. 136 that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the Monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the Port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the Port and that Essar Global would not have a veto over its restructuring efforts.

235 Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the Port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the Port Transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

236 Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) Was There Procedural Unfairness?

237 Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

238 As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions, and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

239 The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore a party against whom a specifically-tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by the trial judge where the relief granted had not been specifically pleaded or sought in argument.

240 Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

241 That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the Monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the Monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the Monitor would be granted leave to amend its claim to support the relief he granted.

242 I would not give effect to this ground of appeal.

(7) Fresh Evidence

243 Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's Board of Directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the Monitor and so Essar Global had no reason to adduce this evidence earlier.

244 Messrs. Mirchandani and Kothari joined Algoma's Board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the Board when the Port Transaction was approved in November 2014.

245 Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.).

246 As this court has noted, the two tests are quite similar: see *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 93 O.R. (3d) 483 (Ont. C.A.), at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

247 Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

248 Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

249 In both its original and its amended statement of claim, the Monitor alleged that representatives of Essar Global were members of Algoma's Board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the Board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

250 In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent Board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

251 However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the Board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

252 Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the Board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

253 I would therefore dismiss the motion for fresh evidence.

(8) Costs

254 GIP claimed costs of CDN$750,156.18 against the Monitor payable on a partial indemnity scale. It claimed it was entirely successful because it successfully resisted relief sought by the Monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the Monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

255 GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

256 At trial, GIP was unsuccessful in challenging both the Monitor's claim of standing and its claim that the Port Transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the Monitor's claims, while it appeals the trial decision.

257 I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. DISPOSITION

258 For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

259 As agreed, I would order that the Monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000 respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The Monitor and Algoma shall have until January 24, 2018 to respond.

R.A. Blair J.A.:

I agree.

K. van Rensburg J.A.:

I agree.

Appeal dismissed; application dismissed.

Footnotes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent, Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the Port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009) 429, at pp. 430-431 and 436.

6 Janis Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010) 99, at p. 99.

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TAB 3

2017 ANNREVINSOLV 16

Annual Review of Insolvency Law
Editor: Janis P. Sarra

16 — Litigation Trusts in CCAA Proceedings

Litigation Trusts in *CCAA* Proceedings

Tom Cumming, Tony Mersich and Pierre Grabinski [*]

I. — INTRODUCTION

This article examines the use of litigation trusts in proceedings under the *Companies' Creditors Arrangement Act (CCAA)*. [1] It compares their development and use in restructuring proceedings to those in the United States of America ("US") under Chapter 11 of the US *Bankruptcy Code*. [2]

Although litigation and liquidation trusts are well established in the US, to date they have only been employed in a handful of cases in Canada. Nevertheless, their use can be justified on the basis of current Canadian *CCAA* jurisprudence. While the *CCAA* does not explicitly provide for such trusts, courts in Canada have, in determining their appropriateness, taken a principled approach that has avoided some of the technical restrictions applicable in the US.

Part II of this article reviews the conceptual framework for the use of litigation trusts. Part III reviews their development and structure in Chapter 11 proceedings under the US *Bankruptcy Code*, and examples of where they have been employed. Part IV discusses the jurisdictional basis for litigation and liquidation trusts under the *CCAA* and reviews proceedings in Canada where they have been employed. Finally, Part V discusses the current status of litigation and liquidation trusts in Canadian proceedings.

II. — CONCEPTUAL FRAMEWORK

Litigation and liquidation trusts are most appropriately employed in restructuring proceedings where the need for an expeditious and efficient proceeding conflicts with the maximization of recovery for creditors because of the nature of the debtor's assets or of the claims against the debtor's estate. To date, these trusts have been employed in larger insolvencies, especially where there are one or more actual or threatened class action proceedings.

For large and complex companies, restructuring proceedings can be extraordinarily expensive and time consuming. The longer proceedings continue, the more expensive they become because of the participation of many different stakeholders and the need for multiple court appearances at different stages. Restructuring proceedings can also detrimentally affect the integrity and value of the debtor's business and this detrimental effect can be exacerbated as time passes. For example, customers can become concerned about whether the debtor will remain in business. If the debtor provides them with important goods or services, the customer may seek alternate suppliers. The debtor will often also have important supply relationships with its creditors. During restructuring proceedings those suppliers may become reluctant to continue to provide those goods and services, or may demand more onerous payment terms. Unless the termination of those contractual arrangements with the debtor is stayed, it can be difficult to maintain those relationships with suppliers. In addition, employees of the debtor may seek other opportunities with more financially secure companies once insolvency proceedings begin.

The disruption these issues cause to the debtor's business becomes more severe as time passes, resulting in declining business and deteriorating asset values. This can undermine the prospects of successfully restructuring the debtor and reduce the amounts ultimately recovered by creditors. It can therefore be critical that restructuring proceedings be completed as quickly as possible. Further, where *CCAA* proceedings extend without substantial progress, courts become increasingly reluctant to grant extensions to stays of proceedings. [3]

Certain types of assets, however, are difficult and time consuming to realize upon. The debtor may have substantial litigation claims against third parties but such claims can take years to convert into judgments and settlements. The collection under such judgments and settlements can also be time consuming. The debtor may also have environmentally contaminated lands that potentially have value if they are remediated. Remediation programs can take a great deal of time to complete.

Litigation trusts have been employed in both Canada and the US where the debtor is a defendant in one or more class actions. Class actions can have multiple defendants, including the company and its officers, directors, auditors, underwriters, insurers and counsel. The time frame for litigating and resolving these claims can be significant. The *CCAA* can provide a structure for the settlement of such proceedings and a litigation trust can provide a summary procedure to validate and quantify individual claims and distribute proceeds of settlement. Settlement is encouraged because if the settlement is part of a *CCAA* plan that has been approved by the creditors and sanctioned by the court, it will be binding on all creditors. Further, third party defendants can be released where they have made a significant contribution to the settlement and otherwise satisfy the test set out by the Ontario Court of Appeal in *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* ("*Metcalf*"). [4]

In many instances, parties in *CCAA* proceedings have simply sought extensions of the stay where there have been material assets or claims that could only be realized or valued over extended periods of time. [5] However, in both Canada and the US, plans have been implemented that create trusts which, post emergence, were entrusted with tasks such as administering and prosecuting litigation claims of the debtor, realizing on illiquid assets, participating in class actions in which the debtor is a defendant, and distributing proceeds realized by or settled on the trustee in accordance with a pre-determined distribution scheme.

In many insolvencies, it is only possible to maximize creditor recoveries and secure creditor support by realizing illiquid tangible assets or complex litigation claims over extended time frames. By transferring such assets to a trust for the benefit of creditor classes, the debtor is able to emerge from the *CCAA* proceedings and the trust is able to deal with the illiquid assets and litigation claims. A trust can also resolve the conflict of interest implicit in a debtor no longer having an economic interest in the asset and therefore having no interest in realizing the maximum value from it, or in having an actual disincentive to pursuing claims where this interferes in the debtor's ongoing business relationships or require a significant investment of management time.

Liquidation trusts are more unusual in Canada but have been employed in at least two proceedings that are reviewed later in this article.

III. — TRUSTS IN US CHAPTER 11 PROCEEDINGS

1. — The Origin and Development of Trusts

Litigation and liquidation trusts have been used in Chapter 11 proceedings in the US for a number of years. The most common situation has been where the debtor has been subject to mass tort claims that it did not have the financial means to defend or pay. Since litigation trusts in the US are essentially a particular type of liquidation trust, both will be discussed.

A liquidation trust has been defined as a distinct legal entity that can be established to receive the assets of a debtor in order to liquidate them for the benefit of creditors. The assets in a liquidation trust can include both physical and litigation assets and the proceeds derived from their liquidation. A litigation trust, on the other hand, only holds litigation assets and their proceeds. [6]

The trust is generally created in the context of a plan of reorganization approved by the requisite majority of creditors and confirmed by the supervising court. It provides a mechanism for realizing upon assets transferred to it and repaying creditors in accordance with the plan. The basic structure of a trust in Chapter 11 proceedings contemplates one or more trustees with fiduciary duties owed to trust beneficiaries, an oversight committee representing trust beneficiaries, a pool of segregated funds for the payment of administration costs, and a pool of segregated funds to repay creditors. The trustee will have discretion to make certain decisions, but otherwise will require the approval of the oversight committee or the court supervising the Chapter 11 proceedings. [7]

In the US, the principal advantage of trusts has been to reduce adversarial proceedings, which tend to increase the cost and length of Chapter 11 proceedings, and can thereby maximize recoveries for the creditors who are the beneficiaries of the trust. Trusts have enabled debtors to exit from the Chapter 11 proceedings, leaving trustees to administer the time-consuming process of determining and valuing claims, liquidating assets and distributing proceeds to trust beneficiaries in accordance with their entitlements under the plans of reorganization. This process is generally perceived to reduce the costs associated with the Chapter 11 proceedings.

Certain powers applicable during the proceedings under the US *Bankruptcy Code* can be given to the trustee, including settling outstanding contracts, marketing and selling illiquid debtor assets, paying claims and distributing any remaining proceeds in accordance with the plan. The US *Bankruptcy Code* also permits trustees to pursue causes of action of the estate, such as avoidance actions, in order to maximize the recoveries of creditors. [8]

2. — Structure of Trusts in Chapter 11 Proceedings

i. — Statutory provisions

While the US *Bankruptcy Code* does not set out specific provisions governing the creation and structure of a litigation or liquidation trust, the use of a trust is contemplated by § 1123(b)(3)(B) of the US *Bankruptcy Code*. Section 1123(b)(3)(B) provides as follows:

> (b) Subject to subsection (a) of this section, a plan may— . . .
>
> > **(3)** provide for—
> >
> > > (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
> > >
> > > (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

Further, § 1142(a) provides that an entity can be organized for the purpose of carrying out the plan:

> (a) Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.
>
> (b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a

confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

The trustee is considered a "representative of the estate" for the purposes of § 1123(b)(3)(B). The rules applicable to litigation and liquidation trusts are also subject to certain rules set out in §§ 671 to 677 of the *Internal Revenue Code* [9] and § 301.7701-4 of the "Treasury Regulations". [10] In order to avoid taxation at both the trust and beneficiary levels, Rev Proc 94-45 requires that a trust must satisfy the following requirements:

a. the trust must be established for the primary purpose of liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business;

b. the transfer of assets to the trust must be treated by all parties as a transfer of the assets to the creditors;

c. the beneficiaries must be treated as the grantors and deemed owners of the assets of the trust for federal income tax purposes;

d. consistent valuations of the transferred assets must be used by the trustee and the creditors for all federal income tax purposes;

e. all of the trust's income must be treated as subject to tax on a current basis, and a ruling request must explain, in accordance with the plan, how the trust's taxable income will be allocated and who will be responsible for the payment of any income tax due; and

f. the trust instrument must contain a fixed or determinable termination date that is generally not more than 5 years from its date of creation.

ii. — Requirement for specificity relating to actions transferred to a trust

Although § 1123(b)(3)(B) of the US *Bankruptcy Code* appears to cast a broad net on claims that can be retained by a litigation trustee, courts have required that the descriptions of the actions that are being retained be "specific and unequivocal". [11] Courts will examine the plan, the disclosure statement and the confirmation order to determine if the claims were described with sufficient specificity. The issue, which was explained by the Sixth Circuit in *Browning v Levy*, [12] is that if claims have not been properly reserved, upon the termination of the Chapter 11 proceedings, they are *res judicata* because they should have been resolved in those proceedings. The Sixth Circuit noted that the plan or accompanying disclosure statement must name the defendant and set out the factual basis for the reserved claims. The Court found that a blanket reservation of any claims, rights and causes of action of a debtor or its bankruptcy estate against any person or entity was insufficiently specific. [13] By contrast, in *Tepper v Keefe Bruyette & Woods Inc*, [14] the Fifth Circuit held that it may be sufficient to describe claims in categories, in order to avoid having to define each party and the factual bases for each claim. [15]

If the causes of action assigned to the trust belong to the estate and are sufficiently described and properly reserved, the trustee will have the exclusive right to assert them. [16] The rationale for this is avoiding wasteful and competitive suits by individual creditors. [17]

iii. — Access to the bankruptcy court

In order for litigation trusts to efficiently carry out their duties, access to the bankruptcy court is important so that all anticipated causes of action and other disputes can be determined in a single forum, thereby enhancing cost effectiveness. However, while reorganization plans attempt to preserve the bankruptcy court's jurisdiction post-confirmation, they cannot confer a jurisdiction that did not previously exist. In the US, bankruptcy courts are prevented from entering final judgments on private rights except to the extent expressly provided by the US *Bankruptcy Code* and therefore the ability of a bankruptcy court to issue post-confirmation judgments in actions will depend on whether the cause of action exists solely through the bankruptcy legislation, in which event it can, or is unrelated to the bankruptcy process, in which event it cannot. [18]

In *BWI Liquidating Corp v City of Rialto*, the Court reviewed whether causes of action assigned to a post confirmation trust could be pursued by the trust before the bankruptcy court. While the Court said the US *Bankruptcy Code* gave jurisdiction in proceedings related to a case under Chapter 11, [19] a court's post-confirmation jurisdiction was different than its pre-confirmation jurisdiction. [20] For a court to have jurisdiction, the proceeding must have a close nexus to the bankruptcy case and it must affect the interpretation, implementation, consummation, execution or administration of the confirmed plan or trust agreement. A close nexus was not established by the fact that (a) the proceeds would enhance the amount available to creditors in the trust; [21] (b) hearing the matter would promote the efficient distribution of trust assets to creditors; [22] (c) the proceeding was commenced shortly after plan confirmation; or (d) the plan was a liquidating plan. According to the Court, the plan must specifically describe a cause of action in order for the Court to retain the "related to" jurisdiction. [23]

iv. — Limitations on trustees' ability to pursue causes of action on behalf of creditors

In the US, there are conflicting decisions on whether a litigation trust formed pursuant to a Chapter 11 plan of reorganization is able to pursue claims of creditors against third parties, or is limited to claims of the debtor or the bankruptcy estate against third parties. In *Caplin v Marine Midland Grace Trust Co of New York*, the Court held that a trustee was limited to asserting only claims of the estate, and could not advance a claim on behalf of a creditor. The Court was troubled by the lack of express provisions in the US *Bankruptcy Code* authorizing a trustee to commence actions in respect of causes of action that creditors have against third parties. The Court noted that the former § 567(3) implied there was no such right because it gave the trustee the right and duty to investigate fraud and misconduct and to report to the judge the potential causes of action "available to the estate". The Court found that this does not contemplate the trustee pursuing claims of creditors against third parties. The language of the statute was restricted to empowering trustees to collect and reduce to money the property of the estate. The Court was also concerned that such an action could be inconsistent with any independent actions that might be brought by creditors and were more likely to give rise to a proliferation of claims. Finally, it was unclear how parties could be bound by such claims. [24]

According to an article by Andrew J Morris, the wording of § 1123(b)(3)(B) of the US *Bankruptcy Code* is consistent with the position of the Court in *Caplin* because it only contemplates a post-confirmation trustee asserting claims that belong to the debtor or the estate, and does not provide for the trustee asserting claims of any other parties. [25] Because the provision applied to bankruptcy plans, it therefore, according to Morris, limited what a post-confirmation trustee was entitled to do. He did note that the cases were not consistent on this point but argued that ultimately § 1123(b)(3)(B) and the reasoning in *Caplin* was determinative of the point. However, the point remains unresolved because other courts, without considering § 1123(b)(3)(B), have permitted trustees to pursue claims of creditors against third parties. [26]

v. — Governance

A liquidation or litigation trustee represents the interest of all parties who are beneficiaries of the trust and therefore must act in good faith with respect to and for the benefit of all beneficiaries. The trustee is also an officer of the court and must perform its duties with a high degree of care. Under § 363(b) of the US *Bankruptcy Code*, a trustee or debtor in possession must obtain court approval for actions out of the ordinary course of business. It is impractical to obtain court approval for every decision. Depending on the size and complexity of the trust, it is considered good practice to permit the trustee to have the authority to act within certain parameters, beyond which the consent of the oversight committee or the approval of the court must be obtained. Also, with major decisions, trustees and oversight committees will want to have the liability protection obtained from having court approval. [27]

The legislation does not provide for oversight committees [28] and therefore their employment, make-up and the scope of their authority is set out in the trust documents. The committee members will typically include former members of the creditors' committees in the bankruptcy proceedings, and are tasked with monitoring the trustee's operations and granting authority to sell assets, enter into settlement agreements and take other steps.

The trust documents will also set out the regularity and frequency of reporting by the trustee to the oversight committee, the court and the beneficiaries. [29] The scope and frequency of such reporting will depend upon the nature of the assets, the quantum of the trust and the complexity of the tasks assigned to the trust. [30] Trustees have also been given leave to communicate with and report to beneficiaries through websites created for the trusts, which is appropriate where the class of beneficiaries is very large and not easily identified, as in the case of classes consisting of mass tort claimants. [31]

vi. — Other structural issues

Typically, the agreement creating the trust and appointing the trustee will empower the trustee, subject to any required approval of an oversight committee and the supervising court, to sell assets or initiate and prosecute litigation, enter into settlements, hold and invest funds, make distributions in accordance with the reorganization plan, lease office space, retain employees, secure necessary books and records of the debtor to support its activities and carry out all of the other administrative duties required under the plan and trust documents. This will include opening accounts, keeping records of collections, costs and distributions, ensuring access to present or former employees of the debtor who are knowledgeable about the litigation or asset, retaining lawyers and other experts. [32]

The documentation must also provide for the funding of the trustee's activities. The trustee must ensure that it has sufficient funding to carry out its duties. The trust may initially be funded by either the debtor's estate or third-party advances. In the latter case, the plan would provide that the advances from the third party would have to be paid in priority to distributions to beneficiaries of the trust. [33] The trustee will be responsible for budgeting the costs of carrying out its functions and reporting to the governance committee, the court and the stakeholders as to costs, fees, recoveries and distributions. [34]

3. — Trusts Employed in Chapter 11 Proceedings

i. — Chapter 11 proceedings of AH Robins Company

A. — Nature of business and operations

In 1968 a gynecologist and an electrical engineer developed an intrauterine birth control device (the "Dalkon Shield") in response to growing concern about the health effects of birth control pills. Dalkon Shield Corporation began producing the Dalkon Shield later that year. [35] In 1970, Dalkon Shield Corporation was purchased by AH Robins Company ("AH Robbins"), a pharmaceutical company, and by 1974 more than 2.2 million Dalkon Shields had been used by women in the US. [36] Unfortunately, flaws in the Dalkon Shield's design caused various health problems and injuries for the women who used the device. The health problems included such conditions as pelvic infections, infertility and septic abortions. Following numerous complaints linked to the Dalkon Shield's use, AH Robins stopped selling it in the US in 1974. [37]

By 1974, AH Robins and its products liability insurance carrier, Aetna, were defending against hundreds of legal actions relating to the Dalkon Shield. [38] These claims continued to multiply until AH Robins commenced Chapter 11 proceedings in 1985 due to spiraling defence costs, the disruption the trials placed on its executive team, and the financial deterioration resulting from discharging judgments. By the time AH Robins filed its petition for Chapter 11 proceedings, an average of seventy new claims were being filed per week against the company. [39]

AH Robins had concluded that it could only equitably and fairly deal with the claims through a Chapter 11 proceeding. [40] By 1985, AH Robins and Aetna had settled nearly 10,000 claims and distributed over $530 million in settlements and judgments. [41] Individual awards against AH Robins and Aetna for claims arising from the Dalkon Shield escalated substantially from approximately $85,000 in 1975 to $9 million for one plaintiff in 1985. [42] The officers and directors had also resolved a securities class action advanced by shareholders for $6.9 million, who alleged the dissemination of false and misleading information. [43] Despite having settled thousands of claims, AH Robins, at the time it filed for relief under Chapter 11, still faced over five thousand pending cases in state and federal court. [44]

B. — Chapter 11 proceedings

Following the filing of the Chapter 11 petition, a number of claimants filed a class action against Aetna, alleging that they were third party beneficiaries under the AH Robins' insurance policy, and as such, had a common, undivided interest in the value of the policy. [45] The claimants also alleged that Aetna was a joint tortfeasor for all injuries caused by the Dalkon Shield — an allegation that Aetna denied. [46]

Settlement discussions between the Dalkon Shield Claimants and Aetna progressed in parallel with the Chapter 11 proceedings; however, both parties agreed to suspend settlement discussions until third party offers to acquire AH Robins were disclosed in the Chapter 11 proceeding. American Home Products Company ("American Home Products") offered to acquire AH Robins in December 1987. The offer was accepted, and the proceeds from the asset sale brought sufficient liquidity to make possible a combined settlement fund and a plan of reorganization. [47]

In November 1985, the bankruptcy court entered a claims bar date of 30 April 1986 for the proceeding. [48] The claims bar date created a closed class of claimants whose aggregate claims would be quantifiable, [49] allowing for a systematic settlement of tort claims. In total, approximately 350,000 claims were filed, and roughly 106,000 were rejected on the basis that they either did not conform to the required conditions for filing a claim, or they were fraudulently submitted. [50]

C. — Plan of reorganization

In order to develop the plan of reorganization, it was necessary that an estimate of the unliquidated claims against the debtor be prepared for the Court pursuant to § 502(c) of the US *Bankruptcy Code*. [51] The Court engaged several expert witnesses to develop a database of potential claimants that could be used to estimate a range for the amount of funds necessary to settle all valid claims. [52] Based on the estimate and submissions made by the parties, the Court determined that $2.475 billion was required to settle all the claims and that therefore, the only plan of reorganization that would be considered would be a plan that provided for the payment of that amount to the creditors. [53]

The approved plan of reorganization attempted to settle all litigation connected to the Dalkon Shield. It created a $2.475 billion trust to settle all personal injury claims, as well as a smaller $50 million trust to compensate defendants that had contribution or indemnification claims against AH Robins. [54] Once the trusts were established, they would operate independently of AH Robins. [55] The litigation trust was funded by a number of different sources. AH Robins provided $2.255 billion from the proceeds of the sale of its business to American Home Products. A further $45 million was contributed by unused insurance AH Robins held for the Dalkon Shield. Aetna provided $325 million to the trust, and the Robins family also provided an additional $5 million. [56]

The plan was adopted largely because it provided for full compensation to claimants and other creditors assuming that the aggregate liability estimates were correct. Two other elements of the Dalkon Shield plan also played a substantial role in its success:

a. the plan resulted in a "global peace", whereby all pending and future claims would be resolved by payments from the injury claimants trust. In exchange, the debtor, its officers and directors, doctors, health care providers and other potentially liable parties would obtain a full and final release from any and all claims associate with the Dalkon Shield; [57] and

b. the injury claimants trust would be run by independent trustees appointed by the Court. [58]

The injury claimants' trust was the only avenue for claimants to settle their claims. The settlement schedule provided three options for each claimant: (i) a small lump sum payment to claimants who suffered minor injuries or whose claim was poorly substantiated; (ii) a payment that was determined by a schedule that considered the type of injury suffered by the plaintiff; or (iii) a payment based on a customized evaluation of the claimant's injuries. If the claimant refused the offer based on the customized evaluation, she was guided to an alternative dispute resolution conference. If no resolution was reached through the resolution conference, the matter would proceed to a binding arbitration or trial. [59]

The arrangement for a full and final release of all defendants gave rise to concerns among some claimants that there would be no recourse in the event the injury claimants' trust did not have sufficient funds to pay awards for all the claims. [60] In response to this concern, the trustees held back a portion of each award until it became clear that the sufficient funds were in the trust to satisfy the claims. [61] In the end, each claimant received her full award.

Further policy considerations influenced how the injury claimants' trust distributed funds to successful claimants. First, the trustees' goal was to maximize the best interests of the claimants as a collective, rather than the best interests of any one particular claimant. [62] This approach was adopted to ensure equal treatment among claimants, irrespective of socio-economic status. [63] Many of the claimants were self-represented, and as a result, would have been at a substantial disadvantage to claimants with the financial capacity to hire counsel to advocate on their behalf, if a standard tort model was employed.

The trustees were also mindful of controlling administrative costs in order to maximize the amounts recovered by the claimants. [64] In order to achieve this goal, the injury claimants' trust made a policy of submitting its best offer to a claimant, and refusing to negotiate an increase absent a mistake in the analysis by the claims reviewers retained by the trustees or new evidence. [65] This "best and final offer" approach also encouraged settlement since claimants had no incentive to prolong their claim in the hopes of obtaining a larger award. By 1997, the trust had resolved 217,700 of the 218,500 claims that had been filed, at an average administrative cost for each claim of only $700. [66]

Dalkon Shield's plan provided that if any funds remained in the injury claimants' trust after all of the claimants had been paid, the remaining funds would be distributed to the claimants on a *pro rata* basis. [67] Because AH Robins had no reversionary interest in the trust, there was no incentive on the trustee to do anything other than to maximize the distributions to the claimants.

