Court File No. CV-09-8396-00CL
Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

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

APPLICANTS

JOINT BOOK OF AUTHORITIES OF THE CMI ENTITIES AND THE LP ENTITIES

(Approval of the Omnibus Transition and Reorganization Agreement)

June 4, 2010

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ATTORNEY-GENERAL OF NOVA SCOTIA et al. v. MacINTYRE

Supreme Court of Canada, Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ. January 26, 1982.

Criminal law — Search and seizure — Information for warrant — Inspection — Whether members of public have right to inspect informations upon which search warrant based — Whether right limited to "interested" parties and where search warrant executed — Whether warrants may be inspected as of right — Whether proceedings concerning granting of search warrant must be held in open Court — Cr. Code, ss. 443, 446.

The applicant, a journalist, sought a declaration that he was entitled to inspect search warrants and the informations used to obtain them after he was refused access to such documents by the Court Clerk. The applicant took the position that his standing was no higher than that of any member of the general public. His application for a declaration was allowed and a declaration made that he was entitled to inspect search warrants and the informations relating to any search warrant that had been executed. On an appeal to the Nova Scotia Supreme Court, Appeal Division, the declaration was broadened to provide that a member of the public is entitled to inspect informations upon which search warrants have been issued and to be present in open Court when search warrants are issued. On further appeal by the Attorney-General of Nova Scotia to the Supreme Court of Canada, *held*, Martland, Ritchie, Beetz and Estey, JJ. dissenting, the appeal should be dismissed and the declaration varied.

Per Dickson J., Laskin C.J.C., McIntyre, Chouinard and Lamer JJ. concurring: The declaration of the Appeal Division of the Supreme Court of Nova Scotia was too wide and should be varied to declare that after a search warrant has been executed and objects found as a result of the search are brought before a Justice pursuant to s. 446 of the *Criminal Code*, a member of the public is entitled to inspect the warrant and the information upon which it has been issued pursuant to s. 443 of the *Criminal Code*. The question of what are the proper limits to be imposed with respect to accessibility of search warrants and informations must be determined by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime and, finally, a strong public policy in favour of openness in respect of judicial acts. Thus what should be sought is maximum accountability and accessibility, but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's fight against crime. At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. Curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these values is the protection of the innocent. Where a search warrant is issued and executed but nothing is found protection of the innocent from unnecessary harm is a valid and important policy consideration which overrides the public access interest. However, if the warrant is executed and something is seized then other considerations apply. Further, the issuance of a search warrant is a judicial act on the part of the Justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings. The effective administration of justice

would be frustrated if individuals were permitted to be present when the warrants were issued. The rule in favour of open Courts admits of an exception where the administration of justice would be rendered impracticable by the presence of the public. The issuance of a search warrant is such a case and accordingly it may be done *in camera*. However, the force of the administration of justice argument abates once the warrant has been executed. There is thereafter a diminished interest in confidentiality as the purposes of the policy of secrecy are largely, if not entirely, accomplished. At this stage, not only interested parties but any member of the public may have access to the information and the search warrant. Undoubtedly every Court has a supervisory and protecting power over its records and access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. However, the presumption is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

Per Martland J., Ritchie, Beetz, and Estey JJ. concurring, dissenting: Search warrants issued pursuant to s. 443 of the *Criminal Code* are not issued in open Court and therefore they and the informations pertaining to them are not documents open for public inspection. Proceedings before a Justice under s. 443 are part of the criminal investigative procedure and are not analogous to trial proceedings which are generally required to be conducted in open Court. The opening to public inspection of the documents before the Justice is not equivalent to the right of the public to attend and witness proceedings in Court. Accordingly, access to these documents should be restricted to persons who show an interest in the documents which is direct and tangible, and the applicant in this case had no such interest. While the function of a Justice may be considered to be a judicial function it is more properly described as a function performed by a judicial officer. There is no requirement that the Justice should perform his function in Court as he does not adjudicate nor does he make any order. If the documents are not subject to public examination prior to the execution of the search warrant there is no reason why they should become subject to examination thereafter, at least until the case in respect of which the search has been made has come to trial. Search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. There are, however, additional important reasons why such documents should not be made public which continue even after the warrant has been executed, such as the possibility that the identity of an informant may be disclosed or that disclosure of such information before trial could be prejudicial to the fair trial of the person suspected to have committed the crime. As well, the release to the public of the contents of informations and search warrants may be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence.

[*Realty Renovations Ltd. v. A.-G. Alta. et al.* (1978), 44 C.C.C. (2d) 249, [1979] 1 W.W.R. 74, 16 A.R. 1, consd; *Caddy v. Barlow* (1827), 1 Man. & Ry. 275; *Attorney-General v. Scully* (1902), 6 C.C.C. 167, 4 O.L.R. 394; *Scott v. Scott*, [1913] A.C. 417; *McPherson v. McPherson*, [1936] 1 D.L.R. 321, [1936] 1 W.W.R. 33, [1936] A.C. 177; *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253; *Inland Revenue Com'rs v. Rossminster Ltd.*, [1980] 2 W.L.R. 1; *R. v. Solloway Mills & Co.* (1930), 53 C.C.C. 261, [1930] 3 D.L.R. 293, [1930] 1 W.W.R. 779, 24 Alta. L.R. 410; *Southam Publishing Co. v. Mack* (1959-60), 2 Crim. L.Q. 119; *Nixon v. Warner Communications Inc.* (1978), 98 S. Ct. 1306; *R. v. Wright*, 8 T.L.R. 293; *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339, refd to]

APPEAL by the Attorney-General of Nova Scotia from a judgment of the Nova Scotia Supreme Court, Appeal Division, 52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 38 N.S.R. (2d) 633, dismissing his appeal from a judgment of Richard, J., 52 C.C.C. (2d) at p. 162, 110 D.L.R. (3d) at p. 290, 37 N.S.R. (2d) 199, granting an application for a declaration.

R. M. Endres and *M. Gallagher*, for appellants.

R. C. D. Murrant and *G. F. Proudfoot*, for respondent.

J. A. Scollin, Q.C., and *S. R. Fainstein*, for intervenant, Attorney-General of Canada.

S. C. Hill, for intervenant, Attorney-General of Ontario.

R. Schacter, for intervenant, Attorney-General of Quebec.

E. D. Westhaver, for intervenant, Attorney-General of New Brunswick.

E. R. A. Edwards, for intervenant, Attorney-General of British Columbia.

K. W. MacKay, for intervenant, Attorney-General of Saskatchewan.

Y. Roslak, Q.C., and *L. H. Nelson*, for intervenant, Attorney-General of Alberta.

A. D. Gold, for intervenant, Canadian Civil Liberties Association.

LASKIN C.J.C., concurs with DICKSON J.

MARTLAND J. (dissenting):—This appeal is from a judgment of the Appeal Division of the Supreme Court of Nova Scotia. The facts which gave rise to the case are not in dispute.

The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and is also a Justice of the Peace. The respondent is a television journalist employed by the Canadian Broadcasting Corporation who, at the material time, was researching a story on political patronage and fund raising. He asked the appellant, Grainger, to show him certain search warrants and supporting material and was refused on the ground that such material was not available for inspection by the general public.

The respondent gave notice to the appellants of an intended application in the Supreme Court of Nova Scotia, Trial Division, for "an Order in the nature of mandamus and/or a declaratory judgment to the effect that the search warrants and Informations relating thereto issued pursuant to section 443 of the *Criminal Code* of Canada or other related or similar statutes are a matter of public record and may be inspected by a member of the public upon reasonable request".

The application was heard by Richard J. [52 C.C.C. (2d) at p. 162, 110 D.L.R. (3d) at p. 290, 37 N.S.R. (2d) 199], who ordered that the respondent "is entitled to a declaration to the effect that the Search Warrants and Informations relating thereto which have been executed upon and which are in the control of a Justice of the Peace or a Court Official are Court records and are available for examination by members of the general public". It will be noted that this order was limited to search warrants which had been executed.