In approving the plan, the Court noted the overwhelming approval of creditors and security holders, that no class of claimant was being impaired, [68] and that the plan provided for full compensation of the creditors, which provided a better outcome than a Chapter 7 liquidation. [69] The Court also noted that (i) the contributions made by the Robins family and by Aetna were valuable consideration for the releases contained in the plan; (ii) those releases were necessary and essential to avoid irreparable harm to the estate; and (iii) the equitable treatment of the claimants and the debtor required the termination of piecemeal litigation relating to or arising from the Dalkon Shield and the creation of a single facility to deal with such claims. [70]

The approval was appealed by certain claimant groups on the basis that the District Court had not properly considered the possibility that the trust would have insufficient funds to satisfy all claims. [71] The Fourth Circuit Court of Appeal dismissed the appeal, finding that the District Court's finding was not clearly erroneous, [72] and stated that such determinations are made on a case-by-case basis and are largely within the discretion of the bankruptcy court. [73] A further application for leave to the Supreme Court of the United States was refused. [74]

ii. — Chapter 11 proceedings of Dow Corning Company

A. — Nature of business and operations

The first silicone elastomer envelope breast implant was developed in 1962. [75] Dow Corning Company ("Dow Corning"), a subsidiary of Dow Chemical Company and Corning Glass Inc, [76] began commercially manufacturing implants the following year. [77] Unfortunately, manufacturing and design defects caused some of the implants to leak while inside the patient. The silicone leaks were harmful to patients and resulted in health problems such as headaches, fatigue and autoimmune diseases. [78]

By 1984, claimants were suing Dow Corning for damages in respect of the implants. [79] In 1991 the United States Court of Appeals, Ninth Circuit awarded Mariann Hopkins a judgment for $7.34 million against Dow Corning on the basis that Dow Corning had fraudulently concealed negative test results relating to the implants. [80] In 1992 Dow Corning stopped manufacturing the implants and the US Food and Drug Administration issued a moratorium on their use. [81] Thereafter, the volume of implant law suits increased dramatically, so that by the spring of 1993 more than 1,000 cases had been filed in the federal court. [82]

Faced with multiplying law suits against implant manufacturers, the Judicial Panel on Multidistrict Litigation consolidated the actions into a single proceeding, pursuant to 28 USC § 1407. [83] A settlement was eventually reached in 1994 in principle with respect to the consolidated action, to which Dow Corning was to contribute $2.02 billion. [84] More than 440,000 women applied to participate in the settlement fund, but 15,000 opted out of the settlement in order to pursue individual actions against Dow Corning. [85] As a result, the settlement was abandoned.

B. — Chapter 11 proceedings

Dow Corning filed for creditor protection under Chapter 11 on 15 May 1995 [86] in order to deal with the mass tort liability and to resolve the existing claims that had been filed against it and its two shareholders, Dow Chemical Company and Corning Glass Inc. Dow Corning succeeded in its application, and all claims against its shareholders were also transferred to the bankruptcy court. [87]

Under a claims process order, the Court made provision for a claims-filing procedure, approved procedures for notifying claimants of their obligation to file claims and set 15 January 1997 as the bar date for all claims in the US and 14 February 1997 as the bar date for all foreign claimants. Once the bar dates had passed, Dow Corning was able to deal with the totality of the claims against it through a plan of reorganization. [88]

C. — Plan of reorganization

After lengthy and intensive negotiations supervised by a court-appointed mediator, Dow Corning, its parent companies, and the claimants reached an agreement on a plan of reorganization on 4 February 1999. [89] The Dow Corning plan was approved by ninety-four percent of the claimants. [90] Certain claimants, however, contested the validity of the plan, claiming that the bankruptcy court was not authorized to enjoin non-consenting creditor's claims against non-debtors, such as Dow Corning's shareholders and insurers, as such order prevented claimants from recovering additional damages from those third parties beyond what they were entitled to under the plan.

The Sixth Circuit of the United States Court of Appeals held that the broad language set out in § 105(a) of the US *Bankruptcy Code*, which gives bankruptcy courts the power to grant injunctions necessary or appropriate to carry out the provisions of the US *Bankruptcy Code*, conferred power on that court to make an order enjoining claims against third parties since the order was not inconsistent with the purpose of the US *Bankruptcy Code.* [91] However, because such orders were dramatic measures, the Court noted that it should be used cautiously, and only in unusual circumstances. [92] The Court set out the following seven factors that must be present in order for a bankruptcy court to enjoin a non-consenting creditor's claims against a non-debtor:

> 1. There must be an identity of interests between the debtor and the third party, usually resulting from an indemnity, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> 2. The non-debtor must have contributed substantial assets to the reorganization;
>
> 3. The injunction must be essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> 4. The impacted class, or classes, must have overwhelmingly voted to accept the plan;
>
> 5. The plan must provide a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
>
> 6. The plan must provide an opportunity for those claimants who choose not to settle to recover in full; and
>
> 7. The bankruptcy court must have made a record of specific factual findings that support its conclusions. [93]

Although the Sixth Circuit Court held that the bankruptcy court was entitled to grant the enjoinment order, it also found that the lower Courts had not provided adequate factual findings demonstrating that such an injunction was appropriate. [94] As a result, it remanded the matter back to the lower Court for additional findings. [95]

Upon remand, the United States District Court of Eastern Michigan, Northern Division, provided additional factual findings in order to establish that each of the factors set out by the Sixth Circuit Court had been satisfied, and confirmed Dow Corning's plan. [96] In particular, the District Court noted that the contributions made by Dow Corning's shareholders, insurers and affiliates were substantial and significant to the plan. [97] Further, the District Court held that the release of those parties was essential, since each of those parties could potentially claim contribution and indemnity against Dow Corning for any losses suffered from subsequent litigation, and that any such claims would reduce the size of the Dow Corning's estate available to other claimants. [98] In fact, Georgene Vairo, who was a trustee of the Dalkon Shield litigation trust, testified at the Dow Corning proceedings as to the important role third party releases played in the resolution of the Dalkon Shield claims. [99]

Dow Corning's plan established a fund of $2.35 billion formed from contributions by Dow Corning, from its operating cash reserves, and from Dow Corning's products liability insurers and shareholders. [100] The fund was to be used to pay for claims of personal injury claimants, government healthcare payers, and other creditors with claims related to implant products liability.

Under the Dow Corning plan, personal injury claimants could choose to either settle or litigate their claims. [101] The settlement process was largely based on the settlement arrangement that was agreed upon in principle prior to the Chapter 11 proceeding. [102] It provided claimants with a defined payment that was determined by a schedule that considered various factors, such as whether a claimant suffered any disease from the implant, or whether the implant had ruptured. [103]

Claimants who chose not to settle their claims (the "non-settling claimants") could pursue litigation against an entity established to administer and defend against such litigation (the "litigation entity"). The litigation entity assumed all Dow Corning's liabilities associated with the claims of the non-settling claimants, [104] and was managed by an officer appointed by Dow Corning but exclusively for the benefit of the debtor and its shareholders. [105] The non-settling claimants' claims were resolved under the terms of the litigation facility agreement and a case management order that had been approved by the District Court. The process generally resembled the normal litigation process in a non-bankruptcy setting, [106] and even entitled claimants to a jury trial if sufficient evidence was available. [107] If a claimant was successful, the award amount would be transferred from the fund to a claims administrator who would then make a distribution to the claimant in accordance with the plan. [108]

The plan also provided that the aggregate of the amounts paid to claimants who did not settle and to defense and administration costs associated with resolving those claims was limited to $400 million. [109] This amount was substantially greater than the anticipated total cost of litigation, which, before the plan was certified was estimated by an expert to be $158 million. [110] The expert's opinion was based, in part, on (i) the expectation that fewer than 5% of claimants would opt-out of the settlement option, [111] and (ii) those who do elect to pursue litigation will be those who fail to qualify for a settlement or who qualify only for lower than average settlement benefits. [112]

In exchange for contributing to the plan fund, section 8.3 of the plan released Dow Corning's insurers and shareholders from all further liability for settled personal injury claims, and section 8.4 permanently enjoined any party holding a claim released against Dow Corning from bringing an action related to that claim against Dow Corning's insurers or shareholders. As discussed previously, these provisions were the source of dispute from certain claimants, which resulted in significant delays in the certification of the plan. However, as noted by Georgene Vairo and the District Court, the releases provided to Dow Corning's insurers and shareholders were essential to making the plan feasible. As a result of the plan, Dow Corning was able to emerge from its restructuring proceedings in 2004. [113] Litigation with respect to the plan continued into 2017. [114]

iii. — Chapter 11 proceedings of General Motors Corporation

A. — Nature of business and operations

General Motors Corporation ("GM") was a leading American manufacturer and market leader in the automotive industry. However, GM began encountering liquidity challenges in 2007 because of declining sales resulting from the economic crisis, competition from foreign automotive manufacturers, and GM's high cost structure resulting from its employee benefits obligations. [115] These liquidity challenges escalated in 2008 and therefore GM sought financial assistance from the US Treasury. [116] On 31 December 2008, GM and the Treasury entered into an agreement that provided GM with emergency financing of up to $13.4 billion pursuant to a secured term loan facility. [117]

GM's first quarter financial results in 2009 were not favourable. Its total net revenue had decreased by 47% in the first three months as compared to the corresponding period in 2008, and its operating losses increased by $5.1 billion from the prior quarter. [118] Sales by GM's dealers in the US fell to approximately 413,000 vehicles in the three months ending 31 March 2009, a decline of approximately 49% compared to the corresponding period in 2008. [119] As a result of GM's ongoing difficulties and after unsuccessfully attempting an out-of-court debt restructuring, [120] GM filed a petition for Chapter 11 bankruptcy protection on 1 June 2009. [121]

B. — Chapter 11 proceedings

Concurrent with the Chapter 11 petition, GM filed a motion requesting that the Court approve the sale pursuant to § 363 of the US *Bankruptcy Code* of GM's operating assets to a new company financed by the US Treasury and Export Development Canada. The Bankruptcy Court approved the petition and set a deadline for competing superior bids to be submitted. No superior bids were submitted and therefore on 5 July 2009, having determined that the proposed asset sale was in the best interests of the creditors, the Court declared it to be the winning bid and approved the proposed sale. Because GM's secured indebtedness was approximately $50 billion, [122] the Court reasoned that there was not a realistic prospect of a superior bid being made. Further, a liquidation analysis determined that the realizable value of GM's assets was between $6 billion to $10 billion, and therefore, if those assets were liquidated, there would be no recovery for unsecured creditors. [123]

Once the Court approved the asset sale, the purchaser changed its name to General Motors Company ("new GM") and the seller changed its name to Motors Liquidation Company ("old GM"). [124] Old GM's assets were transferred to new GM other than shut-down manufacturing plants, certain environmentally contaminated lands, and $ 1.175 billion USD in cash or cash equivalents. [125] Old GM also retained most liabilities, including environmental liabilities, retiree healthcare obligations and litigation related to product liability claims. [126] Old GM was granted 10% of the common stock of new GM, which was reserved for distribution to old GM's general unsecured creditors. [127] As a result, the core business of GM was preserved in new GM, with all of the attendant benefits to employees, suppliers and the economy in general, free and clear of the burden of many of liabilities that had made that business unviable. Old GM then continued the Chapter 11 proceedings by liquidating its retained assets, resolving claims against it and winding down. [128]

C. — Plan of reorganization and release

In order to better manage the claims facing old GM, the plan of reorganization created settlement procedures and a unique trust structure made up of four trusts, consisting of (i) the GUC Trust, which was established to resolve general unsecured claims; [129] (ii) the Asbestos Trust, which was established to process asbestos related personal injury claims and was advanced $2 million for this purpose; [130] (iii) the Environmental Response Trust, which was established to conduct and manage environmental remediation of certain properties; [131] and (iv) the Avoidance Action Trust, which was funded with $1.6 million and created in order to pursue avoidance actions arising out of a prior loan. [132] Each trust was managed by a monitor or administrator, who was authorized to resolve claims against the trust and to make distributions to the beneficiaries in accordance with the plan.

The beneficiaries of the GUC Trust were the creditors and other claimants under the liabilities retained by old GM, many of which were unsecured. [133] The plan provided for $52.7 million together with securities in new GM being advanced to the GUC Trust for administration and to satisfy the unsecured claims against old GM. [134] The Court created an alternative dispute resolution procedure for certain unliquidated or disputed litigation claims against old GM. If a claimant elected to use these procedures, it was required to cap its claim at a reduced amount. In exchange, old GM would pay all fees and costs associated with processing the claim. [135] Alternatively, the claimant could pursue its claim through normal litigation but at its cost. Once a disputed claim was resolved, the claimant became eligible to receive a distribution from the GUC Trust. [136] Old GM had no reversionary interest and therefore all trust assets had to be distributed to the trust beneficiaries. [137]

The Environmental Response Trust was responsible for managing certain properties that required environmental remediation. Prior to the filing of the Chapter 11 petition, GM had worked with consultants and regulatory agencies in order to estimate the cost of remediation work needed on the retained properties. [138] The Environmental Response Trust was established to pay for such costs. In exchange for the establishment of the trust, old GM was released from any liability for the contaminated properties. [139] The plan provided for funding of $600 million for the Environmental Response Trust in order to remediate and maintain these properties. [140]

The plan also provided for releases by old GM of its officers, directors, advisors, agents, consultants, and others [141] other than for claims arising from willful misconduct, gross negligence or fraud. [142] The disclosure statement describes the rationale for the release as follows:

> The release is limited to claims that could be asserted by the Debtors and only applies to claims against such parties in their representative capacity. The purpose of the release of the Debtors' personnel is to prevent a collateral attack against those individuals based on derivative actions. It is the intent of the Plan to bring finality to the Chapter 11 Cases. The parties covered by the limited release have made enormous contributions to the restructuring efforts effected by the Chapter 11 Cases. [143]

IV. — TRUSTS IN CANADIAN *CCAA* PROCEEDINGS

1. — Legal Requirements for Trusts in *CCAA* Proceedings

i. — General requirements for creating valid trusts

A trust can be created in either a plan of compromise and arrangement or in a separate trust agreement. Quite apart from insolvency law considerations, in order for an effective trust to be created, it must satisfy the three certainties, being certainty of intention, certainty of subject matter and certainty of object. A trust is not a separate legal entity in its own right, but rather is the legal relationship pursuant to which one person, the trustee, holds property on behalf of the beneficiaries. Certainty of intention is established where the agreement or document creating the trust clearly expresses the intention that the property be held in trust for other parties. [144] Certainty of object is established where the property to be held in trust is described with sufficient clarity so as to permit it to be definitively ascertained. Further, the beneficiaries' shares in that property must be clearly defined. [145] Finally, certainty of object is established where it is clear whether a person is in fact a beneficiary. The beneficiaries may be described by class, but the description of that class must be sufficiently certain so as to permit a court to determine whether or not a person is a beneficiary. [146]

Where the trust is for the benefit of a large class of creditors, the description of class membership must be sufficiently described so as to permit courts to determine with certainty whether or not a person is a beneficiary. In the case of class action plaintiffs who are the beneficiaries of a litigation trust, this certainty can probably be satisfied using either the proof of claims procedure or a mechanism in the class actions themselves.

In Canada, we have not seen *CCAA* proceedings where assignments of causes of action to litigation trusts have been disallowed on the basis of them not being sufficiently described or on the basis of the causes of action being *res judicata* as a result of not being adequately reserved from the *CCAA* proceedings. That said, it seems clear that if the language creating the trust is not sufficiently certain with respect to the causes of action to be assigned to the trust so as to permit a court to determine whether or not a particular cause of action has been assigned, that could impact upon the validity of the trust or at least the inclusion of the cause of action in it. There does not seem to be any reason, however, why a general description with respect to causes of action being assigned would not be effective so long as that general description does not give rise to uncertainty.

ii. — Theoretical basis for including litigation trusts in CCAA plans

The *CCAA* does not expressly contemplate the creation of litigation or liquidation trusts for the purpose of carrying out functions after the termination of the *CCAA* proceedings. However, given the skeletal nature of the *CCAA* and the broad authority given to courts in its interpretation and application, the jurisprudence strongly supports the use of such trusts where they are reasonably connected with the restructuring and are otherwise consistent with the policies underlying the *CCAA*.

The starting point for analyzing whether a *CCAA* plan can include or make provision for a litigation trust is the decision of the Ontario Court of Appeal in *Metcalfe*. [147] Writing for the majority, Justice Blair considered whether a court can sanction a plan that includes releases by creditors in favour of third parties who themselves are solvent and are not creditors of the debtor company. The releases in question were not expressly provided for in the *CCAA* and it was argued that the court had no authority to sanction a plan that had such provisions. Justice Blair found that the *CCAA* permits the inclusion of third-party releases in a plan where the releases are reasonably connected to the proposed restructuring, citing the following:

> a. the open-ended flexible character of the *CCAA* itself, which signaled a flexible approach to the application of the Act, an active judicial role in its application and interpretation, and a liberal approach to its interpretation;
>
> b. the broad nature of the term "compromise or arrangement" as used in the *CCAA*, permitting a broad scope for negotiations and for applying ingenuity in fashioning proposals; and
>
> c. the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, providing necessary protection to unwilling creditors who may be deprived of certain civil and property rights as a result of the process. [148]

Justice Blair adopted the principles articulated by the Honourable Georgina R Jackson and Dr Janis Sarra in an influential paper written in 2007, [149] where they argued that in order to interpret skeletal legislation such as the *CCAA*, courts must take a hierarchical approach, starting first with examining the legislation itself to search for its object, goals and intentions, and giving its provisions a fair, large and liberal construction. If that interpretative exercise does not answer the question, the court will then determine if there is a gap that can be filled by the court. If not, the court can then consider whether it is entitled in the circumstances to exercise inherent discretion. [150]

Justice Blair found that the power to grant releases in favour of third parties was implicit in the language of sections 4 and 6 of the *CCAA* and therefore he did not need to resort to gap-filling or inherent jurisdiction. [151] Section 4 of the *CCAA* empowers a court to order a meeting of creditors or classes of creditors where a compromise or arrangement is proposed between a debtor and its unsecured creditors or any class of them, [152] and section 6 provides that where a majority in number, representing two-thirds in value of the creditors or a class of creditors agree to a compromise or arrangement, it may be sanctioned by the court and is thereupon binding on all creditors or classes of creditors. The words "compromise" and "arrangement" were left undefined and indefinite but previous decisions suggested they included any scheme for reorganizing the affairs of the debtor. [153] Elaborating, he wrote as follows:

> The *CCAA* is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the

shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". [154]

He also noted that a *CCAA* plan is to be treated as a contract between a debtor and its creditors and therefore parties are entitled to include anything in a plan that can be lawfully incorporated into a contract. [155] He found persuasive the argument of Justice Richards in *Re T&N Ltd and others (No 3)* [156] that the term "arrangement" was to be given a broad meaning that was not confined to compromises or to disputes. Rather, Justice Richards said that the term in insolvency legislation was the equivalent to solvent arrangements under Canadian corporate legislation, and that it was neither necessary nor desirable to attempt to define that term given that the legislature had not attempted to do so. [157]

In *Metcalfe*, Justice Blair said that the appropriateness of the inclusion of third party releases in the plan depends upon there being a reasonable connection or nexus between the compromise of those claims and the restructuring achieved by the plan. [158] In that case, the factors he considered in order to determine that the inclusion of a release was fair and reasonable were that (i) the parties to be released were necessary and essential to the restructuring, (ii) the claims to be released were rationally related to the purpose of the plan and necessary for it, (iii) the plan could not succeed without the releases, (iv) the parties to be released were contributing in a tangible and realistic way to the plan, (v) the plan would benefit both the creditors and the debtor, (vi) the voting creditors who approved the plan did so with knowledge of the nature and effect of the releases, and (vii) the releases were fair and reasonable and not overly broad. [159] Justice Blair also said that the *CCAA* was designed to serve a broad constituency of investors, creditors, employees and the public. [160]

Generally, trust relationships are created by agreements that appoint the trustee, set out the purpose of the trust, and identify the trust property and the beneficiaries. A plan can either directly create a trust, or provide for its creation pursuant to a separate agreement that comes into effect upon the sanctioning and implementation of the plan. While a litigation trust can take many forms and include many different elements, its purpose must be closely related to the success of the restructuring and the maximization of creditor recoveries. Litigation trusts typically create mechanisms for (i) realizing upon illiquid assets without jeopardizing the restructuring through needless delay of the debtor's emergence, (ii) implementing settlements of complex litigation involving the debtor that would otherwise continue for years, and (iii) validating and quantifying class action claims against the debtor in order to permit the implementation of settlements.

A litigation trust can also be justified on the basis of the equitable and orderly treatment of creditors in an insolvency process [161] or the equitable distribution of a debtor's assets amongst its creditors, which is one of the fundamental purposes underlying the *Bankruptcy and Insolvency Act (BIA)* [162] and the *CCAA*. [163] This purpose is achieved in part through the single proceeding model, which requires that most claims against a debtor be entertained in a single forum. [164] In *Century Services Inc v Canada (AG)* ("*Century*"), [165] Justice Deschamps noted that by grouping all possible actions against a debtor into a single proceeding controlled in a single forum, negotiation with creditors was facilitated and the chaos and inefficiency resulting from each creditor separately enforcing its claims against the debtor is avoided. Courts have said that the global recovery for all creditors is maximized by avoiding such inefficiencies and chaos and favouring an orderly collective process. [166] In *Re Nortel Networks Corporation*, [167] Justice Newbould of the Superior Court of Justice of Ontario noted that one of the policies underlying the *CCAA* was to ensure the expeditious and fair determination of claims against the debtor company. In that case, this included avoiding entanglement in a drawn-out, foreign litigation process that had no regard for the practical concerns of an insolvency, and included resolving all remaining unresolved claims in a timely and efficient manner so as to permit the *CCAA* proceedings to be brought to a conclusion. [168]

Justice Deschamps in *Century* also considered the principles applicable to courts sanctioning measures for which there is no explicit authority in the *CCAA*, how courts have interpreted their discretionary authority, and how Parliament has endorsed this approach. She noted that the incremental evolution of judicial discretion in "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has adapted and evolved to meet contemporary business and social needs. However, that discretion must be exercised in furtherance of the *CCAA*'s remedial purpose of avoiding the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations. [169] The sources of the court's authority to innovate during *CCAA* proceedings resides in the authority granted to it under that statute and the court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. She noted that courts have purported to rely upon their equitable jurisdiction to advance the purposes of the *CCAA* and their inherent jurisdiction to fill gaps in the statute, but Justice Deschamps, like Justice Blair in *Metcalfe*, adopted the hierarchical approach suggested by Justice Jackson and Professor Sarra and cautioned against relying on inherent jurisdiction. [170]

Finally, Justice Deschamps considered the scope of a court's authority under section 11 of the *CCAA* to make any order it considers appropriate in the circumstances. Such authority is measured on the basis of its appropriateness, which is assessed by determining whether the order advances the policy and remedial objectives of the *CCAA*. According to Justice Deschamps, appropriateness extends not only to the purpose of the order, but the means it employs, stating that the chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit. [171] In *Century*, that permitted the Court to make an order staying Crown enforcement of a goods and services claim pending the commencement of bankruptcy proceedings under the *BIA* in order to ensure that creditors are not disadvantaged by supporting a *CCAA* proceeding over a bankruptcy or to otherwise interfere in an orderly objective. This was in furtherance of the *CCAA*'s objective of providing a bridge between *CCAA* and *BIA* proceedings, and presumably of ensuring the equitable treatment of creditors.

2. — *CCAA* Proceedings Where Trusts Have Been Employed

There have been a number of *CCAA* proceedings in Canada in recent years where the parties have provided for litigation trusts in order to liquidate and realize upon assets that cannot be liquidated or realized within the time horizon of the proceedings. They have also been employed in order to permit the validation of third party claims against a debtor and the distribution of settlement or estate proceeds among the beneficiaries of the trust. In some cases, the original debtor is simply being liquidated. In other cases, the debtor's operations are restructured to permit them to continue while a trust deals with litigation claims and distributions to creditors. [172]

i. — CCAA proceedings of Lutheran Church -- Canada, the Alberta -- British Columbia District

A. — Background

These *CCAA* proceedings involved companies associated with the Lutheran Church of Canada, which became subject to significant claims by members of Lutheran Church congregations and other creditors. [173] The background was that members of various congregations in Alberta and British Columbia of the Lutheran Church advanced funds in the form of "deposits" to Lutheran Church -- Canada, the Alberta -- British Columbia District (the "District") to permit it to invest in a variety of faith-based investments. These investments included loans on a secured and unsecured basis to congregations to purchase real estate and to build or renovate churches and schools.

The District was registered as a charity and, in seeking to fulfill its charitable mandate, created three internal ministries for the purposes of providing "resources, vision, leadership, and encouragement" to various churches across Alberta and British Columbia: the Department of Stewardship and Financial Ministries, the Outreach Department, and the Parish and School Services Department. [174] These ministries provided resources and support to congregations across Alberta and British Columbia. [175] The Department of Stewardship and Financial Ministries had particular importance to the *CCAA* proceedings, as it had oversight of the Church Extension Fund (the "CEF"), which had been created to provide District members with an "opportunity to invest their money in faith-based developments in the District and beyond". [176] At the time of filing for *CCAA* protection, the CEF had 6,083 accounts, with the majority based on dollar value belonging to individuals over the age of 70. [177] The CEF, in turn, was responsible for investing these funds in a portfolio of assets that included cash, marketable securities, unsecured lines of credits, mortgages and debts related to properties owned by the District, properties that the District had labelled as "trust properties", and buildings owned by member congregations. [178] As of 30 November 2014, the CEF had deposits totalling $95.89 million and a portfolio of assets purportedly worth $108.5 million. [179]

The book value of CEF's portfolio was $108.5 million but its actual value was significantly less, due in large part to the underperformance of the Prince of Peace Development (the "POP Development"), for which the District through CEF had provided significant financing. [180] The lands and buildings in the POP Development were owned by Encharis Community Housing and Services ("ECHS") and included integrated supportive living facilities for seniors, a church, a school, a condominium and other development lands. [181] Adding to the District's financial woes was the fact that CEF's depositors were able to redeem their investments upon request. Historically, the average redemption rate by CEF's depositors totalled approximately $929,000 per month. [182] Based on the underperformance of the CEF and the historical redemption rate, the District became concerned that it would only have sufficient liquidity to satisfy redemption requests until the spring of 2015. With the value of the CEF's portfolio and the District's other assets falling below the amount due to CEF's depositors, the District and related entities sought *CCAA* protection. [183]

Lutheran Church -- Canada, the Alberta -- British Columbia District Investment Ltd ("DIL") was a not-for-profit company that acted as a trust agent and investment manager of registered retirement savings plans, registered retirement income plans and tax-free savings accounts for congregation members and Concentra Trust acted as trustee of these investments. [184] According to the first report of the monitor, loans advanced by DIL that were secured by mortgages did not have the priorities anticipated by DIL and therefore their realizable value was insufficient to pay out the amounts advanced. Further, as a result of the insolvency of CEF, depositors in DIL began to request redemptions of their investments with DIL, and DIL did not have sufficient liquidity to satisfy those redemption requests. [185]

B. — *CCAA* proceedings

Both the District and DIL obtained initial orders under the *CCAA* on 23 January 2015. The *CCAA* proceedings were exceedingly complex, as they involved the various investment funds and portfolios, related entities, and development projects. Moreover, each of the depositors, having lent or otherwise invested funds to the District in relation to its various projects (including the POP Development), would have had unsecured claims against DIL and the District.

Owing to the sheer number of unsecured claims, as well as the feedback received by the District and the monitor that the depositors wanted to have a voice in the *CCAA* process, [186] Justice Jones granted an order on 23 February 2015 creating creditors' committees for the District and DIL. [187] Members of the committees, who were appointed by the monitor, were to act as fiduciaries for and represent the interests of the respective depositors of the District and DIL throughout the *CCAA* proceedings. [188] Following the granting of these orders, a group of dissenting depositors commenced class proceedings in Alberta [189] and British Columbia [190] but further steps were stayed.

C. — Plans of compromise and arrangement

On 3 March 2016, DIL applied to the Court for an order sanctioning its plan of arrangement, which had been approved by its creditors, for sanction by the Court. The decision to sanction the DIL plan was deferred pending the finalization, approval, and submission of the District's plan of arrangement. [191]

The District plan provided for one class of creditors. There was provision for a convenience payment of up to $5,000 whereby an affected creditor was entitled to a distribution under the plan equal to the lesser of $5,000 or the total amount of his or her claim on the effective date. The plan provided for the liquidation of non-core assets of the District and the creation of a corporation ("L-Newco") that would purchase the POP Development and certain other properties from

ECHS in exchange for shares. In the case of the POP Development, the forced sale liquidation value was used for the exchange, and in the case of the other assets, their estimated fair market value was used. ECHS then transferred L-Newco's shares to the District in partial satisfaction of a mortgage loan owed by ECHS to the District, which shares were then distributed to the creditors on a *pro rata* basis. This would result in distributions of between 68% and 80% of the amount of the proven claims. There was a restructuring holdback to pay the professional fees and costs to complete the administration of the *CCAA* proceedings and a representative holdback to fund a representative action process and indemnify the representative plaintiff. [192]

Subsequent to the plan being implemented, the District would continue to carry out church activities but would no longer raise or administer funds through investment vehicles. L-Newco would operate the POP Development. The creditors or their representatives were to make up 50% of the board of directors of L-Newco. If asset sales by L-Newco generate sales proceeds in excess of $5 million, L-Newco could redeem shares. [193]

The DIL plan provided for the orderly transfer of registered accounts to a replacement trustee and administrator. Mortgages held by Concentra Trust were to be liquidated over time and the proceeds were to be paid to the new fund manager. DIL was permitted to make a distribution to depositors and investors, and their recoveries would amount to 77% to 83% of their initial investments. The plan provisions relating to the representative actions were substantially similar to those found in the District plan. [194]

Both of the plans were approved by the double-majorities required under the *CCAA* and sanctioned by order of Justice Romaine in detailed and carefully considered reasons issued in August 2016.

D. — Representative actions

The District and DIL plans both provided for representative actions being initiated and administered on behalf of the depositors by subcommittees. Depositors were given the option to elect whether or not they would participate in and obtain the benefit of these representative actions. [195] The representative actions related to claims based on contractual rights of depositors, claims based on allegations of misrepresentation or wrongful or oppressive conduct, claims based on breach of any legal, equitable, contractual or other duty, claims for which the District or DIL had coverage under directors' and officers' liability insurance, and claims to be pursued in the District's or DIL's name, including any derivative action or claims that could be assigned to a creditor under section 38 of the *BIA*. [196] Each plan provided that a portion of the distributions from asset sales was to be withheld as a holdback to fund the representative actions from depositors who elected to participate in the representative actions. [197] Under the plans, the representative actions were the sole recourse that the depositors were permitted in respect of the representative claims. [198]

Each plan provided for the creation of a subcommittee of three to five individuals appointed by the creditors' committee. [199] Each subcommittee was responsible for retaining and replacing counsel, assisting counsel in identifying representative plaintiffs, consulting with and instructing counsel, communicating with depositors, settling the representative action, establishing the amount of the holdback, arranging for the payment of counsel, and applying to the *CCAA* court for advice and directions. Each subcommittee was to remain in place so long as was necessary to administer the representative actions and distribute any proceeds obtained thereunder. The members of the subcommittees served in a fiduciary capacity on behalf of the participating depositors and essentially the subcommittees were the trustees under the litigation trust.

Initially, proceeds realized in representative actions would be held to fund out-of-pocket costs associated with the representative action, including costs incurred by the monitor or its counsel and a reasonable reserve in an amount determined by the subcommittee in relation to an indemnity. [200] The holdback was taken so that depositors were not required to incur costs associated with the anticipated litigation. Once the amounts held by the subcommittees reached $3 million, however, distributions were to be made to creditors on a *pro rata* basis. [201]

E. — Releases

The plans provided for releases in favour of the monitor, legal counsel in the *CCAA* proceedings, the District, DIL and other identified persons. They did not, however, provide releases of claims which could not be released under section 5.1(2) of the *CCAA*, claims by securities commissions and other regulators arising from compliance requirements under securities or financial institution legislation, or any representative action claims. [202]

F. — Justice Romaine's decision

In her decision in respect of the sanction orders for the DIL and District plans, Justice Romaine noted that there was a nexus between the representative action procedures, which created a litigation trust for the benefit of the depositors, and the restructuring under the plans. This nexus gave the Court jurisdiction to approve plans with these procedures. The representative action provisions permitted the District to continue in the operation of its core functions without the distraction of multiple litigations. At the same time, these provisions preserved the rights of the depositors to assert actions against parties involved in the events that led to the insolvency of the District and DIL. [203]

While the plans of the District and DIL provided that depositors would not have the right to individually pursue third-party claims, the subcommittees overseeing the representative actions would be empowered to do so on their behalf. [204] In response to the dissenting depositors' objection that the subcommittees could compromise or choose not to pursue claims, Justice Romaine noted that the plan imposed fiduciary obligations on the members of the subcommittees to act in the best interests of the depositors, and thus they would only decide not to advance a claim where that decision was consistent with their fiduciary duties. Also, where issues arose from a decision by a subcommittee, the plan permitted parties to seek the advice and direction of the Court. [205] She also noted that the claims of depositors were merely "funneled" through the subcommittees and were therefore not being compromised. [206]

> It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments. [207]

While the procedural rights of individual depositors were being restricted by this process, no substantive rights were lost or compromised.

Relying on the decision of the Supreme Court of Canada in *Century*, Justice Romaine noted that the *CCAA* has a broad remedial purpose of permitting companies to continue in business through a variety of methods with a view to them becoming viable again, including through compromises and arrangements. [208] The aim is to avoid where possible the devastating social and economic consequences of the cessation of business operations, and to allow a debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. Justice Romaine accepted that this is what the plans were attempting to achieve, noting that the provisions:

> a. benefit the debtors by allowing them to deal with claims affecting their officers, directors and employees from a single source;
>
> b. have a rationale and reasonable purpose in protecting the community of mostly older depositors that the debtors continue to serve in a religious capacity; and
>
> c. attempt to maximize recovery through the possibility of focused negotiations with a limited number of parties. [209]

Justice Romaine noted that the representative action provisions will not always be appropriate for dealing with third party claims, but that, in the context of that proceeding, they provided reasonable, rational benefits connected with the overall restructuring.[210] It is noteworthy that in the US under Chapter 11, decisions and academic commentary have cast doubt on whether a litigation trust is able to pursue claims of creditors against third parties. In the circumstances of the depositors of the District and DIL, however, this flexibility in the Canadian system seems to have benefited the depositors.

The District plan also provided for the creation of a corporation in which creditors would have shares and which would hold difficult to realize real estate assets. The corporation would hold such assets pending a final determination of how to realize value from such assets post *CCAA* proceedings. While not expressly a trust, it mimicked the liquidation trusts in the US. Justice Romaine noted that such debt-to-equity conversions are common in *CCAA* proceedings and the Court was not required to determine the value of the equity offered as long as it is satisfied that the value likely exceeds a current forced-sale liquidation recovery. She noted that the real estate market was depressed and a forced liquidation was the only likely alternative, which would not necessarily be in the best interests of the creditors. She also noted that the structure gave the creditors flexibility in order to maximize recovery.[211]

In determining whether the plans were fair and reasonable, Justice Romaine referred to the decision of Justice Farley in *Re Sammi Atlas Inc*, where he indicated that a plan is a compromise that cannot be expected to be perfect, and should be approved if it is fair, reasonable and equitable. Justice Farley noted equitable treatment did not necessarily mean equal treatment. He also said one must look at the creditors generally and objecting creditors specifically to determine if rights are being compromised in an attempt to balance interests by sharing the pain of the compromise equitably as opposed to confiscating rights.[212] The fact that a sizable majority of the creditors supported the plan and that "extraordinary efforts" were made by the monitor, Deloitte Restructuring Inc to provide disclosure about the plans and permit creditors to ask questions at information meetings were important considerations in finding that the plans were fair and reasonable.[213]

In analyzing the level of support by creditors for the plans and the make-up of the majorities in value and by number, Justice Romaine also reviewed the effect of the convenience payments on creditor approval levels. She found that, even if depositors who received the convenience payments were excluded, well in excess of the required majority in number and two thirds in value had supported the plans.[214] While dissenting depositors objected to the creditors owed less than $5,000 being paid in full, Justice Romaine was persuaded that the effect of this was that L-Newco, whose shareholders were those creditors who remained after the convenience payments were made, would have a more manageable governance structure with creditors who had a more significant financial interest in its future.[215]

The releases contained in the plan were also challenged by the dissenting depositors on the basis that broad releases contravened section 5.1(2) of the *CCAA*, which expressly provides that claims against directors that relate to contractual rights or are based on allegations of misrepresentation by directors to creditors or of wrongful or oppressive conduct by directors cannot be compromised.[216] The Court rejected this argument, noting that the representative action provisions permitted the subcommittees to prosecute the very type of actions that cannot be compromised pursuant to section 5.1(2) of the *CCAA*.[217]

Justice Romaine concluded by noting from *Metcalfe* that a restructuring would not be possible if there was no mechanism to bind an unwilling minority of creditors, but only where the plan was supported by the requisite double majority and sanctioned by the court as fair and reasonable. In this way, Parliament encouraged a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors. Justice Romaine cited a number of factors to support her finding that the plans were fair and reasonable and appropriately balanced the interests of and prejudices suffered by the stakeholders, namely (i) the support by the requisite double majority, after significant disclosure and opportunities to review and question the plans; (ii) the support of the creditors' committees, who had a duty to act in the best interests of the creditors; (iii) the support of the monitor; (iv) measuring the plans against the available commercial alternatives, they provided greater benefits to depositors and other creditors than a forced liquidation in a depressed real estate; (v) the preservation of the District's core operations; (vi) the representative action provisions were appropriate and reasonable in the circumstances of the restructuring, and in addition to the benefits of streamlined proceedings, the avoidance of multiple communications and the possibility of increased recovery, depositors were provided with the benefit of the oversight of the subcommittees; and (vii) the representative action process would incorporate causes of action such as derivative actions, which are normally outside the scope of class actions. [218]

ii. — CCAA proceedings of Sino-Forest Corporation

A. — Nature of business and operations

Sino-Forest Corporation ("Sino-Forest") was a forest plantation operator and forest products company with most of its assets and business operations located in the southern and eastern regions of the People's Republic of China. [219] Sino-Forest was a holding company with six direct subsidiaries and a majority interest in a publicly-traded Bermuda company, and had a total of 130 indirect subsidiaries. The majority of these entities were formed in Hong Kong and the British Virgin Islands. [220]

Sino-Forest experienced incredible growth from its establishment in 1994. Between 2004 and 2010, its reported assets increased from $700 million to $5.7 billion. [221] Sino-Forest claimed the ownership and management of 757,000 hectares of forest plantations in southern China. In June 2011, Muddy Waters LLC ("Muddy Waters"), a privately held investment firm that had short-sold Sino-Forest's securities, released a report alleging that Sino-Forest was a "near total fraud" and questioning whether it in fact owned the assets disclosed in its financial statements. [222] Following the release of Muddy Waters' report, the value of Sino-Forest's securities plummeted by 71.3%. [223] Multiple class actions were commenced against Sino-Forest and its officers, directors and employees, auditors, technical consultants and underwriters. Further, regulatory bodies in various jurisdictions began investigations. [224] Sino-Forest also defaulted on its note indentures by failing to file its third quarter financial statements in 2011. [225]

The board of directors of Sino-Forest constituted an independent committee to investigate the allegations of Muddy Waters. The committee released interim and final reports revealing that it could not find evidence rebutting Muddy Waters' allegations, there was a significant risk that Sino-Forest lacked title to a majority of its holdings of standing timber, and there was no verification that income tax or value-added tax had been paid. [226]

B. — *CCAA* proceedings

On 30 March 2012, Sino-Forest commenced proceedings under the *CCAA* [227] and entered into a restructuring support agreement with holders of notes eventually representing more than 72% of the aggregate principal amount of the outstanding notes; Sino-Forest had approximately $1.8 billion of principal amount of debt owing under the notes, plus accrued and unpaid interest. [228] The support agreement contemplated two possible transactions:

a. a court-supervised sales process to determine if any person or group of persons would purchase Sino-Forest's business for at least 85% of the value of the outstanding amount owing under the notes; or

b. if the sales process was not successful, a plan of compromise and arrangement pursuant to which (i) the six direct subsidiaries of Sino-Forest would be transferred to a newly created entity to be owned by certain creditors, and (ii) a litigation trust would be created to enable creditors to receive the benefit of Sino-Forest's litigation claims against persons not otherwise released by the *CCAA* plan. [229]

From 30 March 2012 to 10 July 2012, Sino-Forest ran a sales process.[230] No letters of intent were received that satisfied the required threshold for a successful sale.[231] On 10 July 2012, the sales process was terminated and Sino-Forest announced its intention to proceed with the restructuring transaction.[232]

While the sales process was ongoing, a number of class actions were commenced by Sino-Forest's equity holders[233] against Sino-Forest, certain of its officers, directors, employees, its former auditors, its technical consultants, and the underwriters involved in equity and debt offerings.[234] The claims primarily alleged misrepresentations in connection with these offerings.[235]

C. — Plan of compromise and arrangement

A plan of compromise and arrangement was presented to the court for approval on 3 December 2012. Shortly thereafter, on 10 December 2012, the plan was approved. The purpose of the plan was to provide a "clean break" between the business operations of the Sino-Forest enterprise as a whole and the ongoing litigation of claims in respect of Sino-Forest.[236]

The plan provided for the creation of a new company ("SF-Newco") to which Sino-Forest would transfer its shares in the six holding companies that indirectly held all of the assets of Sino-Forest. Affected creditors with proven claims were to receive their *pro rata* portion of 92.5% of shares in SF-Newco and notes in the aggregate amount of $300 million USD, secured and guaranteed by the assets of SF-Newco's new subsidiaries.[237] Noteholders who consented to the plan early were given the remaining 7.5% of the shares in SF-Newco.[238] The transfer of shares from Sino-Forest to SF-Newco was to be free and clear of all claims against Sino-Forest and certain claims against its subsidiaries so that the business of SF-Newco would be viable as a going-concern for the benefit of the affected creditors. The plan would also effect a full, final and irrevocable release of all affected claims.[239]

The plan also provided for the creation of a litigation trust pursuant to a trust agreement whose purpose was to hold in trust and prosecute for the benefit of the creditors certain litigation claims of Sino-Forest against third parties.[240] Under the plan, the trustee was appointed by Sino-Forest subject to the consent of the monitor and the initial consenting noteholders.[241] The litigation trust agreement was between Sino-Forest and the litigation trustee and constituted the trust and provided for the transfer of the claims to the trustee.[242] Affected creditors held a 75% beneficial interest in the trust, and certain third parties, subject to class action claims by noteholders and who had rights of indemnification from Sino-Forest, had a 25% beneficial interest in the trust.[243] The litigation trust claims consisted of claims of Sino-Forest against certain third parties and claims by the trustees under note indentures issued by Sino-Forest against certain persons in connection with the issuances, other than claims that were released pursuant to the plan or to any claims that were excluded from the litigation trust.[244] Among the claims excluded were causes of action against underwriters of the publicly-traded securities of Sino-Forest.[245]

The trust agreement gave the trustee authority to prosecute, compromise and settle, abandon or dismiss the litigation trust claims.[246] The operations of the trust were funded by an amount transferred by Sino-Forest to the trustee on implementation of the plan. All proceeds, income and recoveries obtained on account of or from the litigation trust claims vested in the litigation trustee, in trust for the benefit of the litigation trust beneficiaries, and were to be distributed in accordance with the *pro rata* shares of the beneficiaries in the trust.[247]

The trust agreement also constituted a litigation trust board made up of three persons consented to by the noteholders.[248] These board members had the authority to oversee, review and guide the activities and performance of the litigation trustee.[249]

Notably, the litigation trust agreement permitted the litigation trustee to participate in the settlement of claims that had not been vested in it under the trust agreement. The plan included a mechanism by which "named third party defendants" who had claims alleged against them in class action lawsuits could take advantage of the plan's settlement framework to obtain the benefit of a broad release of all claims against them. [250] According to the plan, "named third party defendants" consisted of the underwriters, auditors and their affiliates, partners, associates heirs and assigns. [251] The settlement framework provided for the release of a defendant pursuant to a settlement provided that the release was approved by the Court and acceptable to the monitor, the litigation trustee and counsel to certain class action plaintiffs. [252] Effectively, this meant that settlements had to be approved by the trustee and gave it a role in those settlements.

D. — Subsequent actions of the litigation trust

To date, the litigation trust has only litigated a claim against the former chairman and chief executive, Allen Chan. [253] The action was launched by notice of action dated 31 March 2014. [254] Fearing that Mr Chan may dissipate his assets in order to prevent the trustee from having recourse against them, the trustee brought an *ex parte* application for a Mareva injunction against Mr Chan. [255]

In its application, the litigation trustee alleged that Mr Chan was largely responsible for Sino-Forest's demise. Among other things, the trustee alleged that Mr Chan (i) had operational and *de facto* control over a number of purchasers of Sino-Forest's timbers, which control had not been disclosed to Sino-Forest, its auditors, or directors; (ii) caused Sino-Forest to significantly overpay for assets sold by companies controlled by him; (iii) prepared, certified, and published false and misleading financial statements and public disclosure documents of Sino-Forest; (iv) entered into a number of transactions that were suspicious or outright fraudulent; and (v) concealed unlawful activities from Sino-Forest through the use of personal emails. [256]

In granting the *ex parte* injunction, the Court found that there was, upon review of the evidentiary record, a very strong *prima facie* case of fraud on the part of Chan and that the trustee would have been irreparably harmed if his assets were not available to satisfy any judgment obtained against him. [257] The action against Mr Chan remains unresolved and ongoing.

The litigation trust has played a significant role in the compromise and settlement of previously outstanding class action lawsuits related to the insolvency of Sino-Forest. In the wake of the Muddy Waters report, class action proceedings were commenced in Ontario, Québec, Saskatchewan and New York. [258] These proceedings can be classed in three general categories: (1) claims against the directors and officers of Sino-Forest; (2) claims against the auditors of Sino-Forest; and (3) claims against the dealers and underwriters of the publicly-traded shares. Settlements have been entered into by the class action plaintiffs with certain directors, Ernst & Young, and the dealers and underwriters of Sino-Forest's securities.

The Ontario class action reached minutes of settlements with the dealers and underwriters of securities in Sino-Forest in late December 2014. [259] As a part of the settlement, the class action plaintiffs agreed to resolve the claims advanced against the dealers in exchange for $32.5 million. [260] The dealers required a release pursuant to the *CCAA* plan, which under the provisions of the plan could only be obtained with the consent of the litigation trustee. [261] The plan had been heavily negotiated by all involved parties, including the Ontario class action plaintiffs, and all parties had been aware of the requirement for the litigation trustee's consent. [262] Nevertheless, the litigation trustee had been excluded from the negotiations between the class action plaintiffs and dealers. [263]

In early 2015, the class action plaintiffs and the dealers applied to the Court for approval of a settlement notwithstanding that the litigation trustee was unwilling to consent to it. [264] The trustee argued that its exclusion from the negotiations unfairly denied it the opportunity to seek consideration for the beneficiaries of the litigation trust. [265] The class action plaintiffs and dealers argued that the litigation trust may not unreasonably withhold its consent to the proposed *CCAA* release [266] and characterized the trust's position to a "stick-up". Justice Morawetz agreed that the trust's position was flawed as it had no economic interest in the action itself. [267] Ultimately, however, Justice Morawetz decided that the plan required the trust's consent to such settlements [268] and that each of the stakeholders, including the class action plaintiff representatives, had agreed to that requirement. [269] Justice Morawetz therefore directed the parties to negotiate a solution in good faith. [270]

In November 2015, a new motion to approve the $32.5 million settlement was brought by the class action plaintiffs. [271] The dealers increased their settlement payment by $1 million and counsel for the class action plaintiffs reduced its fee by $750,000, and the litigation trustee was paid $1.75 million. [272] The litigation trust consented to the *CCAA* release and Justice Morawetz approved the settlement on the basis that it was fair and reasonable, provided substantial benefit to the other stakeholders, and was consistent with the purpose and spirit of the *CCAA*. [273]

The class action plaintiffs also settled with the directors of Sino-Forest. The first was with David Horsley, the former CFO of Sino-Forest, and the second was with a number of different independent directors who served on the board of Sino-Forest. [274] Under the settlement, David Horsley was required to pay $5.6 million in exchange for a release under the *CCAA* plan. [275] The consent of the litigation trustee was not required under the plan because David Horsley was not a "named third party defendant". Nonetheless, the trustee did participate in the settlement negotiations, and David Horsley was required to provide non-monetary consideration to the trust. Specifically, he was required to appear as a witness at the trial of any action commenced by the litigation trust and to give complete and truthful answers to proper questions concerning any relevant matter. [276]

E. — Decision of Justice Morawetz

The reasons issued by Justice Morawetz in connection with the sanction order pronounced on 12 December 2012 suggest that the litigation trust itself was not controversial. However, in reviewing whether the test for whether a plan ought to be sanctioned, the provision for the litigation trust was a factor considered by the Court. Relying upon *Re Canwest Global Communications Corporation*, [277] Justice Morawetz said the relevant factors were (i) that the claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditors, and the plan must have been approved by the requisite majorities of the creditors; (ii) that the anticipated distributions to creditors under the plan exceeded their potential recoveries in a liquidation or bankruptcy, which Justice Morawetz indicated should be evidenced by an analysis prepared by the monitor or some other disinterested person; (iii) that if other options have been explored and rejected as unworkable, this will be significant; (iv) a consideration of the oppression rights of certain creditors; (v) whether there had been unfairness to shareholders; and (vi) the public interest. [278] In determining that the plan provided a fair and reasonable balance amongst Sino-Forest's stakeholders while simultaneously providing the ability for Sino-Forest to continue as a going-concern for the benefit of all stakeholders, Justice Morawetz noted that the plan adequately considered the public interest and removed uncertainty for the employees, suppliers, customers and other stakeholders of Sino-Forest. It also provided a path to recover debt owed to unsubordinated creditors and preserved the rights, through the litigation trust, to pursue in litigation against parties alleged to have been responsible for the insolvency of Sino-Forest. [279]

iii. — CCAA proceedings of US Steel Canada Inc

A. — Nature of business and operations

US Steel Canada Inc ("USSC") was a wholly owned Canadian subsidiary of United States Steel Corporation ("USS"). [280] USS is an integrated steel producer, with production operations across Canada and the US, and is one of the largest steel producers in North America.[281] In 2007, USS acquired Stelco Inc ("Stelco") through a plan of arrangement, after which, USSC became the successor entity to Stelco.[282]

USSC conducted the majority of its operations from two facilities located in southern Ontario and supplied the majority of its steel to auto manufacturers in the region.[283] The first facility was located near Nanticoke, Ontario, and produced coke, iron and steel, and performed various other operations, such as finishing and pickling.[284] The second facility was located near Hamilton, and was one of the largest steel making operations in Canada.[285] In 2013, steelmaking operations were permanently shut down at the Hamilton facility, after being idle for three years, and operations at the Hamilton facility were reduced to coke production and steel finishing.[286]

After acquiring USSC in the Stelco plan of arrangement, USS integrated much of its North American operations and administrative functions in order to reduce costs. The integrated approach permitted USS to better manage steel production across its facilities. Unfortunately, shortly after USSC was integrated into USS's operations, USSC suffered substantial cash shortfalls, due to the economic downturn in 2008 and higher operating costs associated with USSC's operations. Between 2008 and 2013, USSC suffered free cash flow losses in the aggregate amount of $1.8 billion.[287] As a result USSC sought to restructure its operations and obligations.