The appellants appealed unsuccessfully to the Appeal Division. The judgment dismissing the appeal contained the following declaration:

> IT IS DECLARED that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the *Criminal Code* of Canada.

This declaration was broader in its scope than that made by Richard J. in that it was not limited to search warrants which had been executed. The basis for the Court's decision is set forth in the following paragraph of the reasons for judgment [52 C.C.C. (2d) 161 at p. 182, 110 D.L.R. (3d) 289 at p. 310, 38 N.S.R. (2d) 633]:

> In my opinion any member of the public does have a right to inspect informations upon which search warrants are based, pursuant to s. 443 of the *Criminal Code*, since the issue of the search warrant is a judicial act performed in open Court by a Justice of the Peace. The public would be entitled to be present on that occasion and to hear the contents of the information presented to the Justice when he is requested to exercise his discretion in the granting of the warrant. The information has become part of the record of the Court as revealed at a public hearing and must be available for inspection by members of the public.

Subsection (1) of s. 443 of the *Criminal Code* provides:

> 443(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
>
> (*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
>
> (*c*) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

Section 446 of the *Criminal Code* provides that anything seized under a search warrant issued pursuant to s. 443 and brought before a Justice shall be detained by him or he may order that it be detained until the conclusion of any investigation or until required to be produced for the purpose of a preliminary inquiry or trial.

Subsection (5) of s. 446 provides:

> 446(5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

The appellants, by leave of this Court, have appealed from the judgments of the Appeal Division. The two issues stated by the appellants are as follows:

> (i) Are search warrants issued pursuant to Section 443 of the *Criminal Code* issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,
>
> (ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has given, that the broad declaration made by the Appeal Division cannot be sustained. That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open Court with a right for the public to be present.

That brings us to the second issue defined by the appellants as to whether there is a general right to inspect search warrants and the informations pertaining thereto. This was the real basis of the submission of the respondent who did not seek to sustain the position taken by the Appeal Division. His position is that search warrants issued under s. 443 and the informations pertaining thereto are Court documents which are open to general public inspection.

The respondent relies upon an ancient English statute enacted in 1372, 46 Edward III. An English translation of this Act, which was enacted in law French, appears in a note at the end of the judgment of the Court of King's Bench in *Caddy v. Barlow* (1827), 1 Man. & Ry. 275 at p. 279. I will quote that part of the note which includes the statutory provision:

> It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord

> Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, "these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an act of Parliament in 46 Edw. 3, in these words: — Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification of any thing which can fall in evidence against the King, or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons (*fait as touts gentz*) of whatever record touches them in any manner, as well as that which falls against the King as other persons. *Le Roy le voet.*

The respondent cites this legislation in support of the proposition that a member of the public has access to all judicial records. However, the provisions of the statute did not go that far. It referred to "whatever record *touches* them in any manner" (emphasis added). I take this as meaning that to obtain the benefit of the statute the person had to show that the document sought to be searched in some way affected his interests.

This view is supported by the portion of the footnote which precedes the quotation of the statute. Lord Coke states that any subject may have access to the records "for his necessary use and benefit".

The case of *Caddy v. Barlow* itself related to the admissibility, in an action for malicious prosecution, of a copy of an indictment against the plaintiff which had been granted to her brother, the co-accused.

The respondent refers to the judgment of the Court of Appeal for Ontario in *Attorney-General v. Scully* (1902), 6 C.C.C. 167, 4 O.L.R. 394, in which reference is made to *Caddy v. Barlow* and to the English statute. That case dealt with an application made to the Clerk of the Peace for a copy of the indictment in a criminal charge of theft against the applicant who had been acquitted. He obviously had an interest in obtaining the document.