B. — *CCAA* proceedings

USSC commenced proceedings under the *CCAA* on 16 September 2014. At the time the initial order was granted, USSC's liabilities exceeded its assets by $1.9 billion.[288] Among USSC's liabilities were several pension plans inherited from Stelco for over 14,000 current and former workers.[289] The plans had a solvency deficiency of $838.7 million notwithstanding that USSC had made all required contributions to the pension plans.[290]

C. — Plan of compromise and arrangement

USSC's plan of compromise and arrangement was approved by the Court on 9 June 2017. The purpose of the plan was to (a) complete the restructuring; (b) compromise all proven claims; (c) release and discharge of all claims against USSC; and (d) ensure that USSC could continue as a going-concern.[291]

The plan provided, *inter alia*, that (i) the existing pension plans would be terminated and replaced with new pension plans; and (ii) the environmentally contaminated lands upon which USSC's facilities were located would be transferred to a newly created special purpose holding vehicle for the benefit of certain pensioners (the "land vehicle").[292] The land vehicle was to be governed by a board of trustees who were to be independent of the parties to USSC's plan.[293] The trustees were required to develop a "monetization plan" for the land.[294]

The land term sheet between USSC, its pension holders, and the government of Ontario defined the terms under which the land vehicle operates and was incorporated into USSC's plan. Under the term sheet, the Ontario Ministry of Environment and Climate Change released USSC from any regulatory actions. USSC was required to provide additional environmental monitoring of the land[295] and make an irrevocable cash payment in the amount of $61 million to the Province of Ontario, which would be used to monitor and address any environmental issues affecting the land.[296]

USSC's plan provided that, upon the transfer of the land to the land vehicle, USSC would lease the land from the land vehicle for an initial term of ten years. The average annual rental rate for the land was $7.5 million[297] and the proceeds derived from the rent, less certain administration costs, were to be distributed to designated pension plans.[298] The term sheet contemplated the sale of the land during or after the initial term of the lease,[299] with the proceedings being distributed to the pension plans less applicable administration costs.

The land vehicle permitted the pension shortfall to be addressed by transferring an asset whose value, as a result of contamination, could not be realized within the time horizon of the *CCAA* proceeding. It was believed that the revenue from the land together with the proceeds of its sale upon the completion of remediation would provide real benefit to the pension beneficiaries.

The land vehicle received initial funding for its costs from USSC in order to permit it to operate and eventually sell the land.[300] Further funding was available from a portion of the rental payments made by USSC for the land, provided such funding is approved by the trustees.[301] Lastly, a revolving line of credit was made available to the land vehicle from the province to provide additional funding for remediation.[302]

USSC's plan also provided for final and irrevocable releases and discharges of all the general unsecured claims and certain other claims provided for in the plan.[303] In addition, the term sheets attached to the plan provided for final releases from any regulatory action by the provincial government, including under provincial environmental legislation in respect of contaminated land.[304]

iv. — CCAA proceedings of The Cash Store Financial Services

A. — Background

Cash Store Financial Services Incorporated ("Cash Store") was an Edmonton-based payday lender that owned and operated Canada's largest network of retail branches in the alternative financial products and services industry. Cash Store made payday loans to its customers, which were high interest bridge loans designed to help customers through temporary cash shortfalls. In May 2007, the federal government enacted legislation clarifying the rules with respect to payday loans and the criminal interest provisions of the *Criminal Code* that required companies offering payday loans to qualify for an exemption from those provisions pursuant to regulations established by each province.[305]

The provinces in which Cash Store carried on business enacted differing and inconsistent regulatory schemes for payday loans. The transition to a regulated market environment had a serious impact on Cash Store's viability and led to provincial regulatory actions against Cash Store and the imposition of significant sanctions.[306] Cash Store also defaulted under its loan arrangements with its lenders, threatening its operations and financial stability. Multiple class actions were filed against it in various provinces alleging that it was not in compliance with its regulatory obligations.[307]

B. — *CCAA* proceedings

Cash Store obtained an initial order pursuant to the *CCAA* on 14 April 2014. Between the granting of the initial order and filing its plan of compromise and arrangement, the Cash Store settled some of the litigation against it and completed a sale of substantially all of its assets.[308] However, over the course of the *CCAA* proceeding, Cash Store became aware of additional claims that could be pursued against some of its former directors, officers, advisors, and other third parties. Cash Store's plan provided for the distribution of the proceeds of the asset sale among second lien noteholders, gave effect to third party releases required in connection with the settlement of litigation claims, provided a forum for the distribution of settlement proceeds, and provided for a litigation trust in order to permit creditors to obtain the benefit of the unsettled litigation claims.[309] Recoveries under the settlements amounted in aggregate to approximately $36.9 million and were conditional upon the provision of settlements.[310]

Cash Store's plan also provided for a litigation funding and indemnity reserve, which is intended to finance any litigation that is pursued by the litigation trustee, although the litigation claims remained in the name of Cash Store.[311] The reserve is to be maintained and administered by the monitor, and can be supplemented by cash on hand.[312]

C. — Sanction of the Cash Store plan

In his written reasons issued in connection with the sanction order, Justice Morawetz wrote that in order to approve a plan, the following requirements must be satisfied: (a) strict compliance with all statutory requirements, (b) all materials filed and procedures carried out examined to determine if anything had been done or purported to be done that was not authorized by the *CCAA*, and (c) the plan must be fair and reasonable. [313] In determining whether a plan is fair and reasonable, Justice Morawetz said the courts will consider (i) the classification of creditors and creditor approval, (ii) what creditors would receive on liquidation or bankruptcy compared to the plan, (iii) alternatives to the plan and bankruptcy, (iv) oppression, (v) unfairness to shareholders, and (vi) the public interest. [314]

Justice Morawetz noted that providing for an ongoing trust to permit litigation claims to be pursued for the benefit of the stakeholders was a factor supporting the conclusion that the plan was fair and reasonable. He also considered factors such as the lengthy negotiations required to conclude the plan, the plan's global resolution of claims and class actions, the lack of realistic alternatives, the appropriateness of the releases, and the support of the monitor, the chief restructuring officer and various stakeholder groups. [315]

Justice Morawetz found that the releases satisfied the *Metcalfe* test given the fulsome notice and disclosure thereof to the stakeholders, the success of the plan being contingent upon the inclusion of the releases, the releases being sufficiently broad to achieve their objectives but not so broad as to offend public policy, the absence of releases not permitted under the *CCAA*, and the monitor's support of the releases. [316] He also approved the settlements provided for in the plan on the basis that they satisfied the test in *Robertson v Proquest Information and Learning Co*, [317] being that the transactions were fair and reasonable, the transactions would benefit the debtor and its stakeholders generally, and the settlements were consistent with the purpose and spirit of the *CCAA*.

D. — Litigation by the litigation trustee

To date, the trustee has commenced three proceedings on behalf of Cash Store against third parties. [318] Cash Store was recently ordered to pay security for costs in the amount of $1.6 million with respect to all three proceedings on the basis that it conceded that it had insufficient assets to pay the costs of the defendants if they successfully defend the actions. The creditors, having already received substantial distributions under the *CCAA* plan, which was successfully implemented, also did not meet the test of showing that Cash Store was not impecunious. [319] In its ruling, the Court noted:

> There is an imbalance in an action that is being pursued by a shell company for the benefit of creditors who are not parties. The creditors are quite properly realizing on the plaintiff's causes of action. They will be entitled to the benefit of costs awards if they win. But as things currently stand, the creditors will not be liable for costs if the plaintiff loses. That is the imbalance that security for costs was designed to remedy. [320]

This ruling illustrates that a litigation trust must have sufficient funds to discharge costs awards. The Court in that case believed the creditors in Cash Store had the means to fund such costs but where the trust beneficiaries do not, consideration would have to be given in structuring the trust to ensure that litigation, including potential costs awards, will be funded.

v. — CCAA proceedings of Hollinger Inc

A. — Nature of business and operations

Hollinger Inc ("Hollinger") was a holding company that published newspapers through its numerous subsidiaries. Its principle asset was a controlling interest in Sun-Times Media Group, Inc ("STMG") through its ownership of STMG's class A and class B common stock. [321]

In 2003, several years prior to Hollinger seeking *CCAA* protection, Tweedy, Browne Company LLC, a public shareholder of STMG, demanded that STMG undertake an investigation into the allegations of certain unauthorized related party transactions. [322] In response to these demands, a special committee was formed for the purposes of investigating the conduct of STMG's board of directors, the results of which were made public in the summer of 2004. [323] In its report, the special committee found that approximately $32.15 million USD in unauthorized payments had been made by STMG to related parties, including to several members of Hollinger's board. Shortly after this report was published, Catalyst Partners Inc, a significant creditor of Hollinger, brought an application alleging that its rights as a creditor had been oppressed by the alleged acts of misconduct committed by STMG's board, and an inspector was appointed under the Ontario *Business Corporations Act*. [324]

The ongoing disputes between STMG and its various stakeholders began to have a direct impact on Hollinger. Its principal asset was its ownership interest in STMG. Hollinger's Class B shares in STMG provided it with voting control. Under the articles of STMG, if the Class B shares were assigned, those shares would automatically convert into Class A shares, which only had one vote. Hollinger had pledged some of its Class B shares in STMG to the noteholders and was in default of its obligations to them. Hollinger became concerned that the noteholders would enforce their security against the Class B shares, with the result that their special voting privileges would be lost [325] and Hollinger's economic interest in STMG would be destroyed. Pursuant to STMG's articles, any assignment of the Class B shares, including an assignment to a trustee, would cause those Class B shares to be converted into Class A shares. [326]

B. — *CCAA* proceedings

Hollinger and subsidiaries commenced proceedings under the *CCAA* on 31 July 2007 in order to preserve the *status quo*, permit the applicants and STMG to pursue a strategic resolution process, and to obtain a stay of any action against the applicants, including the enforcement of security. The applicants were granted *CCAA* protection on 1 August 2007. No plan was ever approved or sanctioned.

C. — Multi-party settlement agreement and litigation trust

The litigation trust was created pursuant to a multi-party settlement agreement between Hollinger, STMG and a noteholder. In an order made on 21 May 2008, the Court approved the settlement agreement and appointed former Justice John D Ground as the litigation trustee over all claims and causes of action in favour of the applicants. [327] Those causes of action were mostly against Hollinger's former officers, directors, advisers and banking syndicate. [328] The order appointing the trustee provided that he was an officer of the court in exercising his powers and fulfilling his obligations. [329] Under the settlement agreement, the trustee was responsible for: (i) administering the litigation trust assets efficiently and in a cost-effective manner with a view to maximizing the net return, after costs, from those assets to the applicants and their creditors and other stakeholders; [330] (ii) providing periodic reports to the advisory committee, which was composed of one representative from Hollinger, one representative from a noteholder and the trustee; [331] (iii) acting in accordance with any majority decision of the advisory committee; [332] and (iv) supervising and administering the litigation claims on a day-to-day basis, including giving direction to counsel, seeking direction from the advisory committee with respect to litigation strategy, financing for the litigation claims, determining whether or not to accept or make settlement offers, and determining how proceeds of any settlements are applied. [333]

The settlement agreement released Hollinger from all of STMG's claims other than three claims relating to a promissory note, an indemnity and an aircraft lease. [334] The agreement provided, however, that STMG's recovery from these claims could not exceed $15 million USD. [335] The litigation trust was provided with initial funding but the amount thereof remained confidential. [336] The settlement agreement permitted the trustee to obtain additional financing to carry out its duties but was required to obtain the pre-approval of the advisory committee. [337] The trustee's reports do not disclose whether such financing was ever requested. The settlement agreement also permitted the trustee, with the approval of the advisory committee, to use the proceeds realized from settlements or judgments to fund litigation. [338] The trustee did finance some of its more substantial claims using this funding tool. [339]

D. — Subsequent actions of the litigation trust

Subsequent to its creation, the litigation trust threatened action against Hollinger's former counsel [340] and auditors. The trustee engaged in mediation with the law firm in 2010 and subsequently concluded a settlement that was approved by the Court. [341] The trustee engaged in mediation with the former auditors in respect of audit, tax and consulting services and settled Hollinger's claim against them in 2010. [342]

The trustee also pursued claims against former officers, directors and shareholders of Hollinger and its subsidiaries. In February 2014, the trustee entered into a court approved settlement with Conrad Black, his wife and certain related companies pursuant to a court approved settlement. [343]

The trustee on behalf of Hollinger pursued claims against various other former officers and directors of Hollinger and their individual holdings companies, and entered into a series of court approved settlements with these parties, in some cases on the condition that they cooperate in any litigation by the trustee against other parties. Those settlements were conditional on exchanges of releases. [344] More recently, the trust achieved a final settlement on all claims against it, [345] and was permitted by the Court to release all reserves associated with pending or ongoing litigation. [346]

vi. — CCAA proceedings of Montréal, Maine & Atlantic Canada Co

A. — Background to *CCAA* proceedings

Montréal, Maine & Atlantic Canada Co ("MM&A") was a small freight railroad company that was a wholly-owned subsidiary of Montréal, Maine & Atlantic Railway Ltd ("MM&AR"). Together, the two companies operated in Québec, Vermont and Maine. [347] On 6 July 2013 the brakes on a parked train failed and the resulting derailment caused a large explosion in the centre of the Town of Lac-Mégantic, Québec that killed 47 people and caused substantial damage.

B. — Commencement of *CCAA* proceedings

MM&A applied for protection under *CCAA* on 8 August 2013 [348] in Québec, stating that it urgently required a stay of proceedings from its creditors and from the numerous claims made or anticipated to be made against it, including pursuant to a class action in Québec against MM&A and MM&AR. [349] MM&AR sought and was granted protection under Chapter 11 of the US *Bankruptcy Code* on 7 August 2013.

MM&A initiated the *CCAA* proceedings to permit it to continue operations, serve its customers who were dependent on the railway, and continue employing its work force. [350] MM&A also applied for orders creating a claims procedure and authorizing it to carry out a sale process to sell the business and assets of MM&A and MM&AR as a going-concern and thereby enhance their market value. [351]

As a result of the derailment, a multitude of actions and class actions were threatened or commenced against MM&A and MM&AR, including a Québec class action on behalf of the victims of the derailment seeking to have MM&A and other defendants declared solidarily liable for the damages suffered by them, [352] thirteen actions in the US commenced by special administrators of the estates of deceased victims against MM&AR and other defendants, demands by Lac-Mégantic for physical damage to the town in the amount of $7,796,948.67, demands by business owners, rail car owners, Canadian Pacific Railway and other persons with respect to damage to physical property, and orders requiring remediation by the provincial environmental regulator. [353]

Although both MM&A and MM&AR held insurance policies that would provide certain coverage for the claims brought against them, the coverage was insufficient to cover all potential liabilities associated with the derailment. [354] Due to the volume and magnitude of the claims that MM&A was facing, it asserted that it would be impossible to continue operations and provide services without the protection of an initial order under the *CCAA*. [355]

C. — The *CCAA* plan of compromise and arrangement and the US plan of liquidation

In September 2013, MM&A and the trustee appointed in the Chapter 11 bankruptcy proceeding engaged an investment banker to conduct a sale process of MM&A and MM&AR's assets as a going-concern. Following an auction, the assets were sold to a purchaser. The sale was approved by the US Bankruptcy Court in January 2014. The sale was concluded in early June 2014 and MM&A's operations were terminated. [356]

Because the sale proceeds were insufficient to satisfy all of the claims against MM&A and MM&AR, parties sought contributions from third parties who were potentially liable for the derailment [357] in exchange for full and final releases. [358] In total, an indemnity fund of approximately $300 million was formed from contributions by directors and officers of MM&A, insurance companies, oil producers, tank car lessors and others in exchange for full and final releases. [359] The stakeholders negotiated a plan of compromise and arrangement under the *CCAA* and a liquidation plan under Chapter 11. The funds under the plans were distributed amongst claimants on the basis of a point system set out in the plan that was intended to account for various aggravating factors. Wrongful death claimants in Canada and the US received their distributions pursuant to a portion of the fund allocated to wrongful death claims pursuant to the Chapter 11 liquidation plan, [360] and claims for personal injury, moral damages and property damage, government claims, or subrogated insurance claims in Canada and the US were to be satisfied solely under the *CCAA* plan. [361] In exchange for a distribution from one of the plans, each claimant was bound by a full and final release of liability to all third parties that contributed to the settlement fund in respect of the derailment. [362] Both plans were binding on all claimants. [363] Parties who were potentially liable but did not contribute, such as Canadian Pacific Railway Company ("CP"), did not receive a release. CP was a defendant in one of the class actions and opposed the sanctioning of the plan where MM&A was not released because it argued that this would have the effect of leaving it solely responsible. The Court did not accept that submission and indeed said that it would be unfair for CP to benefit from a release where it did not contribute to a settlement, and that it was for the Court in the class action to determine whether it had liability and the extent of that liability. [364]

In the US, the trust for death claimants was administered by a trustee who was granted authority under the Chapter 11 plan to (a) hold, manage, sell and distribute the assets of the trust; (b) hold, manage, sell and distribute cash obtained through the exercise of its power and authority; (c) object to or seek disallowance of any wrongful death claim; and (d) exercise other powers provided in the agreement that settled the trust. [365]

vii. — CCAA proceedings of The Canadian Red Cross Society

A. — Background and commencement of the *CCAA* proceedings

In 1998, the Canadian Red Cross Society (the "Society") had over $8 billion in tort claims filed against it pursuant to over 230 actions and 10 class actions. These claims arose from serious and even life-threatening diseases caused to thousands of victims by tainted blood collected and distributed by the Red Cross. [366] Because the Society had no means of paying the resulting liabilities, it commenced proceedings under the *CCAA* to (a) permit it to sell the blood collection and distribution business to a newly created entity; (b) continue its other social and humanitarian duties; and (c) develop a plan of compromise or arrangement with the claimants.

It was critical that the claims be resolved quickly, because many of the claimants had substantially reduced life expectancies as a result of the illnesses acquired from the tainted blood. The Society also had other creditors, such as trade creditors and unions, whose claims also had to be resolved but were less urgent. The initial order, made on 20 July 1998, stayed all claims against the Society, and permitted the Society to carry on its blood supply functions until the sale could be completed. Further, the Society was permitted to carry on its social and humanitarian activities that were unrelated to the supply of blood. [367] In order to facilitate an expeditious proceeding, the Court appointed representative counsel for the transfusion claimants, whose fees were to be paid by the federal and provincial governments. [368]

B. — Plan of compromise and arrangement and litigation trust

A commission that was created to inquire into the tainted blood issue recommended that a new blood supply system be developed immediately in order to protect the public. It also recommended the creation of a no-fault scheme to compensate the victims. [369] Pursuant to a court approved sale, the Society's blood supply responsibilities were sold to Canadian Blood Services, which was to provide the blood program for all of Canada except Québec, and to Hema-Québec, which was to provide the blood program in Québec. The sale proceeds amounted to $169 million, of which $70-$100 million was allocated to satisfying the transfusion claims. [370]

The Society prepared a plan of compromise and arrangement which established a trust fund for the purpose of settling the transfusion and HIV claims filed against the Society, the insurers and other co-defendants. [371] The trust was funded by a lump sum payment in the amount of $70,025,000, which was derived from the sale of the Society's assets as contemplated in the Society plan, in combination with amounts paid into escrow by insurers and other co-defendants that were typically hospitals and doctors. [372] The plan divided claimants into three categories: HIV claimants, whose claims related to having been infected with HIV as a result of tainted blood; transfusion claimants, whose claims related to having been infected with a disease other than HIV as a result of tainted blood; and ordinary creditors, whose claims related to anything other than HIV or other transfusion related diseases. Only transfusion claimants and the HIV claimants were beneficiaries under the trust.

The plan was dependent on a settlement between federal, provincial and territorial governments and claimants in various class actions who had been infected between 1986 and 1990. [373] The settlement provided that the governments would pay roughly $1.5 billion to approximately 10,000 claimants. This settlement reduced the number of claims that the Society had to deal with, and as a result, dramatically increased the pool of assets available to satisfy those claims that remained. [374] The plan provided for fixed sum settlements for all HIV claimants and transfusion claimants. [375] In exchange for the fixed settlement fund, claimants receiving distributions were deemed to have released the Society and the other contributors to the trust from all HIV and transfusion claims. [376]

V. — DISCUSSION ON CURRENT STATUS OF TRUSTS IN RESTRUCTURING PROCEEDINGS IN CANADA

Based on the *CCAA* proceedings where litigation trusts and liquidation trusts have been employed, they appear to be most appropriate in larger insolvencies where there are large numbers of creditors, sometimes with claims that cannot easily be validated and quantified in a traditional insolvency proceeding format, and significant assets of the debtor that cannot be realized for the benefit of creditors within a reasonable time horizon for the restructuring proceeding. Many cases in Canada, as in the US, involve mass tort claims or claims of shareholders where the debtor is a public issuer, whether pursued in class actions or otherwise, against the debtor which rendered the debtor actually or potentially insolvent. These trusts are also appropriate where the debtor has no further economic interest in the litigation asset and therefore no real interest in maximizing the amounts realized from it, or in fact by virtue of its business relationships has an interest in the litigation not being pursued.

The trust has been most effectively employed *in tandem* with other *CCAA* "tools" in order to permit the restructuring of the debtor and the maximization of the proceeds available to different classes of creditors. The principal accompanying tools have been third party releases, settlement agreements and orders preventing the prosecution of proceedings against third parties. To date, *Lutheran* has been the only proceeding in Canada where the use of the litigation trust was challenged and therefore the appropriateness of its use was carefully examined by the Court. It is clear, however, that the test for their approval will depend on what tools are being employed by or *in tandem* with the trust.

For instance, if the debtor is a defendant in significant class actions and part of the restructuring solution involves their settlement through contributions by other defendants such as insurers in exchange for releases, *Lutheran*, *US Steel* and *Cash Store* confirm that in order for such a plan to be approved, the debtor will have to satisfy the test in *Metcalfe* for releases, the test in *Robertson v Proquest Information and Learning Co* and *MM&A* for settlement agreements, the test in *Century* for the appropriateness of orders, and the test for sanctioning plans set out in *Metcalfe*, *Lutheran*, *Sino-Forest*, *Cash Store* and in the MM&A proceedings. [377] These decisions suggest that courts will determine the appropriateness of the inclusion of litigation trusts by balancing the benefits received by the stakeholders through the use of the trust and the purpose for which the trust mechanism is being used against the rights that stakeholders are being asked to compromise. It would seem that the more substantive those rights are, the more likely there will be issues with respect to the appropriateness of the mechanism.

Where there is a simpler litigation trust that either permits litigation claims of the debtor to be realized after the debtor's plan is sanctioned and *CCAA* emergence, or permits complex litigation claims against the debtor to be validated and quantified for the purposes of distributing a settlement fund, the applicable test is simply the plan sanction test. Because the inclusion of the litigation trust in the first scenario is for the purpose of maximizing the distributions to creditors, courts have treated it as a positive factor supporting the conclusion that the plan is fair and reasonable and ought to be sanctioned. Examples of this are found in *Lutheran*, *Cash Store* and *Sino-Forest*. In the second scenario, the AH Robins proceeding in the US and the MM&A and MM&AR proceedings in Canada and the US are good examples of a litigation trust structure being employed to create a mechanism for valuing and validating claims of multiple injury claimants in a nuanced way that encourages settlement and the maximization of distributions to that class of creditors. Validating and valuing claims through a claims process administered by the trust also has the benefit of avoiding a multiplicity of parallel judicial proceedings to determine claims that can result in reducing the amounts ultimately available to creditors. That was certainly a consideration in the AH Robbins and the MM&A litigation trusts.

Both *Lutheran* and *Sino-Forest* suggest that courts do not believe that litigation trustees are necessarily subject to the limitation applicable in the US of only being able to pursue claims of the estate against third parties. However, Justice Romaine noted in her decision in *Lutheran* that it may not always be appropriate to stream third party claims through a litigation trust. In that case, given that the majority of the creditors were elderly and the trust had clear procedural benefits that seemed likely to maximize proceeds ultimately available to them, Justice Romaine concluded that the streaming was reasonable and connected to the overall restructuring. [378] It was also important in that case that substantive rights of creditors were not being lost by virtue of the streaming. Their causes of action remained but were being pursued on their behalf by the committees acting as litigation trustees. [379]

Where litigation trusts are pursuing claims against third parties after the sanction and implementation of a plan, the *Metcalfe* test for the provision of third party releases requires court approval for such releases. In principle, as long as the scope of such releases and type of parties who might benefit from them are set out in or clearly contemplated by the plan, and the court reserves jurisdiction to grant such releases, such releases should be acceptable if they otherwise satisfy the *Metcalfe* tests. To the extent that such settlements and releases are necessary, it would be prudent to maintain the *CCAA* proceedings and the jurisdiction of the court for the limited purpose of providing advice and direction to the litigation trustee and approving and implementing settlements.

There ought to be no reason why a litigation trust could not be employed in insolvencies where there is no plan of compromise and arrangement or that proceed under legislation other than the *CCAA*. For instance, Hollinger never filed a plan and yet pursuant to a settlement agreement provided for a litigation trust for the benefit of the creditors. However, the releases provided in the Hollinger proceedings appear to be conventional releases of the type that are generally exchanged upon the settlement of legal actions. If a broader release was required, it would be difficult to accomplish it outside the context of a *CCAA* plan or a *BIA* proposal given the requirement that there be a reasonable connection between the third party release and the restructuring to be achieved by a plan.[380]

The potential for litigation trusts to be abusive to other litigants was considered by the Court in proceedings taken by the Cash Store trust. Cash Store was required to post security for costs because it had insufficient assets to satisfy any cost award against it and yet it was litigating on behalf of creditors who did have such means. There was an inherent unfairness in that situation that appeared to trouble the Court. This decision highlights the care that must be taken by professionals in structuring trusts. Other issues that must be considered are how the professional and administrative costs of the trust will be paid, what level of reporting to the beneficiaries and the court will be required, what the scope of the trustee's powers will be and to what extent the trustee will be required to obtain the approval or be able to seek the advice and direction of the court. Also, to what extent will the beneficiaries be given a voice in the administration of the trust and the strategies employed by the trustee to maximize value for them.

Liquidation trusts have not been extensively used in Canada. Generally speaking, the receivership mechanism and the ability to liquidate all or substantial portions of a debtor's property in *CCAA* proceedings is more than adequate to deal with most situations where the debtor's property must be liquidated for the benefit of the creditors. However, as in the environmental trust employed by GM in its Chapter 11 proceedings, USSC employed an environmental trust in its *CCAA* proceedings. The benefit in the USSC case was that land that was virtually unsellable in its current, contaminated state was reserved for the long term benefit of pension beneficiaries who otherwise would have received very little in respect of their unfunded deficiency claims. A mechanism was put in place to monitor and remediate the lands, which was in the public interest, and the lands' implicit "uncontaminated" value was reserved for a time when the long term remediation work had been completed. Such trusts could have a role in resolving other long term contamination of industrial sites in Canada and perhaps abandonment obligations with respect to the mining and petroleum industries.

Care must be exercised in structuring trusts. They must satisfy the general trust requirements of the three certainties. In *Lutheran*, it was significant that the monitor carried out broad consultations with the stakeholders regarding the purpose and effect of the litigation trusts. An independent trustee who is court appointed and therefore an officer of the court may well have avoided some of the negative perceptions at work in the litigation carried out by Cash Store on behalf of its creditors. Courts are also able to provide protections to the trustee against liabilities. The decision in *Lutheran* also suggests that where procedural and substantive rights of stakeholders or third parties in *CCAA* proceedings are being affected by a litigation trust structure, there must be compelling reasons to support this that are grounded in the policies underlying the *CCAA*. Canadian jurisprudence supports the use of trusts in the *CCAA* in appropriate circumstances to maximize distributions to creditors and accomplish other objectives supported by the *CCAA*.

Footnotes

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1 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].

2 US *Bankruptcy Code*, 11 USC [US *Bankruptcy Code*].

3 For instance, upon granting the twenty-fifth extension of the stay of proceedings in *Re Poseidon Concepts Corp*, 2017 CarswellAlta 749 (Alta QB), Justice Horner said that unless a plan was filed or there were extraordinary circumstances, the stay would not be further extended.

4 *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* (2008), 92 OR (3d) 513 (CA), leave to appeal refused 2008 CarswellOnt 5432, 2008 CarswellOnt 5433, 390 NR 393 (note), 257 OAC 400 (note), [2008] SCCA No 337 [*Metcalfe*]; Kelly Bourassa and Milly Chow, "At the Crossroads: What Happens When Class and Insolvency Proceedings Collide?", in Janis P Sarra and Barbara E Romaine, eds, *Annual Review of Insolvency Law 2014* (Carswell: Toronto, 2015) at 9.

5 For instance, Crystallex International Corp ("Crystallex") commenced *CCAA* proceedings on 23 December 2011. The principal asset according to the Court in *Re Crystallex International Corp*, 2012 ONCA 404, application / notice of appeal 2012 CarswellOnt 8914 (SCC), additional reasons 2012 ONCA 527, 2012 CarswellOnt 9479, leave to appeal refused 2012 ONCA 527, 2012 CarswellOnt 9479 at para 2, was a $3.4 billion USD arbitration claim against the government of Venezuela in relation to the cancellation of a contract giving it an interest in a mining property. According to the redacted twentieth report of Ernst & Young Inc, the monitor, dated 24 May 2017, Court File No CV-11-9532-00CL (ON SCJ [Comm List]), in April 2016 an international arbitration panel awarded Crystallex $1.202 billion USD in damages, but Crystallex has yet to recover anything under that award, there has yet to be any distributions to creditors or shareholders, and the *CCAA* proceedings are, after six years, still ongoing.

6 David P Bart *et al*, *A Practitioner's Guide to Liquidation and Litigation Trusts* (Alexandria, VA: American Bankruptcy Institute, 2015) at 42 ["*A Practitioner's Guide*"].

7 *Ibid* at 42 and 43.

8 *Ibid* at 44.

9 *Internal Revenue Code*, 26 USC §§ 671-677.

10 Treas Reg § 301.7701-4.

11 *Dynasty Oil & Gas v Citizens Bank*, 540 F3d 351 at 355 (5th Cir, 2008).

12 For example, in *Browning v Levy*, 283 F 3d 761 (6th Cir, 2002).

13 *Ibid* at 769.

14 *Tepper v Keefe Bruyette & Woods Inc*, No 3:11-CV-2087-L-BK, 2012 US Dist LEXIS 133865 (ND Tex).

15 *Ibid* at 20-21.

16 *The Lincoln Electric Company v Michael P Manahan*, 2011 US Dist LEXIS 89169 at 6 (ND Ohio ED), citing *Schertz-Cibolo-Universal City Indep Sch Dist v Wright (In re Educators Group Health Trust)*, 25 F 3d 1281 (5th Cir, 1994).

17 *Ibid* at 6, citing *Koch Ref v Farmers Union Cent Exch Inc*, 831 F 2d 1339 (7th Cir, 1997).

18 A Practitioner's Guide, *supra* note 6 at 94.

19 *BWI Liquidating Corp v City of Rialto*, 437 BR 160, 2010 Bankr LEXIS 3284 at 4 (Bank Del).

20 *Ibid* at 6, citing *In Re Resorts International, Inc*, 372 F 3d 154 (3rd Cir, 2004) [*Resorts*].

21 *Ibid* at 6, citing *Resorts.*

22 *Ibid* at 8.

23 *Ibid* at 6. See also *Morris v Zelch*, 372 BR 3 (Bank ND Ohio ED, 2007), where the Court said that notwithstanding that the description in the plan of the causes of action being assigned was too general, the description in the accompanying disclosure statement was sufficiently specific to allow the causes of action to survive.

24 *Caplin v Marine Midland Grace Trust Co*, 406 US 416 at 428-432 (1972) [*Caplin*].

25 Andrew J Morris, "Clarifying the Authority of Litigation Trusts: Why Post-Confirmation Trustees cannot assert Creditors' Claims against Third Parties" (2012) 20:2 *ABI Law Review* 589 at 601-602 ["*Morris Article*"].

26 *Ibid* at 592, referring to *Grede v Bank of New York Mellon*, 598 F 3d 899 at 902 (7th Cir, 2010), where the Court held that the restrictions cease to apply at the time of confirmation so that a trustee can pursue claims on behalf of assigning creditors rather than being confined to pursuing claims on behalf of the estate.

27 *A Practitioner's Guide*, *supra* note 6 at 48 and 113.

28 Although according to *A Practitioner's Guide*, *supra* note 6 at 100, some courts have held that § 1129(a)(5) of the US *Bankruptcy Code* requires disclosure of individuals making up an oversight committee, referring specifically to *In re Beyond.com Corp*, 289 BR 138 at 144-45 (Bank ND Cal, 2003).

29 *A Practitioner's Guide*, *supra* note 6 at 112.

30 *Ibid* at 115.

31 *Ibid* at 96.

32 *Ibid* at 77 to 89.

33 *Ibid* at 111.

34 *Ibid* at 86 and 87.

35 Richard B Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (Chicago: University of Chicago Press, 1991) at 3.

36 *In Re No Dist of Cal "Dalkon Shield" IUD Products*, 526 F Supp 887 at 893 (ND Calif, 1981).

37 *In Re AH Robins Company, Incorporated, Debtor*, 880 F 2d 709 at 711 (4th Cir, 1989) [*Robins*].

38 *Ibid* at 711.

39 *Ibid* at 715.

40 *Ibid* at 717.

41 *Ibid.*

42 *Ibid* at 744.

43 *Ibid* at 715.

44 *Ibid* at 717.

45 *Ibid.*

46 *Ibid* at 718.

47 *Ibid* at 741.

48 *Vancouver Women's Health Collective Society Women's Health Clinic, Inc et al v AH Robins Company Inc*, 820 F 2d 1359 at 1360 (4th Cir, 1987).

49 Kenneth R Feinberg, "The Dalkon Shield Claimants Trust", (1990) 53:4 *Law and Contemporary Problems* 79 at 101 ["*Feinberg Article*"].

50 Georgene Vairo, "Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution", (1997) 31:1 *Loy LA L Rev* 79 at 153 ["*Vairo Mass Tort Claims*"].

51 *Robins*, *supra* note 37 at 720.

52 Georgene Vairo, "Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?", (1992) 61:3 *Fordham Law Review* 617 at 628 ["*Vairo Paradigm Lost*"].

53 *Robins*, *supra* note 37 at 720.

54 *Vairo Paradigm Lost*, *supra* note 52 at 630.

55 *In Re AH Robins Co Inc*, 88 BR 742 at 752 (ED Va, 1988) [*Robins Plan Approval*].

56 *Feinberg Article*, *supra* note 49 at 104.

57 *Vairo Paradigm Lost*, *supra* note 52 at 629.

58 *Ibid.*

59 *Feinberg Article*, *supra* note 49 at 106-108.

60 *Vairo Paradigm Lost*, *supra* note 52 at 630.

61 *Ibid* at 643.

62 *Ibid* at 638.

63 *Ibid.*

64 *Ibid* at 639.

65 *Ibid.*

66 *Vairo Mass Torts Claims, supra* note 50 at 153.

67 *Ibid* at 151.

68 *Robins Plan Approval, supra* note 55 at 750.

69 *Ibid* at 751.

70 *Ibid* at 751.

71 *In Re AH Robins Co Inc*, 80 F 2d 694 at 696 (4th Cir, 1989).

72 *Ibid* at 700.

73 *Ibid* at 696.

74 *Feinberg Article*, *supra* note 49 at 105.

75 *In Re Dow Corning Corp*, 211 BR 545 at 550 (Bank ED Mich ND, 1997) [*Dow Corning*].

76 Evan Caplan, "Milking the Dow: Compensating the Victims of Silicone Gel Breast Implants at the Expense of the Parent Corporation" (1997) 29 *Rutgers LJ* 121 at 122 ["*Caplan Article*"].

77 *Ibid* at 123.

78 *Dow Corning*, *supra* note 75 at 551.

79 See generally, *Stern v Dow Corning Corp, et al*, No C-83-2348-MHP (ND Cal, 1984).

80 *Hopkins v Dow Corning Corporation*, 33 F 3d 1116 at 1119 (9th Cir).

81 *Caplan Article*, *supra* note 76 at 125

82 *Ibid.*

83 *Dow Corning*, *supra* note 75 at 551.

84 *Ibid* at 552. See *In re Silicone Breast Implant Products Liability Litigation*, 1994 US Dist LEXIS 12521 for a more detailed description of the settlement agreement.

85 Jason Jardine, "The Power of the Bankruptcy Court to Enjoin Creditor Claims against Nondebtor Parties in Light of 11 U.S.C. 524(e): In re Dow Corning Corp", (2004) Iss 2 *BYU L Rev* 283 at 299.

86 *Dow Corning*, *supra* note 75 at 553.

87 *Ibid* at 593.

88 *Ibid* at 553-554.

89 *In Re Dow Corning Corporation, Debtor*, Case No 95-20512, *Amended Joint Disclosure Statement with respect to Amended Joint Plan For Reorganization for Dow Corning Corporation*, 4 February 1999 at 1 (Bank ED Mich ND) [*Dow Disclosure Statement*].

90 *In Re Dow Corning Corporation*, Case No 95-20512, *Memorandum Opinion and Order of Honorable Denise Page Hood*, 11 December 2002 at 29 (Dist ED Mich ND) [*Hood Memorandum*].

91 *In Re Dow Corning Corporation*, 280 F 3d 648 at 658 (6th Cir, 2002) [*Dow 6th Circuit*].

92 *Ibid.*

93 *Ibid.*

94 *Hood Memorandum*, *supra* note 90 at 653.

95 *Ibid* at 663.

96 See generally, *Hood Memorandum*, *supra* note 90.

97 *Hood Memorandum*, *ibid* at 17.

98 *Ibid* at 19-20.

99 *Ibid* at 27.

100 *Dow 6th Circuit*, *supra* note 91 at 654-655.

101 *Dow Disclosure Statement*, *supra* note 89 at 2.

102 *Ibid* at 2.

103 *Ibid* at 3-5.

104 *In Re Dow Corning Corporation*, Case No 95-20512, *Litigation Facility Agreement between Dow Corning Corporation and DCC Litigation Facility Inc,* 4 February 1999 at Article 2.03 (Bank ED Mich ND).

105 *Ibid* at Article 2.01.

106 *Dow Disclosure Statement, supra* note 89 at 9.

107 *Ibid.*

108 *Ibid.*

109 *In Re Dow Corning Corporation*, Case No 95-20512, *Settlement Facility and Fund Distribution Agreement between Dow Corning Corporation and the Claimants' Advisory Committee*, 4 February 1999 at Article 3.02(a)(i) (Bank ED Mich ND).

110 *Hood Memorandum, supra* note 90 at 34.

111 *Ibid* at 33.

112 *Ibid.*

113 "Dow Corning Emerges from Chapter 11 on June 1, 2004" (1 June 2004) online: <http://www.dowcorning.com/content/news/pr_chapter11emergence.asp> .

114 See, *eg*, *Ezra v DCC Litig Facility Inc*, 137 S Ct 703 (2017).

115 *In Re Motors Liquidation Company*, Chapter 11 Case No 09-50026, *Disclosure Statement for Debtor's Amended Joint Chapter 11 Plan,* 8 December 2010 at 10 (Bank SD NY) [*GM Disclosure Statement*].

116 *Ibid.*

117 *Ibid* at 11.

118 *Ibid* at 13.

119 *Ibid.*

120 *Ibid.*

121 *Ibid* at 14.

122 *In Re General Motors Corp*, 407 BR 463 at 480-481 (Bank SD NY, 2009) [*GM Petition Decision*].

123 *Ibid.*

124 *GM Disclosure Statement, supra* note 115 at 17.

125 *GM Petition Decision, supra* note 122 at 481.

126 *Ibid* at 17-19.

127 *Ibid* at 17-18.

128 *GM Disclosure Statement, supra* note 115 at 20.

129 *Ibid* at 76.

130 *Ibid* at 5 and 80.

131 *Ibid* at 83.

132 *Ibid* at 3, 31 and 86.

133 *In re Motors Liquidation Company*, Chapter 11 Case No 09-50026, *Second Amended and Restated Motors Liquidation Company GUC Trust Agreement*, 30 July 2015 at "Background" F (Bank SD NY) [*GUC Trust Agreement*].

134 *GM Second Amended Plan, infra* note 136 at 14.

135 *GM Disclosure Statement, supra* note 115 at 35.

136 *In re Motors Liquidation Company*, Chapter 11 Case No 09-50026, *Debtor's Second Amended Joint Chapter 11 Plan* at Article 7.4 (Bank SD NY) [*GM Second Amended Plan*].

137 *GUC Trust Agreement, supra* note 133 at Article 2.6.

138 *GM Disclosure Statement, supra* 115 at 20.

139 *Ibid* at 84.

140 *Ibid* at 11.

141 *Ibid* at 102

142 *Ibid* at 103.

143 *Ibid.*

144 Donovan WM Waters QC, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada* (Toronto: Carswell, 2012) at 140 ["*Waters*"].

145 *Ibid* at 159.

146 *Ibid* at 168, 169 and 171.

147 *Metcalfe*, *supra* note 4.

148 *Ibid* at paras 43 and 58.

149 *Ibid* at para 48 citing Georgina R Jackson and Dr 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: Carswell, 2008) at 41, ["*Selecting the Judicial Tool to get the Job Done*"].

150 *Metcalfe*, *supra* note 4 at paras 48 and 49.

151 *Ibid* at para 46.

152 Section 5 of the *CCAA*, *supra* note 1, provides the identical powers with respect to a compromise or arrangement between the debtor and its secured creditors.

153 *Metcalfe*, *supra* note 4 at para 60.

154 *Ibid* at para 61.

155 *Ibid* at para 62, citing *Re Air Canada*, [2004] OJ No 1909, 2 CBR (5th) 4 (SCJ [Commercial List]) at para 6; *Re Olympia & York Developments Ltd* (1993), 12 OR (3d) 500, [1993] OJ No 545 (Gen Div) at 518.

156 *Re T&N Ltd and others (No 3)*, [2007] 1 All ER 851, [2006] EWHC 1447 (Ch Div).

157 *Metcalfe*, *supra* note 4 at para 67.

158 *Ibid* at paras 70 and 72.

159 *Ibid* at para 113.

160 *Ibid* at paras 51 and 52.

161 *Ibid* at para 18.

162 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended [*BIA*].

163 See *Alberta (Attorney General) v Moloney*, [2015] 3 SCR 327 at paras 32 and 87 [*Moloney*], referring to the rationale behind the collective proceeding model through which equitable distribution is achieved found in Roderick J Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 3.

164 *Newfoundland and Labrador v AbitibiBowater*, [2012] 3 SCR 443 at para 21.

165 *Century Services Inc v Canada (AG)*, [2010] 3 SCR 379 at para 22 [*Century*].

166 *Moloney*, *supra* note 163 at para 33.

167 *Re Nortel Networks Corporation*, 2015 ONSC 1354 (SCJ [Commercial List]) [*Nortel*].

168 *Ibid* at paras 27 and 28.

169 *Century*, *supra* note 165 at paras 58 and 59, citing *Elan Corp v Comiskey* (1990), 41 OAC 282 at para 57.

170 *Ibid* at paras 64 and 65, referring to *Selecting the Judicial Tool to get the Job Done*, *supra* note 149.

171 *Ibid* at para 70.

172 We note that one notable exclusion from this discussion is the *CCAA* proceedings of Poseidon Concepts Corp, Poseidon Concepts Ltd, Poseidon Concepts Limited Partnership and Poseidon Concepts Inc. Gowling WLG is retained in that matter and we are therefore unable to comment upon it at this time.

173 *Re Lutheran Church of Canada*, 2016 ABQB 419 [*Lutheran*].

174 *Re Lutheran Church of Canada*, Court File No 1501-00955, *Affidavit of Kurtis Robinson, sworn 22 January 2015* (Alta QB) at para 4.

175 *Ibid* at para 15.

176 *Ibid* at para 22.

177 *Ibid* at para 22(b).

178 *Ibid* para 24.

179 *Ibid* at paras 23-24.

180 At the time of filing for *CCAA* protection, the loans due to the CEF in respect of the POP Development had a total outstanding balance of approximately $91.65 million and made up approximately 91% of the value of the CEF Loans (*ibid* at para 33).

181 *Ibid* at paras 6-7.

182 Based on approximately $9.29 million CEF deposits having been redeemed during the period of 1 February to 30 November 2014 (*Ibid* at para 23).

183 *Ibid* at para 2.

184 *Ibid* at para 8.

185 *Re Lutheran Church of Canada*, Court File Number 1501-00955, *First Report of the Monitor*, 17 February 2015 (Alta QB) at paras 21-22.

186 *Lutheran*, *supra* note 173.

187 *Re Lutheran Church of Canada*, Court File Number 1501-00955, *Order of The Honourable Justice CM Jones*, 23 February 2015 (Alta QB) at paras 5-18.

188 *Ibid* at para 3; see also *Lutheran*, *supra* note 173 at para 9.

189 The class action proceedings in Alberta were commenced pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5.

190 The class proceedings in British Columbia were brought by two depositors pursuant the *Class Proceedings Act*, RSBC 1996, c 50.

191 While reference is limited to the District's plan for the purposes of this paper, the DIL plan contained substantially the same provisions as the District's plan with respect to the creation of the subcommittee and the subcommittee's rights and obligations concerning the commencement and handling of a representative action (see also: *Lutheran*, *supra* note 173 at para 41).

192 *Ibid* at paras 15-19.

193 *Ibid* at paras 21, 22.

194 *Ibid* at paras 36-42.

195 *Ibid* at paras 23-24. There were members of the congregation who were depositors who believed that participating in any such action would be contrary to their religious beliefs and therefore a procedure was developed to permit them to opt out of any such actions.

196 *Lutheran*, *supra* note 173 at para 23.

197 *Ibid* at para 25.

198 *Re Lutheran Church of Canada*, Court File Number 1501-00955, *Fifth Amended Plan of Compromise and Arrangement of Lutheran Church-Canada, the Alberta-British Columbia District*, filed 10 June 2016 (Alta QB) at s 5.5.

199 *Ibid*, s 1.1; see also *Lutheran*, *supra* note 173 at para 26.

200 *Ibid.*

201 *Lutheran*, *supra* note 173 at para 16.

202 *Ibid* at paras 28-30.

203 *Ibid* at paras 125-126.

204 *Ibid* at para 126.

205 *Ibid* at paras 127, 129.

206 *Ibid* at paras 131, 171.

207 *Ibid* at para 130.

208 *Ibid* at para 133.

209 *Ibid* at para 134.

210 *Ibid.*

211 *Ibid* at para 160.

212 *Ibid* at para 142, referring to *Re Sammi Atlas Inc*, 1998 CarswellOnt 1145, [1998] OJ No 1089 (Gen Div [Commercial List]) at para 4.

213 *Ibid* at para 147. She also referred at para 144 to the decision in *Re Muscletech Research & Development Inc*, 2007 CarswellOnt 1029, [2007] OJ No 695 (SCJ [Commercial List]) at para 18, where the Court said that an important factor to be considered by the court in determining whether a plan is fair and reasonable is the degree of approval given to the plan by the creditors, and that a court should not second guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

214 *Ibid* at paras 152-155.

215 *Ibid* at para 155.

216 *Ibid* at paras 136-137.

217 *Ibid.*

218 *Ibid* at paras 172, 178.

219 *Re Sino-Forest Corporation*, 2012 ONSC 7050 (SCJ [Commercial List]), leave to appeal refused 2013 ONCA 456, 2013 CarswellOnt 8896, [2013] OJ No 3085, leave to appeal refused 2014 CarswellOnt 3023, 2014 CarswellOnt 3024, 472 NR 395 (note), 338 OAC 400 (note), [2013] SCCA No 395 at para 13 [*Sino-Forest I*].

220 *Re Sino-Forest Corporation*, 2012 ONSC 2063 (SCJ [Commercial List]) at para 8 [*Sino-Forest II*].

221 *Re Sino-Forest Corporation*, 2015 ONSC 439 at para 28 [*Sino-Forest III*].

222 *Sino-Forest I, supra* note 219 at para 15.

223 *Sino-Forest III, supra* note 221 at para 37.

224 *Sino-Forest I, supra* note 219 at 15.

225 *Ibid* at para 16.

226 *Sino Forest III, supra* note 221 at para 40.

227 *Ibid* at para 42.

228 *Sino-Forest I, supra* note 219 at para 17.

229 *Ibid* at para 18.

230 *Ibid* at para 20.

231 *Ibid.*

232 *Ibid.*

233 *Ibid* at paras 23 to 25.

234 *Ibid* at para 23.

235 *Ibid* at para 24.

236 *Ibid* at para 12.

237 *Ibid* at para 40.

238 *Ibid* at para 41.

239 *Ibid* at para 35.

240 *Sino-Forest Litigation Trust Agreement*, at s 1.5, "Nature and Purpose of the Litigation Trust", online: FTI Consulting, <http://cfcanada.fticonsulting.com/sfc/FinalPlanDocuments.htm> ["*Sino-Forest Trust Agreement*"].

241 *Re Sino-Forest Corp*, Court File No CV-12-9667-00CL, *Plan of Compromise and Reorganization,* 3 December 2012 (Ont SCJ [Commercial List]) at s 1.1, "Definitions" [*Sino-Forest Plan*].

242 *Sino-Forest Trust Agreement*, *supra* note 240 at s 1.1.

243 *Sino-Forest I, supra* note 219 at para 41.

244 *Sino-Forest Plan*, *supra* note 241 at s 1.1, "Litigation Trust Claims".

245 *Ibid* at s 1.1, "Excluded Trust Claims".

246 *Ibid* at s 1.5, "Nature and Purpose of the Litigation Trust".

247 *Sino-Forest Trust Agreement, supra* note 240 at s 3.2, "Collection of Litigation Trust Proceeds".

248 *Ibid* at s 4.1, "Litigation Trust Board".

249 *Ibid* at s 4.2, “Authority of the Litigation Trust Board”.

250 *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 4004 at para 18 [*Labourers' Pension Fund*].

251 *Sino-Forest Plan, supra* note 241 at s 1.1, “Named Third Party Defendants”.

252 *Ibid* at s 1.1, “Named Third Party Defendant Release”.

253 *SFC Litigation Trust (Trustee of) v Chan*, 2016 ONSC 3226 (Div Ct).

254 *Ibid* at para 9.

255 *Ibid* at para 12.

256 *Ibid* at para 11.

257 *Ibid* at para 14.

258 *Sino-Forest I, supra* note 219 at para 23.

259 *Labourers' Pension Fund, supra* note 250 at para 4.

260 Settlement Agreement between Class Action Plaintiffs and Dealers, online: Siskinds Law Firm, <http://www.siskinds.com/sino-forest-corp/>.

261 *Labourers' Pension Fund, supra* note 250 at para 14.

262 *Ibid* at para 20.

263 *Ibid* at para 22.

264 *Ibid.*

265 *Ibid.*

266 *Ibid* at para 29.

267 *Ibid* at para 36.

268 *Ibid* at para 47.

269 *Ibid* at para 34.

270 *Ibid* at para 49.

271 *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2015 ONSC 6886.

272 *Ibid* at para 24.

273 *Ibid* at paras 40 and 41.

274 Settlement Agreement between Class Action Plaintiffs and Independent Directors, online: Siskinds Law Firm, <http://www.siskinds.com/sino-forest-corp/> at paras 14-16.

275 *Ibid.*

276 *Ibid* at para 28.

277 *Re Canwest Global Communications Corporation*, 2010 ONSC 4209 (SCJ [Commercial List]).

278 *Ibid* at para 61.

279 *Ibid* at para 65.

280 *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL, *Report of the Proposed Monitor, sworn September 16, 2014* (Ont SCJ [Commercial List]) at para 10.

281 *Ibid* at para 11.

282 *Ibid* at para 14.

283 *Ibid* at para 17.

284 *Ibid* at paras 18-19.

285 *Ibid* at para 22.

286 *Ibid.*

287 *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL, *Affidavit of Michael McQuade, sworn September 16, 2014* (Ont SCJ [Commercial List]) at para 9.