The Appeal Division in the present case which, as previously noted, based its decision to permit the examination of the search warrants and informations upon its conclusion that these documents were produced at a judicial hearing in open Court, did deal with the assertion of a general right to examine Court documents in the following passage in its reasons [at p. 182 C.C.C., p. 310 D.L.R.]:

> In my opinion at common law Courts have always exercised control over

their process in open Court and access to the records. Although the public have a right to any information they may gleam [*sic*] from attendance at a public hearing of a process in open Court, and to those parts of the record that are part of the public presentation of the judicial proceeding in open Court there have always been some parts of the Court file that are available only to "persons interested" and this "interest" must be established to the satisfaction of the Court. Parties to civil actions and the accused in criminal proceedings have always been held by the Courts to be persons so interested. Other persons must establish their right to see particular documents before being entitled to do so.

The Appeal Division cited in its reasons paras. 1492 and 1493 of *Taylor on Evidence*, 11th ed. (the same paragraphs appear with the same numbers in the 12th edition) [at pp. 173-4 C.C.C., pp. 301-2 D.L.R.]:

"1492. It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction; but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose. If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action. So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.

"1493. Indeed, it may be laid down as a general rule, that the King's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of his Majesty's subjects can prove himself to be *interested*. Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves, — without putting them to the expense and trouble of making a formal application for a mandamus. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bona fide* required on some special and public ground, or the court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced."

The first edition of this work was published in 1848, and so these propositions may be taken as representing the author's views of the law of England on this subject.

In Halsbury's Laws of England, 4th ed., vol. 1, para. 97, a similar statement of the law appears:

> The applicant's interest in the documents msut be direct and tangible. Neither curiosity, even though rational, nor the ascertainment of facts which may be useful for furthering some ulterior object, constitutes a sufficient interest to bring an applicant within the rule on which the court acts in granting a mandamus for the inspection of public documents.
>
> Although reasonable grounds must be shown for requiring inspection, it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein.

It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, *i.e.*, for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, *inter alia*, to search buildings, receptacles or places and seize documents or other things which may afford evidence with respect to the commission of a criminal offence. A Justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed; anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence; or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

The function of the Justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the Justice should perform his function in Court. The Justice does not adjudicate, nor does he make any order. His power is to give authority to do

certain things which are a part of pre-trial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the Justice issued a search warrant.

As the function of the Justice is not adjudicative and is not performed in open Court, cases dealing with the requirement of Court proceedings being carried on in public, such as *Scott v. Scott*, [1913] A.C. 417, and *McPherson v. McPherson*, [1936] 1 D.L.R. 321, [1936] 1 W.W.R. 33, [1936] A.C. 177, are not, in my opinion, relevant to the issue before the Court. The documents which the respondent seeks to examine are not documents filed in Court proceedings. They are the necessary requirements which enable the Justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for criminal proceedings.

If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Part XXV of the *Criminal Code*. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the Justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

In *R. v. Fisher* (1811), 2 Camp. 563, 170 E.R. 1253, a prosecution was instituted for criminal libel in consequence of the

publication by the defendants of the preliminary examinations taken *ex parte* before a Magistrate prior to the committal for trial of the plaintiff on a charge of assault with intent to rape. In his judgment, Lord Ellenborough said, at p. 570:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert . . . The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal.

Inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy. It was this kind of risk which led to the recognition in law of the right of the police to protect from disclosure the identity of police informants. That right exists even where a police officer is testifying at a trial. The same kind of risk arises in relation to persons who give information leading to the issuance of a search warrant. For the same reasons which justify the police in refusing to disclose the identity of an informer, public disclosure of documents from which the identity of the informant may be ascertained should not be compelled.

In his reasons, my brother Dickson has referred to the fact that in recent years the search warrant has become an increasingly important investigatory aid as crime and criminals become increasingly sophisticated and has pointed out that the effectiveness of a search pursuant to a search warrant depends, *inter alia*, on the degree of confidentiality which attends the issuance of the warrant. To insure such confidentiality, it is essential that criminal organizations, such as those involved in the drug traffic, should be prevented, as far as possible, from obtaining the means to discover the identity of persons assisting the police.