288 *Ibid* at para 13.

289 *Ibid* at Schedule B.

290 *Ibid* at paras 129-131.

291 *Re US Steel Canada Inc*, Court File No CV-14-10695-00CL, *Second Amended and Restated Plan of Compromise, Arrangement and Reorganization*, 9 June 2017 (Ont SCJ [Comm List]) at s 2.2.

292 *Ibid* at s. 4.2.

293 *Ibid* at Schedule C s 6.

294 *Ibid* at Schedule C s 7.

295 *Ibid* at Schedule B s 13.

296 *Ibid* at Schedule C s 2.

297 *Ibid* at Schedule C s 11.

298 *Ibid* at s 4.2(g) and Schedule D.

299 *Ibid* at Schedule C s 7.

300 *Ibid* at Schedule C s 8.

301 *Ibid* at Schedule C s 7.

302 *Ibid* at Schedule C s 13.

303 *Ibid* at s 2.2.

304 *Ibid* at Schedule C s 13.

305 *An Act to amend the Criminal Code (criminal interest rate)*, SC 2007, c 9.

306 *Re The Cash Store Financial Services Inc*, Court File No CV-14-10518-00CL, *Affidavit of Steven Carlstrom, sworn April 14, 2014* (Ont SCJ [Commercial List]) at paras 93-113.

307 *Ibid* at paras 114-119.

308 *Re The Cash Store Financial Services Inc*, Court File No CV-14-10518-00CL, see generally, the Schedules attached to the Plan of Compromise and Arrangement, dated 6 October 2015 [*Cash Store Plan*].

309 *Re The Cash Store Financial Services Inc*, 2015 ONSC 7253 at para 25 [*Cash Store*].

310 *Ibid* at paras 22 and 23.

311 *Cash Store Plan*, *supra* note 308 at Definition: "Litigation Funding and Indemnity Reserve".

312 *Ibid* at s 6.4(d).

313 *Cash Store*, *supra* note 309 at para 34, referring to *Re Canadian Airlines Corp* (2000), 20 CBR (4th) 1 (Alta QB), leave to appeal refused 2000 ABCA 238, 2000 CarswellAlta 919, 266 AR 131, 84 Alta LR (3d) 52, 9 BLR (3d) 86, 20 CBR (4th) 46, [2000] 10 WWR 314, 228 WAC 131, [2000] AJ No 1028 ([In Chambers]), affirmed 2001 ABCA 9, 2000 CarswellAlta 1556, 277 AR 179, 88 Alta LR (3d) 8, [2001] 4 WWR 1, 242 WAC 179, leave to appeal refused 2001 CarswellAlta 888, 2001 CarswellAlta 889, 293 AR 351 (note), 275 NR 386 (note), 257 WAC 351 (note), [2001] SCCA No 60 and *Re Sino-Forest I*, *supra* note 219.

314 *Ibid* at para 38.

315 *Ibid* at para 40.

316 *Ibid* at para 46.

317 *Ibid* at para 54, citing *Robertson v Proquest Information and Learning Co*, 2011 ONSC 1647 (SCJ [Commercial List]).

318 For instance, see *1511419 Ontario Inc v Canaccord Genuity Corp*, (Ont SCJ Docket CV-14-10773-00CL), and *1511419 Ontario Inc v KPMG LLP*, (Ont SCJ Docket CV-14-10771-00CL).

319 *1511419 Ontario Inc v Canaccord Genuity Corp*, 2017 ONSC 3448 (SCJ [Commercial List]) at paras 1, 2 and 14.

320 *Ibid* at para 7.

321 *Re Hollinger Inc*, Court File No 07-CL-7120, *Affidavit of G Wesley Voorheis, sworn July 31, 2007* (Ont SCJ [Commercial List]) at paras 6-7 [*Voorheis Affidavit*].

322 *Re Hollinger Inc*, 2006 BCSECCOM 745 (CanLII) at para 12.

323 *Ibid* at para 14.

324 *Re Hollinger Inc*, 2012 ONSC 5107, additional reasons 2012 ONSC 7040, 2012 CarswellOnt 16526, 5 CBR (6th) 143 (SCJ [Commercial List]) at para 7 (see also: *Catalyst Fund General Partner I Inc v Hollinger Inc*, 2004 CanLII 40665 (Ont SCJ), affirmed 2006 CarswellOnt 1416, 79 OR (3d) 288, 15 BLR (4th) 171, 266 DLR (4th) 228, 208 OAC 55, [2006] OJ No 944 (CA), *Catalyist Fund General Partner I Inc v Hollinger Inc*, 2004 CanLII 22085 (Ont SCJ), additional reasons 2004 CarswellOnt 3782, 48 BLR (3d) 194, [2004] OJ No 3886, 2004 CanLII 66299 (SCJ); *Catalyist Fund General Partner I Inc v Hollinger Inc*, 2004 CanLII 66299 (Ont SCJ)); *Business Corporations Act*, RSO 1990, c B.16.

325 *Voorheis Affidavit*, *supra* note 321 at para 44.

326 *Ibid* at para 7.

327 *Re Hollinger Inc*, Court File No 07-CL-7120, *Order of the Honourable Mr Justice Campbell for the approval of multi-party settlement and cost reduction/asset enhancement program*, 21 May 2008 (Ont SCJ [Commercial List]) at para 13 [*MPSA Order*].

328 *Re Hollinger Inc*, Court File No 07-CL-7120, Report of John D Ground, QC (retired justice) in his Capacity as Litigation Trustee of the Applicants, dated 31 March 2011 (Ont SCJ [Commercial List]) at para 8 [*Litigation Trustee's First Report*].

329 *Ibid.*

330 *MPSA Order*, *supra* note 327 at Schedule A para 35.

331 *Ibid.*

332 *Ibid* at Schedule A para 36.

333 *Ibid* at Schedule A para 28.

334 *Ibid* at Schedule A at paras 10-11.

335 *Ibid* at Schedule A para 12.

336 *Ibid* at Schedule A para 39.

337 *Ibid* at para 16 and Schedule A para 38.

338 *Ibid* at Schedule A para 38.

339 *Litigation Trustee's First Report*, *supra* note 328 at para 45; *3rd Report of Hon John D Ground, QC in his capacity as Litigation Trustee of the Applicants*, 16 April 2012 at para 18.

340 "Release and Settlement Agreement Between Torys LLP and Hollinger Inc.", dated March 26, 2010, online: EY Document Centre <http://documentcentre.eycan.com/Pages/Main.aspx?SID=29>.

341 *Ibid.*

342 "Release and Settlement Agreement Between KPMG LLP and Hollinger Inc", 1 October 2010, online: EY Document Centre <http://documentcentre.eycan.com/Pages/Main.aspx?SID=29>.

343 See, *eg*, Court File No 05-CL-5822, Court File No 06-CL-621, Court File No 07-CL-6954, Court File No 06-CL-621, all of which were subsequently consolidated and continued, pursuant to an Order of Justice Campbell granted on 25 February 2013, in Court File No 06-CL-621. See also Affidavit of William E Aziz (Re: Black Settlement Approval and Notice), sworn 12 November 2014, Court File No 07-CL-7120 at paras 8-12 (Ont SCJ [Commercial List]).

344 For instance, see "Hollinger's Litigation Trustee Reaches Settlement with Former Director" (17 May 2012), PressReader online: <www.pressreader.com>; "Hollinger Inc.: Settlement of Claims Against Peter Atkinson" (19 July 2013), Market Wired online: <www.marketwired.com>; Order of the Honourable Mr Justice McEwen (White Settlement Approval), granted 30 April 2015, Court File No 07-CL-7120 (Ont SCJ [Commercial List]); the Order of the Honourable Mr Justice McEwen (Radler Ltd Settlement Approval), dated 13 November 2014, Court File No 07-CL-7120 (Ont SCJ [Commercial List]); and *Hollinger Inc v Radler*, 2006 BCCA 539 ([In Chambers]) at para 3.

345 *Re Hollinger Inc*, Court File No 07-CL-7120, *Thirty-First Report of the Monitor*, 21 August 2017 at para 20.

346 *Re Hollinger Inc*, Court File No 07-CL-7120, *Order of the Honourable Justice Myers (re: Stay Extension)*, 22 August 2017 at para 4.

347 *Re Montreal, Maine & Atlantic Canada Co*, Court File No 500-11-045094-139, *First Report of the Monitor on the State of the Petitioner's Financial Affairs*, 21 August 2013 (QCCS [Comm Div]) at para 6 [*MM&A First Report*].

348 *Ibid* at para 7.

349 *Re Montreal, Maine & Atlantic Canada Co*, Court File No 500-11-045094-139, *Amended Petition for the Issuance of an Initial Order*, 8 August 2013 (QCCS [Comm Div]) at para 3.

350 *MM&A First Report, supra* note 347 at para 8.

351 *Ibid.*

352 In common law parlance, jointly and severally.

353 *Ibid* at para 25.

354 *Ibid* at para 36.

355 *Ibid* at para 35.

356 *Re Montréal, Maine & Atlantic Canada Co*, Court File No 500-11-045094-139, *Nineteenth Report of the Monitor on the Petitioner's Plan of Arrangement*, 14 May 2015 (QCCS [Comm Div]) at para 9.

357 *Ibid* at para 11.

358 *Ibid.*

359 *Ibid* at para 14.

360 *In Re Montréal, Maine & Atlantic Railway, Ltd*, Bk No 13-10670, *Trustee's Revised First Amended Plan of Liquidation*, 15 July 2015 (Bank Maine) at para 4.12.

361 *Ibid* at paras 4.8-4.11.

362 *Re Montréal, Maine & Atlantic Canada Co*, Court File No 450-11-000167-134, *Amended Plan of Compromise and Arrangement*, 8 June 2015 (QCCS [Comm Div]) at para 5.1 [*MM&A Plan*].

363 *Ibid at* para 10.2; *MM&A Plan*, *ibid* at para 8.1.

364 *Montréal, Maine & Atlantic Canada Co, Richter Advisory Group Inc and Canadian Pacific Railway Company*, decision of the Honourable Gaétan Dumas, SCJ (13 July 2015, Court File No 450-11-000167-134) at paras 58 and 59.

365 *MM&A Plan*, *supra* note 362 at paras 1.86, 5.6 and 5.7.

366 Janis Sarra, *Creditor Rights and the Public Interest* (Toronto: University of Toronto Press, 2003) at 195 ["*Creditor Rights*"].

367 *Ibid* at 197.

368 *Ibid* at 197.

369 *Ibid* at 199.

370 *Ibid* at 201.

371 *Re The Canadian Red Cross Society*, Commercial List File No 98-CL-002970, Amended Plan of Compromise and Arrangement, 31 July 2000 (Ont SCJ [Commercial List]) at s 2.04 [*Red Cross Plan*].

372 *Ibid* at s 5.02.

373 *Ibid*, s 1.0, "FPT 1986-1990 Settlement".

374 *Creditor Rights*, *supra* note 366 at 206.

375 *Red Cross Plan*, *supra* note 371 at ss 5.08-5.11.

376 *Ibid* at s 5.13. This was pre-*Metcalfe*, and it was unclear whether third party releases would be effective.

377 There can be a question, in the case of legal proceedings where a debtor in *CCAA* proceedings is one of many defendants, and there are settlements, as to what extent pierringer agreements will govern claims as against non-settling defendants. Pierringer agreements permit a plaintiff to settle with one defendant on the basis that its claims as against the non-settling defendants are not extinguished by the settlement, but continue against the non-settling defendants to the extent that they are accountable for their own share of liability at trial. The non-settling defendants are no longer jointly liable with the settling defendants, but the non-settling defendants may be jointly liable with each other. See *Sable Offshore Energy v Ameron International*, [2013] 2 SCR 623 at paras 6 and 23. We have not explored this issue in this article. We have also not considered the effect of champerty and maintenance on the ability to assign claims to litigation trusts and to fund them.

378 *Lutheran*, *supra* note 173 at para 134.

379 *Ibid* at para 130.

380 *Metcalfe*, *supra* note 4 at para 70.

TAB 4

2016 ABQB 419
Alberta Court of Queen's Bench

Lutheran Church - Canada, Re

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

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

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

B.E. Romaine J.

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

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

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

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

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

I. Introduction

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

2 A group of creditors have applied to replace the Monitor at a time when the last two plans of arrangement and compromise in these proceedings had been approved by the requisite double majority of creditors. I dismiss the application to replace the Monitor on the basis that there is no reason arising from conflict or breach of duty to do so.

I find that the proposed plans are within my jurisdiction to sanction are fair and reasonable in the circumstances and should be sanctioned. These are my reasons.

II. Factual Overview

A. Background

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

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

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

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

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

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

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

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

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

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

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

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

B. The District Plan

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

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

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

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

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

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

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

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

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

19 Distributions to creditors will be subject to two holdbacks:

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

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

20 The District will continue to operate but the District's bylaws and handbook will be amended such that the District would no longer be able to raise or administer funds through any type of investment vehicle. NewCo will continue to operate the Harbour and Manor seniors' care facilities.

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

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

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

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

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

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

e) to provide dissent rights to minority NewCo shareholders.

The Representative Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) replacing counsel;

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

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

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

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

29 The District plan releases:

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

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

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

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

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

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

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

C. The District Meeting

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

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

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

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

35 Of the creditors who voted, 1,076 or approximately 83% voted in favour of the District plan and 218 or approximately 17% voted against the District plan. Those creditors who voted in favour of the plan held claims totalling approximately $65 million, or approximately 76% in value of the voting claims, and those creditors who voted against

the plan held claims totalling approximately $20.1 million or approximately 24% in value of the voting claims. Therefore, the District plan was approved by the required majority, being two-thirds in dollar value and a majority in number of voting eligible affected creditors.

D. The DIL Plan

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

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

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

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

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

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

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

E. The DIL Meeting

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

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

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

III. The Applications

A. Application to Remove the Monitor

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

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

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

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

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

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

1. Overview

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

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

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

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

2. Conflict of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 As the Monitor points out, its role with respect to the Representative Action is limited to assisting in the formation of the Subcommittees (although it has no role in deciding who will serve on the Subcommittees), facilitating the review of qualifications of legal counsel who wish to act in the Representative Action (although the Monitor will not participate in the selection of the representative counsel), and communicating with Depositors based on instructions given by the Subcommittees with respect to the names of the members of the Subcommittees, the name of the representative counsel, the estimated amount of the Representative Action Holdback, the commencement date of the Representative Action, the deadline for opting out of the Representative Action, and instructions on how to opt-out of the Representative Action should Depositors choose to do so. The Monitor's involvement will be directed by the Subcommittees and is anticipated to be limited to these tasks. The Monitor notes that, should it or the Subcommittees determine that the Monitor has a conflict of interest in respect of completing any of these tasks, the Monitor would recuse itself. It submits however, that it is appropriate that it be involved in order to ensure that the Subcommittees are able to undertake these duties in a manner that complies with the requirements of the plans and does not prejudice the rights of Depositors under the plans.

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

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

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

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

66 The opposing Depositors' submission that the Monitor cannot with any degree of neutrality or objectivity advise the Court on the reasonableness and fairness of the Representative Action provisions of the plans ignores the fact that the Monitor is not released from liability for any damages arising from its pre-CCAA conduct as auditor to the District by the plans.

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

68 In summary, I find that there is no actual or perceived conflict of interest that would warrant the replacement of the Monitor, particularly at this late state of the *CCAA* proceedings. The Monitor made full disclosure of the historical audit

relationship of its sister corporation to the District and DIL and its own pre-filing relationship to the District Group. Neither the Monitor nor Deloitte & Touche benefit from any releases as part of the plans. The Monitors' continuing involvement in the Representative Action process is limited, administrative in nature, and would take place pre-litigation.

3. Breach of Fiduciary Duty

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

70 The documents at issue are:

a) a master-site development plan (the "MSDP") that was prepared for the District by an architectural firm in December, 2012 and was subsequently approved by the Municipal District of Rocky View County. This plan includes site information, layout and analysis of activities, facilities, maintenance and operations and a context for land use and the associated population density; and

b) an approved area structure plan for the Hamlet of Conrich (the "Conrich ASP"), which was put forward by the MD of Rocky View and which includes reference to the Prince of Peace properties.

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

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

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

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

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

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

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

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

79 In that regard, I note that, although Mr. Kellen in a sworn affidavit deposed that he became aware of the MSDP and Conrich ASP on or about April, 2016, he appears to have posted a link to the Conrich ASP in the CEF Forum website on February 24, 2015. It also appears that the MSDP document was discussed in the CEF Forum in January, 2016, with a link posted for participants in the forum. Mr. Kellen filed a supplementary affidavit after the Monitor noted these facts in its Twenty-First Report. He says that he now recalls reviewing the Conrich ASP, which references the MSDP, in February, 2015, but does not recall reading it in any great detail, that he did not appreciate the significance of the documents and simply forgot about them. This is hard to reconcile with Mr. Kellen's present insistence that the documents are highly relevant.

80 A further issue is whether the Monitor's recommendation of the District plan gave rise to a duty to disclose these documents. The opposing Depositors submit that the Monitor endorsed the plan on the basis of potential upside opportunities available through development. This submission appears to refer to a sentence in the Monitor's March 28, 2016 report to creditors, as follows:

> The issuance of NewCo Shares pursuant to the District Plan allows District Depositors to benefit <u>from the ability to liquidate</u> the Prince of Peace Properties at a time when market conditions are more favourable <u>or the ability to benefit from potential upside opportunities</u> that may be available <u>such as through the further expansion of the Harbour and Manor seniors' care facilities, through a joint venture</u> to further develop the Prince of Peace Properties <u>or through other options</u>
>
> (emphasis added).

81 Clearly, the Monitor in its report referenced further development as only one of the options available to NewCo shareholders at the time of their first shareholders' meeting. It is incorrect to say that the Monitor's endorsement of the District plan was based solely on the option of development by NewCo acting alone. The Monitor did not recommend any particular mandate for NewCo in its various reports.

82 The Monitor decided that disclosure of the two documents at issue was not necessary in the context of a plan that put decisions with respect to the various options available to the new corporate owner of the property in the hands of the shareholders at a future date.

83 The opposing Depositors submit, however, that the District Depositors had the right to this information relating the pros and cons of development before deciding whether to become NewCo shareholders in the first place.

84 As it happened, they did have such access through the Monitor's April 29, 2016 QFA document, and also, it appears, through information posted on the CEF Forum and from information communicated during the information meetings for Depositors. There is no evidence that any Depositor failed to receive the Monitor's QFA document prior to the June 10, 2016 District meeting date.

85 The opposing Depositors are critical of the Monitor's QFA disclosure. The problem appears to be that the Monitor does not agree that the issues disclosed in the MSDP and the Conrich ASP are as dire as the opposing Depositors describe.

86 The opposing Depositors also fault the Monitor for not referencing a website where the documents could be found, but I note that the QFA provides a telephone numbers and email address for any inquiries.

87 They fault the Monitor for not discussing in the QFA the requirement to upgrade the sanitary sewer lift station and to provide for the disposal of storm water. As noted by the Monitor, those issues are typical of what would be encountered by any developer in considering a new development. The QFA refers to the development risks as follows:

> All development activities have risk associated with them, however, the Monitor is not aware of any known issues related to the PoP Development which would suggest that the future subdivision or development of Prince of Peace Properties would not be feasible other than the risks that are typically associated with real estate development generally.

88 A difference of opinion between the opposing Depositors and the Monitor with respect to the significance of these development requirements does not constitute concealment, bad faith or breach of duty by the Monitor.

89 The opposing Depositors also fault the Monitor for failing to provide Depositors with new election letters and forms of proxy in its May 20, 2016 notice of adjournment of the District meeting. The notice clearly sets out the procedure to be followed if a Depositor wishes to change his or her vote or proxy. It invites Depositors to contact the Monitor by telephone or email if they have any additional questions. The Monitor notes that it sent out three election forms with its initial mail-out to Depositors, and received no requests for a new election form. It received at least one change of vote after sending out this notice.

90 One of the Alberta class action plaintiffs alleges that the Monitor impeded them from distributing material at the information meetings. The Monitor reports that the Alberta plaintiffs were present at the Sherwood Park meeting, handing out material and requesting contact information from other attendees. Some of the attendees expressed confusion as to who had authored the material being handed out by the two Alberta plaintiffs and who was requesting their contact information. The Monitor requested that the Alberta plaintiffs hand-out material at a reasonable distance from the meeting room entrance and communicate clearly to attendees that the material they were handing out was not authored, endorsed or being circulated by the Monitor and that they were not requesting contact information on behalf of the Monitor.

91 The Monitor wrote to class action counsel as follows:

> The Monitor recognizes that your clients have expressed views thus far which are in opposition to the District's plan. Of course it is up to each depositor, including your clients, to decide how to vote. We also recognize that any party, including your clients, are entitled to voice their support or opposition to the District's plan. However, in the interest of ensuring an efficient meeting that respects the *CCAA* process and the interests of other depositors in attendance, the Monitor is implementing the below referenced rules and procedures. These rules and procedures are intended to provide your clients with the ability to convey their opinions in a fashion which does not impede the meeting and respects the rights of other parties in attendance.

92 The Monitor had a table established for the use of the class action representatives within reasonable proximity to the entrance to the room in which the meetings were held. The class action representatives were entitled to circulate written information to attendees within the reasonable vicinity of that table, but not permitted to disseminate any written material within the room or in the doorway entering the room in which the meetings were held.

93 The rules provided that any written communication circulated by the class action representatives was to include a prominently displayed disclaimer that such materials were not authored, endorsed or being circulated by the Monitor.

A sign identifying the class action representatives was to be prepared by them and displayed at the table established for their use.

94 These are reasonable rules, designed to avoid confusion, and they did not impede the class action plaintiffs from voicing their views.

95 The opposing Depositors submit that the Monitor instructed attendees at information meetings to cast their votes immediately, without waiting for the District meeting. The Monitor denies encouraging creditors one way or the other with respect to when to vote. It communicated to attendees the options available to creditors for voting on the District plan and the deadlines associated with each option. It also communicated at meetings that creditors who wished to do so could provide the Monitor with any paperwork they had brought with them. It is a stretch to impute any kind of bad faith to the Monitor in conveying this information.

96 The class action plaintiffs and their counsel had the ability to attend all of the information meetings. They were in attendance and actively participated in the information meeting in Langley, BC, at the Sherwood Park Meeting, the Red Deer Meeting and the District Meeting. Both counsel were in attendance and participated in the District Meeting. The Monitor notes that it is aware of at least two emails that were widely circulated by a relative of one of the class action plaintiffs outlining the views of the class action plaintiffs on the District Plan. I am satisfied that the opposing Depositors had a more than adequate opportunity to communicate their views to other Depositors and to attempt to garner support for their opposition, and that they were not impeded by the Monitor.

97 I must address one more disturbing allegation. Two opposing Depositors submit that the Monitor's non-disclosure of the MSDP and the Conrich ASP in the context of what they allege is the Depositor's false and misleading communications with CEF Depositors might lead a reasonable and informed person to believe that "the Monitor is prepared to condone and facilitate the District's dishonest conduct". This is a disingenuous attack on the Monitor's professional reputation, made without evidence or any reasonable foundation. There is no air of reality to this allegation. There is no evidence that the Monitor was aware of misleading statements, if any, made by the District or its employees or agents before or during the *CCAA* proceedings.

98 The Monitor has prepared 22 regular reports during the approximately 18 months of these proceedings, plus five confidential supplements and three special reports providing creditors with specific information relating to their respective plans of compromise and arrangement. The Monitor also prepared hand-outs tailored to provided information to specific groups of creditors, and five QFAs with information on multiple topics, including NewCo, the potential outcomes of the *CCAA* proceedings, estates, trust accounts, the assignment of NewCo shares by creditors and the potential future subdivision of the Prince of Peace properties.

99 The Monitor attended five regional information meetings in Alberta and British Columbia between April 19 and April 28, 2016 to review the contents of the District plan and respond to any inquiries by District Depositors related to the plan. The Information Meetings were each between approximately two and a half and four hours long. It is clear that the information provided to creditors during these CCAA proceedings was far more extensive than that which would normally be provided.

100 Monitors, being under a duty to the Court as the Court officer and to the parties involved in a *CCAA* proceeding under statute, must sometimes make recommendations that are unpopular with some creditors. The Court expects a Monitor's honest and candid advice, and relies on it. The Monitor in this case went to great lengths to inform the great number of Depositors of ongoing proceedings, and to give its well-reasoned and measured opinion on the myriad of issues in this complex proceeding. In retrospect, it may have been prudent for the Monitor to reference the MSDP and Conrich ASP earlier, in substantially the way it was later referenced in the Monitor's QFA on development, but that is a hindsight observation, and unlikely to resolve other than one of the opposing Depositors' many complaints in support of their application.

4. Cost and Delay

101 The Monitor and the District Group submit that the timing of this application to remove the Monitor is suspect: that the alleged conflicts complained of have been disclosed for months. The opposing Depositors say that they were awaiting the outcome of the District vote, and that it was not until the May 14, 2016 District meeting that they knew that the Monitor knew about and had failed to disclose the MSDP and the Cornich ASP.

102 It is clear that the timing of the application is strategic: a clear majority of the DIL and District creditors have voted in favour of the plans despite the efforts of the relatively few opposing Depositors to convince others to join in their opposition. They must now rely on other grounds to frustrate, delay or defeat the Court's sanction of the plans. That is their prerogative as creditors who oppose the plan, and the Court must, and does, consider their objections seriously, whatever the underlying motivation. However, relief on a motion of this kind should only be granted where the evidence indicates "a genuine concern with respect to the merits of the alleged conflict": *Moffat v. Wetstein*, [1996] O.J. No. 1966 (Ont. Gen. Div.) at para 131.