Apart from the protection of the identity of the person furnishing the information upon which the issuance of a search warrant is founded, it is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities in connection with searches. In *Inland Revenue Com'rs v. Rossminster Ltd.*, [1980] 2 W.L.R. 1, the House of Lords considered the validity of a search warrant procured pursuant to

an English statute, the *Taxes Management Act, 1970.* The warrant was obtained because of suspected tax frauds. When executed, the occupants of the premises were not told the offences alleged or the "reasonable ground" on which the Judge issuing the warrant had acted. In his reasons for judgment, Lord Wilberforce said, at pp. 37-8:

> But, on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search *premises* regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this at this stage, nor has he the right to be informed of the "reasonable grounds" of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences. With reference to the police, Lord Reid stated this in these words:
>
> > "The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities. And it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy." (*Conway v. Rimmer* [1968] A.C. 910, 953-954).

The release to the public of the contents of informations and search warrants may also be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence. The fact that his premises are the subject of a search warrant generates suspicion that he was in some way involved in the offence. Publication of the fact that such a warrant had been issued in respect of his premises would be highly prejudicial to him.

For these reasons, I am not satisfied that there is any valid reason for departing from the rule as stated in Halsbury so as to afford to the general public the right to inspect documents forming part of the search warrant procedure under s. 443.

In summary, my conclusion is that proceedings before a Justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open Court. The opening to public inspection of the documents before the Justice is not equivalent to the right of the public to attend and witness proceedings in Court. Access to these documents should be restricted, in accordance with the practice established in England,

to persons who can show an interest in the documents which is direct and tangible. Clearly, the respondent had no such interest.

I would allow the appeal and set aside the judgments of the Court of Appeal and of Richard J. In accordance with the submission of the appellants, there should be no order as to costs.

RITCHIE J. concurs with MARTLAND J.

DICKSON J.:—The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and also a Justice of the Peace. In the latter capacity he had occasion to issue certain search warrants. The respondent, Linden MacIntyre, is a television journalist employed by the Canadian Broadcasting Corporation. At the material time Mr. MacIntyre was researching a story on political patronage and fund raising. Mr. MacIntyre asked Mr. Grainger to show him the search warrants and supporting material. Mr. Grainger refused, on the ground that such material was not available for inspection by the general public. Mr. MacIntyre commenced proceedings in the Supreme Court of Nova Scotia, Trial Division, for an order that search warrants and informations relating thereto, issued pursuant to s. 443 of the *Criminal Code* or other related or similar statutes, are a matter of public record and may be inspected by a member of the public upon reasonable request.

I

Mr. Justice Richard of the Trial Division of the Supreme Court of Nova Scotia delivered reasons approving Mr. MacIntyre's application [52 C.C.C. (2d) at p. 162, 110 D.L.R. (3d) at p. 290, 37 N.S.R. (2d) 199]. He held that Mr. MacIntyre was entitled to a declaration to the effect that search warrants "which have been executed", and informations relating thereto, which are in the control of the Justice of the Peace or a Court official are Court records available for examination by members of the general public.

An appeal brought by the Attorney-General of Nova Scotia and by Mr. Grainger to the Appeal Division of the Supreme Court of Nova Scotia was dismissed [52 C.C.C. (2d) 161, 110 D.L.R. (3d) 289, 38 N.S.R. (2d) 633]. The Appeal Division proceeded on much broader grounds than Richard J. The order dismissing the appeal contained a declaration "that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to s. 443 of the *Criminal Code* of Canada". The Court also declared that Mr. MacIntyre was entitled to be present in

open Court when the search warrants were issued. This right, the Appeal Division said, extended to any member of the public, including individuals who would be the subjects of the search warrants.

This Court granted leave to appeal the judgment and order of the Appeal Division. The Attorney-General of Canada and the Attorneys-General of the Provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta intervened to support the appellant Attorney-General of Nova Scotia. The Canadian Civil Liberties Association intervened in support of Mr. MacIntyre.

Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

II

A search warrant may be broadly defined as an order issued by a Justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the Justice who issued the warrant to be dealt with by him according to law.