103 While the timing of this application to replace the Monitor does not preclude the opposing Depositors from bringing the application, the Court must balance the potential risk to creditors and the District Group arising from the alleged potential conflict of interest against the prejudice to creditors and the District Group arising from the inevitable delay, duplication of effort and high costs involved with replacing the Monitor at this very late stage of the proceedings.

104 I have found that the Monitor does not have any legitimate conflict of interest, real or perceived, and that it has not breached any fiduciary duty. Even if I am wrong in this determination, the damage caused by such conflict or breach of duty has been mitigated by full disclosure of potential conflicts and disclosure of the information that the opposing Depositors submit should have been disclosed prior to the vote on the District Plan.

105 Compared to this, appointing a replacement Monitor would involve costs in excess of $150,000, taking into account that the replacement Monitor would need to retain counsel. The process would cause substantial delay in already lengthy proceedings while the replacement Monitor reviews the events of the last eighteen months.

106 I also take into account that the key issue that the opposing Depositors want a replacement Monitor to review is whether the Representative Action provisions of the plans are within the jurisdiction of a *CCAA* court to sanction. This is a question of law, on which a replacement Monitor would have to rely on counsel.

107 At this point in the proceedings, in addition to being reviewed by the Monitor's legal counsel, the provisions of the plans related to the Representative Action have been reviewed by the creditors' committees for the District and DIL, who act in a fiduciary capacity with respect to the creditors of those respective entities and by each committee's independent legal counsel. The jurisdictional issue related to the Representative Action provisions is a legal matter rather than a business issue. As such, this Court is qualified to opine on it independently, without the assistance of a new Monitor.

108 I note that the creditors' committees who represent the majority of Depositors are strongly opposed to a replacement Monitor. They pointed out that the plans have been approved by the requisite majorities, and delay and additional cost does not serve the interests of the general body of creditors, particularly without what they consider to be any justifiable reason.

109 The assistance of a further limited purpose Monitor would likely be of little to no further assistance to the Court and would result in increased professional costs to the detriment of creditors as a whole. This is the tail-end of a lengthy process. The introduction of another Monitor without any clear, ascertainable benefit to the body of creditors, leading to uncertainty, costs and delay, is unwarranted.

5. Conclusion

110 The anger and frustration expressed in these proceedings by a small minority of Depositors, while perhaps understandable given their losses and the trust they placed in their Church, is misplaced when it is directed against the Monitor.

111 There is no reason arising from conflict of interest or breach of fiduciary duty to replace the Monitor.

112 I therefore dismiss the application.

B. Sanctioning of the DIL and District Plans

1. Overview

113 As provided in section 6(1) of the *CCAA*, the Court has the discretion to sanction a plan of compromise or arrangement where, as here, the requisite double majority of creditors has approved the plan. The effect of the Court's approval is to bind the debtor company and its creditors.

114 The general requirements for court approval of a *CCAA* plan are well established:

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

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

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) at para 17; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.) at para 60, leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal refused [2001] S.C.C.A. No. 60 (S.C.C.); *Canwest Global Communications Corp., Re*, 2010 ONSC 4209 (Ont. S.C.J. [Commercial List]) at para 14.

115 It is clear that there has been strict compliance with all statutory requirements with respect to both the DIL and the District plans, assuming jurisdiction as a different issue. The opposing Depositors attack the plans on the basis of the second and third requirements.

116 They submit:

(a) the plans contain provisions that are not within the scheme and purpose of the *CCAA*;

(b) the plans compromise third party claims;

(c) the plans provide no benefit to Depositors within the purpose of the CCAA;

(d) the plans contravene section 5.1(2) of the *CCAA*;

(e) the plans have not been advanced in good faith, with due diligence and full disclosure; and

(f) the plans are not fair and reasonable.

1. Do the plans contain provisions that are not within the scheme and purpose of the CCAA?

117 The opposing Depositors submit that the Representative Action provisions of the plans do not advance the District Group's restructuring goals.

118 The District and the Creditors' Committees respond that the Representative Action provisions follow the "one proceeding" model that underpins the *CCAA* and will prevent maneuvering among Depositors for better positions in subsequent litigation, which, they say, has already commenced with the stayed class action proceedings. They submit that the provisions provide certainty to Depositors and allow the District to continue its core function without the distraction of a myriad of claims, consuming its limited resources and having the potential to compromise its insurance coverage.

119 The opposing Depositors submit that procedural rules can be used to limit proceedings in the absence of the Representative Action provisions, and that if more than one class proceeding is brought within a jurisdiction, carriage motions can be brought to determine which action can proceed to certification. Thus, they argue, there is little likelihood that the District will be overwhelmed by litigation in the event that the plans are not approved. Rather, there will be one class proceeding in each of British Columbia and Alberta, and potentially a number of independent claims advanced by those who choose to opt out of those actions or whose claims are of an individual nature not suited to determination in a class proceeding. It is open to the District to apply to have those individual claims consolidated if is appropriate to do so.

120 This argument contains its own contradictions. It anticipates multiple actions that may have to resolved through court application and carriage motions, the very multiplicity of actions that the Representative Action provisions are proposed to alleviate.

121 The opposing Depositors cite *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 240 O.A.C. 245, 2008 ONCA 587 (Ont. C.A.) (CanLii); leave dismissed [2008] SCC No. 32765 [2008 CarswellOnt 5432 (S.C.C.)] for the proposition that the Court does not have the jurisdiction to approve a plan that contains terms that fall outside the purpose, objects and scheme of the *CCAA*. The *Metcalfe* decision dealt with a unique situation involving the Court's jurisdiction to approve a plan that involved wide-ranging releases. In the result, the Court approved the plan including the releases. The DIL and District plans do not involve third-party releases except in a limited sense that is not at issue. It is true that Blair, J.A. noted in the *Metcalfe* decision that there must a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of a third party release. However, he also noted at para 51 that, since its enactment:

> Courts have recognized that the [*CCAA*] has a broader dimension than simply the direct relations between the debtor company and creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected.

122 The opposing creditors in *Metcalfe* raised many of the same arguments that the opposing Depositors raise in this case, and the Court noted that they "reflect a view of the purpose and objects of the *CCAA* that is too narrow": para 55.

123 The opposing Depositors also argue that any provision of a plan that may benefit the District is improper. They submit that the District's arguments "anticipate that it will be the beneficiary of [the Subcommittee's] goodwill", and that this betrays the District's improper motive. There is nothing improper or contrary to the scheme and purpose of the *CCAA* for a debtor company to attempt to be able to continue its business more efficiently and effectively post-*CCAA*. That is the very core and purpose of the *Act*. This argument assumes that the Subcommittees would betray their fiduciary duty to act in the best interests of the creditors they will represent by favouring DIL or the District. There is no evidence that this would happen; on the contrary, the Creditors' Committees have ably represented the interests of creditors as a whole in this restructuring, and there is no reason that the Subcommittees would do otherwise.

124 Finally, the opposing Depositors submit, referencing the results of a survey conducted by the Lutheran Church — Canada, that there is little likelihood of the District remaining in operation in the future without being subsumed into a single administrative structure. At this point, this is only a possibility that would not be implemented for more than a year, if it is implemented at all.

125 There is a nexus between the Representative Action provisions of the plans and the restructuring in that these provisions are designed to allow the District to continue in the operation of its core function without the distraction of

multiple litigation, while preserving the rights of Depositors to assert actions against third parties involved in the events that led to this insolvency. This Court does not lack jurisdiction to sanction the plans for this reason.

2. Do the Representative Action provisions of the plans compromise third party claims?

126 The basis for this submission is that the Subcommittees will have absolute discretion to commence and compromise third party claims (including derivative claims), to instruct counsel, and to determine the litigation budget to be shouldered by the Depositors. Under the terms of the plans, a Depositor whose third-party claim is denied by the Subcommittee has no right to proceed independently.

127 The plans impose fiduciary duties on the Subcommittee members to act in the best interest of Depositors who do not opt-out. No claims are *prima facie* released, other than the partial releases that are unopposed. Thus, it must be assumed that a claim against a third party will not be advanced by a Subcommittee only if not doing so is consistent with its fiduciary duties for whatever reason (for example, advice from representative counsel that a claim has no basis for success).

128 The opposing Depositors put forward a hypothetical situation in which an individual may have a meritorious claim that he or she wishes to pursue, but the Subcommittee doesn't wish to proceed due to lack of funding. The District and the Monitor point out, and I accept, that the definition of Representative Action permits more than one action. There is no provision of the plans that prevents this hypothetical individual from funding the Subcommittee to pursue such an action on his or her behalf as a Representative Plaintiff. The individual would become part of the Subcommittee and the action would be advanced by the Subcommittee using representative counsel. The hypothetical action would be treated like any other representative action claim under the plans. The Subcommittee would have carriage and control of such litigation, subject to its fiduciary obligations.

129 If any issues arose from such a hypothetical situation, the advice and direction of the Court is available.

130 It is important to note that the Representative Action provisions of the plans do not deprive any Depositors of the right to pursue claims as described against third-parties. They merely funnel the process through independent Subcommittees of creditors chosen from among the Depositors who have claims remaining after the Convenience Payments and who will have the fiduciary duty to act in the best interests of the body of such creditors to maximize recovery of their investments.

131 While third-party claims could be pursued in another fashion, through uncoordinated action by individual Depositors, that does not mean that the Representative Action provisions constitute a compromise of such claims. There is no jurisdictional impediment to sanction arising from this inaccurate characterization of the plan provisions.

3. Do the Representative Action provisions provide any benefit to Depositors within the purpose of the CCAA?

132 The Monitor identified the benefits of the Representative Action provisions in its reports to Depositors as follows:

(a) they provide a streamlined process for the establishment of the Representative Action class and the funding of the Representative Action;

(b) they prevent a situation where Depositors are being contacted by multiple groups seeking to represent them in a class action or otherwise;

(c) they may result in increased recoveries through settlement of the Representative Action claims on a group basis; and

(d) as certain Depositors have indicated that they view any involvement in litigation as inconsistent with their personal religious beliefs, the Representative Action process allows them to opt-out before litigation is even commenced, should that be their preference.

133 The opposing Depositors suggest that none of these benefits fall within the "express purposes" of the *CCAA*. As noted by the Supreme Court in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services], the *CCAA* has a broad remedial purpose, and permits a company to continue its business through various methods, with a view to becoming viable once again, including compromises or arrangements between an insolvent company and its creditors, and a going-forward strategy.

134 The *Act* is aimed at avoiding, where possible, the devastating social and economic consequences of the cessation of business operations, and at allowing the debtor to carry on business in a manner that causes the least possible harm to employees and the communities in which it operates. I accept that this is what the District Group is attempting to do with the plans, including the Representative Action provisions. While these provisions are of benefit to the District in allowing it to deal with claims affecting its officers, directors and employees from a single source, they also have a rationale and reasonable purpose in protecting the community of mostly older Depositors that the District will continue to serve in a religious capacity, and in attempting to maximize recovery through the possibility of focused negotiations with a limited number of parties. This does not mean that these types of provisions will always be an appropriate way to deal with third party claims, but, in the circumstances of this rather unique restructuring, the benefits are reasonable, rationale and connected with the overall restructuring.

135 The DIL and District plans are part of a four component conceptual plan of arrangement and compromise that is designed to permit the District to continue to carry out its core operations as a church entity without the CEF and DIL functions that it has previously carried out and without the senior's care ministry component it had carried out through ECHS and EMSS. The opposing Depositors take an overly narrow view of the *CCAA's* purpose, and ignore the real benefits identified by the Monitor to the large group of Depositors who are interested in recovering as much of their investment as possible. This Court does not lack jurisdiction to sanction the plans on this ground.

4. Do the plans contravene section 5.1(2) of the CCAA?

136 Claims that may be included in the Representative Action provisions include claims that cannot be compromised pursuant to section 5.1(2) of the *CCAA* as they are claims against directors that relate to a contractual right of one or more creditors or are based on allegations of misrepresentations made by directors to creditors or wrongful or oppressive conduct by a director.

137 As noted previously, the plans do not release or compromise any claims that can be pursued in the Representative Action. Accordingly, the plans permit the directors to be pursued in a Representative Action in accordance with s. 5.1(2) of the *CCAA*.

5. Have the plans been advanced in good faith, with diligence and full disclosure?

138 As noted with respect to the application to replace the Monitor, it was not necessary for the District to disclose the MSDP and the Conrich ASP in the context of the District plan. However, these documents were disclosed to Depositors before the reconvened District meeting, and Depositors had the ability to change their vote on the District plan with this information in hand. The District was not guilty of bad faith arising from these circumstances.

139 The opposing Depositors also submit that counsel for the District Group, by acting as counsel and advancing the plans, has "intentionally sought to misuse the *CCAA* proceedings to shield himself and his law firm from liability". First, neither counsel nor his firm is released by the plans from any liability, other than the limited release provisions that are not contentious. The opposing creditors have made a number of allegations against counsel and his firm; none of these allegations have been tested or established and undoubtedly the Subcommittees will have to consider whether to bring proceedings against these parties for advice that may have been provided to the District Group prior to the *CCAA* filing. This situation does not give rise to bad faith by the District Group.

140 The opposing Depositors also allege that counsel for the District Group has been unjustly enriched as a result of the legal fees they have been paid while acting as counsel in these proceedings. Counsel has not been able to respond to this allegation of dubious merit. Again, this is irrelevant to the issue of the District Group's good faith.

141 Similar allegations have been made about the Monitor, which have been addressed in the decision relating to the replacement of Monitor.

6. Are the Plans Fair and Reasonable?

a. Overview

142 Farley, J. in *Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) at para 4 provided a useful description of the Court's duty in determining whether a proposed plan is fair and reasonable:

> ... is the Plan fair and reasonable? A Plan under the *CCAA* is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights. It is recognized that the *CCAA* contemplates that a minority of creditors is bound by the Plan which a majority have approved — subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509.

In an earlier case, he commented:

> In the give and take of a *CCAA* plan negotiation, it is clear that equitable treatment need not necessarily involve equal treatment. There is some give and some get in trying to come up with an overall plan which Blair J. in *Olympia & York* likened to a sharing of the pain. Simply put, any *CCAA* arrangement will involve pain — if for nothing else than the realization that one has made a bad investment/loan: *Re: Central Guarantee Trust Ltd.*, [1993] O.J. No. 1479.

143 The objection of the opposing Depositors to these plans focus mainly on whether the different treatment of some creditors results in inequitable treatment, whether the plans are flawed is any respect and how much weight I should accord to the approval of the majority.

b. Deference to the Majority

144 Dealing with the important factor of the approval of the plans by the requisite double majority of creditors, the Court in *Muscletech Research & Development Inc., Re*, [2007] O.J. No. 695 (Ont. S.C.J. [Commercial List]) at para 18 commented:

> It has been held that in determining whether to sanction a plan, the court must exercise its equitable jurisdiction and consider the prejudice to the various parties that would flow from granting or refusing to grant approval of the plan and must consider alternatives available to the Applicants if the plan is not approved. An important factor to be considered by the court in determining whether the plan is fair and reasonable is the degree of approval given to the plan by the creditors. It has also been held that, in determining whether to approve the plan, a court should not second-guess the business aspects of the plan or substitute its views for that of the stakeholders who have approved the plan.

145 The opposing Depositors, however, invite me to do just that. They refer to a remark by McLachlen, J. (as she then was), in *Gold Texas Resources Ltd., Re*, [1989] B.C.J. No. 167 (B.C. S.C. [In Chambers]) at page 4, to the effect that the

court should determine whether "there is not within an apparent majority some undisclosed or unwarranted coercion of the minority.... (i)t must be satisfied that the majority is acting *bona fide* and in good faith".

146 The opposing Depositors submit that, in considering the voting results, I should keep in mind that the many of the Depositors "are not businessmen" and that 60% of them are senior citizens over 60 years of age. I note that some of the opposing creditors are also "not businessmen" and are over 60, but the Court is not asked to discount their opposing votes for that reason.

147 I have read the considerable disclosure about the plans prepared and distributed by the Monitor, and note the extraordinary efforts of the Monitor and the District Group to ensure that Depositors had the opportunity to ask questions at the information meetings. The Depositors have had months to inform themselves of the plans. Even if the disputed development disclosure had been necessary, there were roughly 1 1/2 months from the Monitor's disclosure of the documents to the vote on the District Plan. It would be patronizing for the Court to assume anything other than the Depositors were capable of reading the materials, asking relevant questions and exercising judgment in their own best interest. Business sophistication is not a necessity in making an informed choice.

148 The opposing Depositors also submit that there is evidence of efforts by Church officials to influence the outcome of the vote in favour of the plans. This evidence consists of affidavits from the opposing Depositors or their supporters that accuse various Church pastors of efforts to intimidate or silence those who oppose the plans. These allegations have been made against individuals who are not direct parties in these proceedings, at such a time and in such circumstances that it was not possible for them to respond.

149 As seen from the allegations against the Monitor, to which the Monitor had an opportunity to respond, there may be very different perceptions about what actually occurred during the incidents described in the allegations. I appreciate that it must be uncomfortable to be at odds with your religious community on an important issue. However, these allegations would bear greater weight if the terms of the plans were prejudicial to the Depositors as a whole, or the allegations were supported by the Creditor's Committees but they are not. It is not unreasonable or irrational for Depositors to have voted in favour of the plans.

150 I am unable to accept on the evidence before me that the Depositors who voted in favour of the plans did so because they were coerced by church officials. This does a disservice to those who exercised their right to vote and to have an opinion on the plans, no matter what their level of sophistication, their age or their religious persuasion.

c. The Convenience Payments

151 The opposing Depositors also submit that the votes in favour of the District plan were unfairly skewed by the fact that creditors with claims of less than $5,000 are to be paid in full (the "Convenience Creditors"). The Monitor reports that, of the 1,616 Convenience Creditors, 500 or 31% in number holding 54% in value of total claims under $5,000 voted on the District plan.

152 Of the 500 Convenience Creditors who voted on the District plan, 450 or 90% voted in favour of the District plan and 50 or 10% voted against the District plan. The Convenience Creditors who voted in favour of the District plan had claims of approximately $641,300 (91% of the total claims of voting Convenience Creditors), and the Convenience Creditors who voted against the District plan had claims of approximately $66,500 (9% of the total claims of voting Convenience Creditors).

153 Approximately 1,294 Eligible Affected Creditors with total claims of approximately $85.1 million voted on the District plan. The Convenience Creditors therefore represented approximately 39% in number and approximately 1% in dollar value of the total eligible affected creditors. In order for the District plan to be approved, both a majority in number and two-thirds in dollar value of voting creditors must have voted in favour of the plan. As such, while the

Convenience Payments increased the likelihood that a majority in number of Creditors would vote in favour of the plan, they had little impact on the likelihood that two-thirds in dollar value of voting creditors would vote in favour of the plan.

154 Excluding the Convenience Creditors, a total of 794 creditors voted on the District plan, of which 626, or approximately 79% voted in favour and 168 voted against. Therefore the plan still would have passed by a majority in number of voting creditors had the Convenience Creditors not voted.

155 The District Group and the Monitor note that the Convenience Creditor payments have the effect of limiting the number of NewCo shareholders to about 1,000, rather than 2,600, thus creating a more manageable corporate governance structure for NewCo and ensuring that only Depositors with a significant financial interest in NewCo will be shareholders. This is a reasonable and persuasive rationale for paying out the Convenience Creditors. While each case must be reviewed in its unique circumstances, this type of payout of creditors with smaller claims is not uncommon in *CCAA* restructurings: *Contech Enterprises Inc., Re*, 2015 BCSC 129 (B.C. S.C.); *Target Canada Co., Re*, 2016 CarswellOnt 8815 (Ont. S.C.J. [Commercial List]); *Nelson Financial Group Ltd., Re*, 2011 ONSC 2750 (Ont. S.C.J.).

156 As noted previously, equitable treatment is not necessary equal treatment, and the elimination of potential shareholders with little financial interest from NewCo is a benefit to remaining Depositors in the context of the District plan. They may not have had any significant financial influence in the corporation, but their interests would have had to be taken into account in deciding on the future of NewCo.

d. The NewCo provisions

157 The opposing Depositors submit that, as the future of the Prince of Peace properties cannot be known until after the first meeting of NewCo shareholders six months after the effective date of the plan, the plan deprives the Court of the ability to ensure the plan is fair and reasonable and therefore appropriate to impose on the minority.

158 This is incorrect. What is relevant to the Court in reviewing the plan is the value of the shares of NewCo that are part of the consideration that will be distributed to some of the District Depositors. As noted in *Century Services* at para 77:

> Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation.

159 The Monitor notes that the value of the NewCo shares is intended to be based principally on the independent appraisals, which reflect a range of forced sale values. The Monitor has consulted with the Deloitte' Valuations Group, which has indicated that in valuing shares such as those of NewCo, it would be more common to value assets such as the Prince of Peace properties based on appraised market values as opposed to forced sale values. The Monitor reports that it has attempted to balance this consideration against other practical considerations, such as that fact that, depending on the mandate that is chosen for NewCo, the Prince of Peace properties may still be liquidated in the near-term, and that therefore, there is the need to accurately reflect the shortfall to some of the Depositors, which will represent the amount they would ultimately be able to pursue in the Representative Action. I accept the Monitor's opinion that it is unlikely that the values attributed to the Prince of Peace properties in calculating the value of the NewCo shares will reflect the lowest forced sale values reflected in the appraisals.

160 The District Plan contemplates a debt-to equity conversion, which is common in *CCAA* proceedings. The Court does not have to make a determination of the value of the equity offered, as long as it is satisfied, as I am, that the value of the package to be distributed to the Depositors will likely exceed a current forced-sale liquidation recovery in this depressed real estate market, which is the alternative proposed by the opposing Depositors. The plan provides the NewCo shareholders with flexibility to optimize recovery at the time of the first shareholder's meeting, with the advantage of recommendations from an experienced management team. While there is no guarantee that the market will improve, it is a realistic possibility. At any rate, the sale of the Prince of Peace properties will not be the only option

available to NewCo shareholders. Again, I must take into account that this appears to be the view of the Depositors who voted in favour of the plan.

161 The opposing Depositors submit that the NewCo shares are not a suitable investment for District Depositors over the age of 70. It is unrealistic to believe that any *CCAA* plan of compromise and arrangement would be supported by all of a debtor company's creditors or that the compromise effected would be ideally suited to every creditor's personal situation. The NewCo articles attempt to address the concerns of those who don't want to hold shares by building in provisions that would allow the possibility that shareholders are able to sell to other shareholders or have their shares redeemed.

162 This is not a perfect solution, but plans do not have to be perfect to be found to be fair and reasonable. I find that the NewCo provisions of the District plan, in the context of the plan, as a whole, are fair and reasonable.

e. The Representative Action provisions

163 In addition to submissions previously discussed with respect to these provisions, the opposing Depositors submit that "(n)o honest and intelligent District Depositors acting in their own best interests would give up these fundamental rights of [full and unfettered access to the courts] where the law already provides perfectly satisfactory processes for advancing legal claims against third parties on a class basis. These provisions are neither fair nor reasonable, and accordingly must not receive the sanction of this Court".

164 The short answer to this is that a majority of the honest and intelligent Depositors have voted in favour of the plans, including the Representative Action provisions. It is not the place of this Court to second guess their decision without good and persuasive reasons: *Central Guaranty Trustco Ltd., Re* [1993 CarswellOnt 228 (Ont. Gen. Div. [Commercial List])] at paras 3&4; *Muscletech* at para 18.

165 The opposing Depositors also submit that the Representative Action provisions of the plans are flawed in that they do not provide for information about causes of action the Subcommittee intends to advance, and against whom prior to the opt-out deadline.

166 However, Depositors are able to opt-out at any time prior to the last business day preceeding the date of commencement of the Representative Action. It is not unreasonable to anticipate that Depositors will have further information with respect to the proposed Representative Actions prior to their commencement.

167 It is also true that participating Depositors will not know their own proportionate share of the Representative Action Holdback until after the opt-out deadline has passed and the size of the Representative Action class is known. However, the Monitor has committed to provide a range of what individual shares may be.

168 The opposing Depositors submit that in the absence of reliable information about the extent of their financial commitment to the Representative Action, it can reasonably be expected that many District Depositors will be content to receive their distribution under the plan and forgo the balance of their claims by electing to opt out the Representative Action. This is not a reasonable assumption. Representative counsel will likely be retained on a contingency fee basis, and therefore Depositors will be unlikely to be at risk for a substantial retainer to advance the Representative Action.

169 Finally, on this issue, the opposing Depositors submit there is an irreconcilable conflict of interest between the Subcommittee and a Representative Plaintiff that can be expected to mar the Representative Action. Unlike the Subcommittee tasked with instructing counsel, the Representative Plaintiff bears the sole financial responsibility for paying an adverse costs award. The opposing Depositors submit that it is reasonable to expect that there may be a divergence of views between the Subcommittee and the Representative Plaintiff as to the conduct of the Representative Action.

170 As would be the case in class action proceedings when the interests of representative plaintiffs come into conflicts with the interests of the class, advice and direction can be sought from the Court in the event that this situation materializes.

171 The opposing Depositors submit that the Representative Action provisions interfere with a citizen's constitutional right of access to the courts. These provisions do not deprive the Depositors from their right to take action against third parties; they are able to do so through a Subcommittee chosen from their members with fiduciary duties to the whole. This issue was considered in the context of third-party releases, which do eliminate the right to pursue an action against third parties, in *Metcalfe*, and Blair, J.A. commented at para 104 as follows:

> The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the *CCAA*. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The *CCAA* is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the *CCAA* governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount.

7. Conclusion

172 As noted at para 18 of *Metcalfe*:

> Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the *CCAA* supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

173 In this case, the requisite double majority, after significant disclosure and opportunities to review and question the plans, have voted in favour of the plans. The Creditors' Committees of DIL and the District, who have the duty to act in the best interests of the body of creditors, support the plans.

174 The Monitor supports the plans, and there is no reason in this case to give the Monitor's opinion less than the usual deference and weight.