Search warrants are part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the *Code*, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the Justice, usually performed *ex parte* and *in camera*, by the very nature of the proceedings.

The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.

As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the *Criminal Code*.

III

The *Criminal Code* gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney-General of Nova Scotia relied upon Taylor's *Treatise on the Law of Evidence*, 11th ed., published in 1920, upon a footnote to O. 63, r. 4 of the English Rules of Court, and upon *Inland Revenue Com'rs v. Rossminster Ltd.*, [1980] 2 W.L.R. 1. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exerciseable when some direct and tangible interest or proprietary right in the documents can be demonstrated.

It does seem clear that an individual who is "directly interested" in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (*R. v. Solloway Mills & Co.* (1930), 53 C.C.C. 261, [1930] 3 D.L.R. 293, [1930] 1 W.W.R. 779 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed. The point is discussed by Mr. Justice MacDonald of the Alberta Supreme Court in *Realty Renovations Ltd. v. A.-G. Alta. et al.* (1978), 44 C.C.C. (2d) 249 at pp. 253-4, [1979] 1 W.W.R. 74, 16 A.R.1:

> Since the issue of a search warrant is a judicial act and not an adminis-

> trative act, it appears to me to be fundamental that in order to exercise the right to question the validity of a search warrant, the interested party or his counsel must be able to inspect the search warrant and the information on which it is based. Although there is no appeal from the issue of a search warrant, a superior Court has the right by prerogative writ to review the act of the Justice of the Peace in issuing the warrant. In order to launch a proper application, the applicant should know the reasons or grounds for his application, which reasons or grounds are most likely to be found in the form of the information or warrant. I am unable to conceive anything but a denial of Justice if the contents of the information and warrant, after the warrant is executed, are hidden until the police have completed the investigation or until the Crown prosecutor decides that access to the file containing the warrant is to be allowed. Such a restriction could effectively delay, if not prevent, review of the judicial act of the Justice in the issue of the warrant. If a warrant is void then it should be set aside as soon as possible and the earlier the application to set it aside can be heard, the more the right of the individual is protected.

The appellant, the Attorney-General of Nova Scotia, does not contest the right of an "interested party" to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore, is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed "interested parties" and those members of the public who are unable to show any special interest in the proceedings.

There would seem to be only two Canadian cases which have addressed the point. In (1959-60), 2 Crim. L.Q. 119, reference is made to an unreported decision of Greschuk J. in *Southam Publishing Co. v. Mack* in Supreme Court Chambers in Calgary, Alberta. *Mandamus* was granted requiring a Magistrate to permit a reporter of the Calgary Herald to inspect the information and complaints which were in his possession relating to cases the Magistrate had dealt with on a particular date.

In *Realty Renovations Ltd. v. A.-G. Alta., supra*, MacDonald J. concluded his judgment with these words [at p. 255]:

> I further declare that upon execution of the search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand.

It is only fair to observe, however, that in that case the person seeking access was an "interested party" and therefore the broad declaration, quoted above, strictly speaking went beyond what was required for the decision.

American Courts have recognized a general right to inspect and copy public records and documents, including judicial records and

documents. Such common law right has been recognized, for example, in Courts of the District of Columbia (*Nixon v. Warner Communications Inc.* (1978), 98 S. Ct. 1306). In that case Mr. Justice Powell, delivering the opinion of the Supreme Court of the United States, observed at p. 1311:

> Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject of litigation, its contours have not been delineated with any precision.

Later, at p. 1312, Mr. Justice Powell said:

> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e.g. *State ex rel. Colscott v. King*, 154 Ind. 621, 621-627, 57 N.E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, e.g. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 677, 137 N.W. 2d 470, 472 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N.W. 2d 241 (1966). But see *Burton v. Reynolds*, 110 Mich. 354, 68 N.W. 217 (1896).

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The *rationale* of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.