175 Measuring the plans against available commercial alternatives leads me to the conclusion that they provide greater benefits to Depositors and other creditors than a forced liquidation in a depressed real estate market.

176 The plans preserve the District's core operations. I accept that the Representative Action provisions are appropriate and reasonable in the circumstances of this restructuring, that, in addition to the benefits identified by the Monitor of stream-lined proceedings, the avoidance of multiple communications and the potential of increased recovery, Depositors will benefit from the oversight of the Subcommittees and the Representative Action process will be able to incorporate cause of action, such as derivative actions, that are normally outside the scope of class actions.

177 The insolvency of the District Group has caused heartbreak and hardship for many people, as is the case in any insolvency. In the end, the majority of affected creditors have accepted plans that resolve their collective problems to the extent possible in difficult circumstances. As noted in *Metcalfe* "in insolvency restructuring proceedings almost everyone loses something": para 117. That is certainly the case here, and the best that can be done is to try to ensure that the plans are a reasonable "balancing of prejudices". It is not possible to please all stakeholders.

178 The balance of interests clearly favours approval. I am satisfied that the DIL and District plans are fair and reasonable and should be sanctioned.

Application dismissed.

TAB 5

2005 CarswellOnt 6818
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 6818, [2005] O.J. No. 4883, 11 B.L.R. (4th) 185, 144 A.C.W.S. (3d) 15, 15 C.B.R. (5th) 307, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC., AND OTHER APPLICANTS LISTED IN SCHEDULE "A"

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

Goudge, Sharpe, Blair JJ.A.

Heard: November 14, 2005
Judgment: November 17, 2005
Docket: CA C44436, M33171

Proceedings: additional reasons at *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 ((Ont. C.A.)); affirmed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 ((Ont. S.C.J. [Commercial List]))

Counsel: Paul Macdonald, Andrew Kent, Brett Harrison for Informal Independent Converts' Committee
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Fred Myers for Her Majesty the Queen in Right of Ontario, Superintendent of Financial Services
Ken Rosenberg for United Steelworkers of America
A Kauffman for Tricap Management Ltd.
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Heath Whitley for CIBC
Steven Bosnick for U.S.W.A. Loc. 5328, 8782

Subject: Insolvency; Civil Practice and Procedure

ADDITIONAL REASONS to judgment reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305 (Ont. C.A.).

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

Background

1 This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the *Companies' Creditors Arrangement Act* ("CCAA").[1] Stelco has been in the midst of this fractious process for approximately twenty-one months. Justice Farley has been the supervising judge throughout.

2 Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee ("the Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday afternoon (The courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005.

3 This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument — and in order to clarify matters so that the vote could proceed the following day — we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

4 The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis à vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

5 These are those expanded reasons.

Facts

6 Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

7 The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately, $228 million. In the Proposed Plan, these three groups of unsecured creditors — the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders, and the Trade Creditors — have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

8 The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.). They also argue that the supervising judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

9 In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)),

but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

10 In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

11 The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

12 The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled — the elimination of their subordinated position by virtue of the Turnover Payment provisions.

13 Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paragraphs 13 and 14 of his reasons:

> [13] I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/Senior Debt [2] plus the trade debt vis-à-vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid any unnecessary fragmentation — and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> [14] Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis-à-vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible. . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the consideration obtained.

14 We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

15 The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

See *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 24; *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) at para. 15; *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 7.

16 Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), this court has not dealt with the issue since its decision in *Nova Metal Products Inc. v. Comiskey (Trustee of)*, *supra*, and the Converts' Committee argues that the Alberta line of authorities is contrary to *Nova Metal Products Inc.*

17 A brief further comment respecting the leave process may be in order.

18 The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada — including this one — have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the authorities cited above remain good law.

19 Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings — particularly in major ones such as this one involving Stelco — has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded.

20 As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No Error in Law or Principle

21 Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-94] All E.R. Rep. 246 (Eng. C.A.), which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited:

At pp. 249-250 Lord Esher said:

> The Act provides that the persons to be summoned to the meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [3] recognizes, though it does not define.

> The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251, Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term 'class' as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

22 These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process — a flexibility which is its genius — there can be no fixed rules that must apply in all cases.

23 In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:

> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

24 In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 71 (N.S. T.D.); *Woodward's Ltd., Re* (1993), 84 B.C.L.R. (2d) 206 (B.C. S.C.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 166 (B.C. S.C.); *Northland Properties Ltd., Re* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *NsC Diesel Power Inc., Re* (1990), 79 C.B.R. (N.S.) 1 (N.S. T.D.); *Savage v. Amoco Acquisition Co.* (1988), 68 C.B.R. (N.S.) 154 (Alta. C.A.), (*sub nom. Amoco Acquisition Co. v. Savage*); *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent *Canadian Airlines Corp., Re* decision: *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) at para. 27.

25 In the passage from his reasons cited above (paragraphs 13 and 14) the supervising judge in this case applied those principles. In our view he was correct in law in doing so.

26 We do not read the foregoing principles as being inconsistent with the earlier decision of this court in *Nova Metal Products Inc. v. Comiskey (Trustee of)*. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 259), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

27 *Nova Metal Products Inc. v. Comiskey (Trustee of)* did not deal with the issue of whether creditors with divergent interests as amongst themselves — as opposed to divergent legal interests vis-à-vis the debtor company — could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test — a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra*,); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra*; *Fairview Industries Ltd., Re, supra*; *Woodward's Ltd., Re, supra*. In our view, there is nothing in the decision in *Nova Metal Products Inc.* that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

28 In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include *Nova Metal Products Inc. v. Comiskey (Trustee of)* [4] and *Wellington Building Corp., Re, supra* [5]. Examples of the latter include *Sklar-Peppler, supra* [6] and *Campeau Corp., Re* (1991), 10 C.B.R. (3d) 100 (Ont. Gen. Div.) [7].

29 Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality of interest they may have vis-à-vis Stelco.

30 We agree with the line of authorities summarized in *Canadian Airlines Corp., Re* and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary — see, for example *NsC Diesel Power Inc., Re, supra* — we prefer the Alberta approach.

31 There are good reasons for such an approach.

32 First, as the supervising judge noted, the CCAA itself is more compendiously styled "An act to facilitate compromises and arrangements between companies and their creditors". There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (B.C. S.C.) at para. 24 (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

33 In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

34 Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar. Rev. 587, at p. 602.

35 Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring, runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", *supra*; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association — Ontario Continuing Legal Education, 5th April 1983 at 19-21; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, *supra*, at para. 27; *Northland Properties Ltd., Re*, *supra*; *Sklar-Peppler*, *supra*; *Woodward's Ltd., Re*, *supra*.

36 In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted in *Canadian Airlines Corp., Re*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans."

Discretion and Fact Finding

37 Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

38 We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis-à-vis Stelco. Each is entitled to be paid the monies owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

39 Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not

accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

40 We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis-à-vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

41 Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

***Goudge J.A.*:**

I agree.

***Sharpe J.A.*:**

I agree.

Application granted; appeal dismissed.

Footnotes

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

2 Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

3 The *Joint Stock Companies Arrangement Act*, 1870.

4 A second secured creditor with superior voting power was separated from a first secured creditor for voting purposes, in order prevent the former from utilising its superior voting strength to adversely affect the latter's prior security position.

5 The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

6 Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power".

7 Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

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TAB 6

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

Deschamps J.:

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

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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

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

3.1 Purpose and Scope of Insolvency Law

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

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

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

the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

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

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

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

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

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

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the

time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

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

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

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

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

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

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

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

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

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

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

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

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

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

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

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

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

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

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

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

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna

in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

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

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

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

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

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

Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

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

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

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary

for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

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

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

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

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

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

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

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

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

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

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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

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

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

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

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

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act <u>is deemed</u>, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, <u>to hold the amount separate and apart</u> 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, <u>in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act</u>. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — <u>Notwithstanding</u> any other provision of this Act, <u>the *Bankruptcy and Insolvency Act*</u> (except sections 81.1 and 81.2 of that Act), <u>any other enactment of Canada</u>, any enactment of a province or any other law, <u>where</u> at any time <u>an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty</u> in the manner and at the time provided under this Act, <u>property of the person</u> ... equal in value to the amount so deemed to be held in trust <u>is deemed</u>
>
> > (a) <u>to be held</u>, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, <u>in trust for Her Majesty</u> whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222. (1) [Deemed] Trust for amounts collected** — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> **(3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property

held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails;

and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non 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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
>> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...

> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB 7

2017 ONCA 99
Ontario Court of Appeal

U.S. Steel Canada Inc., Re

2017 CarswellOnt 1346, 2017 ONCA 99, 275 A.C.W.S. (3d) 249, 45 C.B.R. (6th) 41

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

And In the Matter of a proposed plan of compromise or arrangement with respect to U.S. Steel Canada Inc.

G.R. Strathy C.J.O., K.M. Weiler, M.L. Benotto JJ.A.

Judgment: February 8, 2017
Docket: CA M46908, M46916

Counsel: Ken Rosenberg, Lily Harmer, Karen Jones, Robert Healey, for Moving Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Sharon L.C. White, for Moving Party, USW Local 1005
Andrew J. Hatnay, Barbara Walancik, Amy Tang, for Moving Party, non-union active employees and retirees of U.S. Steel Canada Inc.
James Gage, Paul Steep, for Responding party, U.S. Steel Canada Inc.
Robert Staley, Kevin Zych, William A. Bortolin, for Responding Party, Monitor, Ernst & Young Inc.

Subject: Civil Practice and Procedure; Insolvency

MOTION by unions for leave to appeal order regarding payment of benefits.

***Per curiam*:**

1 These motions for leave to appeal arise in the context of the ongoing proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, involving U.S. Steel Canada Inc. ("USSC").

2 In 2015, an order was made suspending the payment of certain benefits, referred to as "OPEBs" (other post-employment benefits, for example, prescription, dental and vision benefits) to retirees. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"), together with its local unions and representative counsel to the non-USW active and retired members, jointly brought a motion. They sought to have the payment of OPEBs reinstated on the basis that USSC's financial position had improved since the 2015 order was made.

3 The *CCAA* judge dismissed the motion on the condition that USSC make a one-time payment of $2.7 million towards the benefits. The moving parties now seek leave to appeal from that decision.

4 There is no dispute about the applicable test. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In assessing whether leave should be granted, the court must consider:

a. whether the proposed appeal is *prima facie* meritorious or frivolous;

b. whether the point on the proposed appeal is of significance to the practice;

c. whether the point on the proposed appeal is of significance to the action; and

d. whether the proposed appeal will unduly hinder the progress of the action.

See: *Nortel Networks Corp., Re*, 2016 ONCA 332, 36 C.B.R. (6th) 1 (Ont. C.A.), at para. 34; *SNMP Research International Inc. v. Nortel Networks Corp.*, 2016 ONCA 749 (Ont. C.A.), at para. 6; *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24.

5 In this case, the *CCAA* judge had broad discretion under s. 11. The test governing the exercise of that discretion is whether the order furthers the remedial objectives of the statute, namely, to permit the debtor to carry on business and avoid the social and economic consequences of liquidation: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 70.

6 It is rare that this court will interfere with a discretionary decision of a *CCAA* judge. In our view, there is no *prima facie* merit to the moving parties' submission that this court should do so in this case. The *CCAA* judge, who has extensive familiarity with the circumstances of the debtor, considered the evidence before him, the submissions of the parties and their respective "with prejudice" settlement discussions. He carefully balanced competing considerations, including the goal of a successful reorganization, which would benefit all interested parties, including the moving parties. In the final analysis, while he refused to reinstate the payment of benefits to the end of 2016, he ordered that USSC make a one-time payment of $2.7 million towards benefits. We are not satisfied that an appeal from that order has any real prospect of success.

7 Given the fact-specific nature of the exercise of discretion in this case, the issue is not of significance to the insolvency practice.

8 In the circumstances, it is unnecessary to consider the other aspects of the leave test.

9 For these reasons, leave to appeal is denied. The motion is dismissed with costs to the respondent USSC, fixed at $2,500, inclusive of disbursements and all applicable taxes.

Motion dismissed.

End of Document

TAB 8

2017 ONSC 7649
Ontario Superior Court of Justice

Urbancorp Cumberland 2 GP Inc., (Re)

2017 CarswellOnt 20265, 2017 ONSC 7649, 287 A.C.W.S. (3d) 16

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP CUMBERLAND 2 GP INC., URBANCORP CUMBERLAND 2 L.P., BOSVEST INC., EDGE ON TRIANGLE PARK INC., AND EDGE RESIDENTIAL INC.

F.L. Myers J.

Heard: December 13, 2017
Judgment: December 20, 2017
Docket: CV-16-11541-00CL

Counsel: Robert J. Drake, Lori Goldberg, for Monitor, Fuller Landau Group Inc.
Mark van Zandvoort, Timothy Jones, for Cooltech Air Systems Ltd., Cooltech Home Comfort Ltd., Genesis Home Services Inc., AEM Capital Corp., and Icarus Holdings (Milton) Inc.
Clifton P. Prophet, for Alvarez & Marsal Canada Inc., receiver, manager and construction lien trustee of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc.

Subject: Corporate and Commercial; Insolvency

MOTION by Monitor seeking advice and directions regarding *Companies' Creditors Arrangement Act* proceedings.

F.L. Myers J.:

Outcome

1 The Monitor moves for advice and directions on whether payments in kind made by the *CCAA* debtors Edge on Triangle Park Inc. and Edge Residential Inc. to creditors of other Urbancorp affiliates were oppressive. The Monitor argues that using the currency of condominium units owned by Edge to satisfy debts of the other affiliates to their trade creditors amounts to oppression that should result in a monetary award against the trade creditors who received the units.

2 In my view, even if the Monitor had been empowered to bring this proceeding and if it is entitled to discretionary recognition as a complainant under the oppression remedy provisions of the *OBCA*, it still has not proved that, at the time that Edge transferred its property, any creditor or "the creditors," collectively, had any particular expectations, that any such expectations as might have been held were reasonable, or that anyone relied on any such reasonable expectations as he, she, it, or they might have held. Neither has the Monitor proved that the breach of any such reasonable expectations met any of the three qualitative assessments of oppression.

3 The motion is therefore dismissed.

The Basic Facts

4 The responding parties, whom I will refer to collectively for convenience as Cooltech, were creditors of Edge on Triangle Park Inc., other Urbancorp affiliates, and Urbancorp's owner Alan Saskin personally. Cooltech was a plumbing and HVAC contractor on several Urbancorp projects. It had a long history of satisfactory business dealings with Mr. Saskin and his businesses.

5 The Monitor challenges approximately $2.3 million paid by Edge to Cooltech, in July and August 2015, by means of the transfer of condominium units, parking spots, and storage lockers, transferred at or near fair market value, to pay off debts of other Urbancorp entities and a debt of $500,000 owed to Cooltech by Alan Saskin personally.

6 The transfers were made more than one year prior to the commencement of insolvency proceedings by Urbancorp. The Monitor does not challenge the transfers as fraudulent conveyances. It does not rely on any badges of fraud surrounding the transactions.

7 The Monitor no longer challenges the payments in kind made by Edge to Cooltech in respect of Edge's own debts. It does not challenge them under even the enhanced powers available in insolvency proceedings to remedy unjust preferences or transfers at undervalue for example.

8 In return for paying Cooltech, Edge received intercompany book entries from the affiliates whose loans it paid and other inter-company credits to account for the payment of Mr. Saskin's personal debt. The Monitor says that replacing hard assets with what have subsequently turned out to be impaired loans from insolvent entities prejudiced creditors' recovery in these proceedings and therefore was oppressive.

The Position of Cooltech

9 Cooltech was am arm's length, third party creditor with a cash-flow strapped customer with whom it had dealt for 20 years. Mr. Saskin approached it and offered to pay Urbancorp's bills by transferring property in kind. Cooltech knew Mr. Saskin to run asset-rich but cash-poor businesses. When Mr. Saskin offered units in kind to pay Cooltech's outstanding invoices, Cooltech agreed.

10 Tthe Monitor does not claim that the value of the units was amiss. Cooltech received value commensurate with what it was owed. There was no gift component to the transaction. Rather, the source of the Monitor's complaints is not the sales *per se*, but the fact that the inter-company loans advanced to compensate Edge have subsequently turned out to be impaired. That had nothing to do with Cooltech. There is no basis in the evidence to suggest that it did anything wrong for which it should be held liable for recovery under an oppression remedy aimed at Triangle or Urbancorp. Cooltech is not alleged in this proceeding to have induced or procured a tort or a breach of fiduciary duty for example.

The Evidence

11 The Monitor has been able to show, from the books and records of various Urbancorp entities, that in mid-2015, when the transfers in kind occurred, Cooltech had been owed money by various Urbacorp entities for many months. There is no evidence as to whether this was unusual for these parties. There was no discussion in the evidence of the implication, if any, of the timing in the condominium development business cycle - just before the buildings were completed - when a developer's cash and credit might be expected to be near exhaustion perhaps. Was this normal for these parties? Was anyone particularly fussed? Payments in kind are not unknown in the industry. Were they unusual between these parties? Without knowing some of these answers, I cannot draw any inference about what Cooltech might have known about the state of Urbancorp's finances if anything.

12 I also do not know what Mr. Saskin thought or knew about the status of his business at the time. There is simply no evidence before me other than (a) the fact that Urbancorp had outstanding debts to Cooltech for many months on different projects or loans; and (b) Urbancorp failed in late 2016. The financial statements are not particularly instructive. A snapshot of a moment in time based on depreciated book values does not provide a real time assessment of cash flows

and realizable values or allow an inference that the business had failed or inevitably would be failing shortly so as to suggest that other creditors' interests ought to have been top-of-mind at the time.

13 In fact, in January, 2016, many months *after* the property transfers occurred, Urbancorp raised a very substantial amount of money by issuing bonds in Israel. That transaction may be challenged by the Israeli bondholders and their legal representative. I am not suggesting that it was not also problematic. But, the simple fact that Urbacorp was having cash flow problems that were then followed by a successful public financing also does not lead to any ready inference that Urbancorp or Cooltech knew or ought to have known that, in the summer of 2015, Urbancorp was so near failure that by accepting units in kind Cooltech was stealing a march on other creditors - some of whom (e.g. the Israeli bondholders) did not even exist as yet.

14 Apparently, Mr. Saskin offered units to other creditors too. Some took them and others did not. Cooltech's principal spoke to some of the other creditors prior to agreeing to take units. That fact, on its own, does not allow me to infer anything nefarious or any particular state of knowledge in Cooltech.

15 Neither does the fact that Cooltech accepted units from Edge on indebtedness from other entities establish any entitlement to relief against Cooltech. A creditor is indifferent as to which entity pays the bills in a wholly-owned group. Absent complicity in a tort or breach of trust, the pocket from which Mr. Saskin chooses to pay is no business of Cooltech. Mr. Saskin owned the whole outfit 100%. Absent insolvency, you are not robbing Peter to pay Paul if you are Peter.

The Role of the Monitor

16 Trustees in bankruptcy can be recognized as complainants in oppression proceedings. *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.). The recognition is discretionary. At para. 45 of *Olympia & York Realty Corp.*, Goudge JA explained:

> . . . s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly [page 556] oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

17 In *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366 (Ont. S.C.J. [Commercial List]), the *CCAA* court specifically empowered the Monitor to bring oppression proceedings against a party whom the Monitor alleged was impairing the company's ability to restructure by its oppressive conduct. See paras. 34 and 37.

18 In the case at bar, the Monitor has not been empowered to bring proceedings on behalf of the *CCAA* debtors. Mr. Drake points to the Monitor's authority to seek advice and directions in its initial order. In my view, that power ought to have been used *before* the Monitor purported to act on behalf of the debtor corporations in claiming relief against a creditor. Until empowered to sue, the Monitor is a neutral with duties to all interested parties. See *Essar*, at para. 30.

19 The Monitor is not truly seeking advice and directions in this motion. It has sued Cooltech for monetary relief under the banner of a motion for advice and directions. It seeks judgment holding Cooltech liable. It is not asking for the court's input or advice other than to adjudicate the complaint.

20 Monitors can certainly be empowered to bring legal proceedings and to act on behalf of *CCAA* debtors in appropriate circumstances. Under s. 23 (1)(k) of the *CCAA* the court has broad discretion to empower the Monitor to take steps to facilitate the restructuring or to advance the goals of the *CCAA*. *Ted Leroy Trucking Ltd., Re*, 2010

SCC 60 (S.C.C.) (CanLII) at para. 70. Mr. Drake submits that when the court appointed a creditors' committee in this case, a sealed report from the Monitor made reference to the Monitor bringing proceedings in the interests of creditors. However, the order itself grants no such authority to the Monitor. A reference in a Monitor's report that is not adopted into an order is not approval for the Monitor to take steps. There are no steps delineated. There are no parameters for the exercise established.

21 The Monitor is not a trustee in bankruptcy. The creditors know how to bankrupt a debtor if they believe doing so is appropriate. In the interim, I do not see how, in this liquidating *CCAA* process, the Monitor bringing proceedings in place of the creditors who stand to gain from it can be said to facilitate the restructuring. In *Essar* there was a particular roadblock to a fair and proper restructuring affecting all interested parties. Here, by contrast, the Monitor pits the current creditors against a group of creditors who were paid over one year before the proceedings commenced. Why is this a fight for the Monitor rather than the creditors who stand to benefit from the claim? There is no evidence before me concerning the existing creditor body. Perhaps there are tens of thousands of powerless or involuntary creditors who need representation as in the *CCAA* proceedings for *Nortel Networks Limited.* Or is there, perhaps, one legal representative of a body of similarly situated creditors who is well able to bring proceedings if he should wish to do so?

22 I accept that if proceedings are available, they can be brought summarily within the procedural context of this case as was done in *Essar* and as approved expressly in *Stelco Inc., Re* [2006 CarswellOnt 3050 (Ont. C.A.)], 2006 CanLII 16526. But, I am not convinced in the utility of empowering the Monitor to drop its cloak of neutrality to bring what are really inter-creditor proceedings or that doing so facilitates this restructuring process.

23 Moreover, the Monitor asserts that the creditors generally held a reasonable expectation that they would be treated fairly and lawfully by Edge. It asks to be recognized as a complainant under the oppression remedy on the creditors' behalves. However, in *Lord v. Clearspring Spectrum Holdings L.P.*, 2017 ONSC 2246 (Ont. S.C.J. [Commercial List]) (CanLII), I explained:

> . . . before a person can claim an oppression remedy, he or she must actually, subjectively, i.e. personally, hold an expectation. For example, at para. 63 of [*BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560] the Court wrote:
>
>> [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 1999 CanLII 14946 (ON SC), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.
>>
>> [56] That is, a stakeholder must personally (i.e. subjectively) have an expectation and actually rely on it before it even gets to the question of whether that expectation is also objectively reasonable.

24 I accept that the Monitor does not have to hold the expectation that it asserts. Moreover, as discussed in *Lord* at para. 56, the expectation may be proved by inference. In this case though, I know absolutely nothing about the creditors in existence in July and August 2015 or what they might have known or expected. I have no facts on which to assess whether any expectation that they might have held was reasonable. I have no evidence that anyone relied or ought reasonably to have relied on whatever expectation they may have held or from which to infer that fact. It is trite to say that any creditor expects fair and legal treatment. In the summer of 2015, did they receive fair and legal treatment? There is no suggestion that the payments made by Edge were unlawful. How do I know if they were fair? Were they offered to all equally? What effect did the payments have on the company when made? Did the payments, perhaps, stave off a group failure for long enough to allow the refinancing of the enterprise to occur in January, 2016? Was that refinancing a good, bad, or indifferent thing *vis-à-vis* Edge and its creditors as at mid-2015?

25 In short, there is no evidence before me to allow me to assess whether there is a reason for the Monitor to be entitled to the exercise of discretion to (a) allow it to sue; or (b) allow it to qualify as complainant. Absent evidence that

can lead to an inference of the existence of reasonable expectations, reliance, and oppression, the Monitor is unsuited to act for creditors in this case.

26 If there is no actual creditor with a sufficient stake to sue or to support the Monitor with evidence in a suit, then I again question the utility of empowering the Monitor to bring a claim that pits creditors against each other. It is not the Monitor's role to "try one on" to see if it can increase recovery for the current creditor body. Creditors are free to spend their money and face the consequences. The Monitor, by contrast, acts with the *imprimatur* the Court. It is far more constrained in its activities and ought typically to consider seeking court approval before undertaking litigation on behalf of particular interests.

Costs

27 The Monitor initially brought the case challenging the value of the transferred units and also challenging the transfers of units by Edge in respect of its own debt. It trimmed back its allegations as it realized it lacked evidence and a legal basis to make those claims. That should have been determined before the Monitor put the respondents to the cost of responding to those broad, meritless claims. Mr. Drake agreed that the respondents' request for $40,000 was a reasonable quantum for costs if they succeeded.

Order

28 The motion for advice and directions is dismissed. The Monitor shall pay costs to the respondents fixed at $40,000 all-in forthwith.

Motion dismissed.

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TAB 9

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency

APPLICATION by monitor for approval of fees.

J.E. Topolniski J.:

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay

under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re,* 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat, Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court,

observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

(a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act.*

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
> > (d) <u>advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC</u> or any DIP lender, <u>which information shall be reviewed with the Monitor</u> and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.
> >
> > [Emphasis added.]

88 Clause 30 of the Initial Order states:

> <u>The Monitor shall provide HSBC and any other creditor of the Applicants'</u> and any DIP Lender <u>with information provided by the Applicants in response to reasonable requests for information</u> made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the

commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

(i) assume that the parties carefully drafted the terms of the order;

(ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and

(iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports

before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this

clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

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(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

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., 698874I CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

The Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF MR. EDWARD S. LAMPERT, ESL INVESTMENTS INC., ESL PARTNERS, L.P. AND RBS PARTNERS, L.P., ET AL.
(MOTION RETURNABLE March 2, 2018)

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