The concern for accountability is not diminished by the fact that the search warrants might be issued by a Justice *in camera*. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

IV

The appellant, the Attorney-General of Nova Scotia, says in effect that the search warrants are none of Mr. MacIntyre's business. MacIntyre is not directly interested in the sense that his premises have been the object of a search. Why then should he be entitled to see them?

There are two principal arguments advanced in support of the position of the appellant. The first might be termed the "privacy" argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of "reasonable grounds" to believe that there is evidence with respect of the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to embarrassment and public suspicion through release of search warrants?

The second, independent, submission of the appellant might be termed the "administration of justice" argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purpose and intention of Parliament, embodied in s. 443 of the *Criminal Code*, would be frustrated.

V

Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from Court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of

justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.L.R. 293, are apposite and were cited with approval by Duff J. in the *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

> "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177 at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

It is, of course, true that *Scott v. Scott* and *McPherson v. McPherson* were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.

The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. *Ex parte* applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the "open court" rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of

Halsbury's Laws of England, 4th ed. vol. 10, para. 705, p. 316, states the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera.

At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

VI

That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an exception to the open Court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys-General have established, at least to my satisfaction, that if the application for the warrant were made in open Court the search for the instrumentalities of crime would, at best, be severely hampered and, at

worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney-General of Ontario that the presence in an open court-room of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open Court by a Justice of the Peace with the public present. The respondent Mr. MacIntyre stated in para. 5 of his factum:

> One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision-making process . . .

It appeared clear during argument that the act of issuing the search warrant is, in practice, rarely, if ever, performed in open Court. Search warrants are issued in private at all hours of the day or night, in the Chambers of the Justice by day or in his home by night. Section 443(1) of the *Code* seems to recognize the possibility of exigent situations in stating that a Justice may "at any time" issue a warrant.

Although the rule is that of "open Court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the Court may sit *in camera*. The issuance of a search warrant is such a case.

In my opinion, however, the force of the "administration of justice" argument abates once the warrant has been executed, *i.e.*, after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point individuals who are directly "interested" in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally

uninhibited accessibility of the public to the working of the Courts should be undertaken with the greatest reluctance.

The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (*i.e.*, those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

VII

I conclude that the administration of justice argument does justify an *in camera* proceeding at the time of issuance of the warrant but, once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced. The general rule of public access must prevail, save in respect of those whom I have referred to as innocent persons.

I would dismiss the appeal and vary the declaration of the Appeal Division of the Supreme Court of Nova Scotia to read as follows:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a Justice pursuant to s. 446 of the *Criminal Code*, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the *Code*.

There will be no costs in this Court.

BEETZ and ESTEY JJ. concur with MARTLAND J.

MCINTYRE, CHOUINARD and LAMER JJ. concur with DICKSON J.

Appeal dismissed; declaration varied.

STEVENSON v. AIR CANADA

Ontario High Court of Justice, Divisional Court, Osler, Osborne and Gray JJ. January 19, 1982.

Contracts — Remedies — Injunction — Contract of personal service — Plaintiff subject to collective agreement containing compulsory retirement clause — Plaintiff commencing proceedings before Canadian Human Rights Commission contesting validity of clause — Whether interlocutory injunction preventing defendants from terminating plaintiff's employment appropriate.

Injunctions — Interim injunction — Contract of personal service — Plaintiff subject to collective agreement containing compulsory retirement clause — Plaintiff commencing proceedings before Canadian Human Rights Commission contesting validity of clause — Whether interim injunction preventing defendants from terminating plaintiff's employment appropriate.

The plaintiff was an airline pilot and subject to a collective agreement which contained a provision for compulsory retirement at age 60. The plaintiff had lodged a complaint with the Canadian Human Rights Commission contesting the validity of a compulsory retirement clause, and shortly before reaching the age of 60 brought this action claiming, *inter alia*, an interim injunction restraining the defendants from terminating his appointment pending the outcome of the Canadian Human Rights Commission proceedings. Upon appeal from an order granting an interim injunction, *held*, the appeal should be allowed and the injunction dissolved. The effect of the injunction was not to preserve the true *status quo*, which was that employment terminated at age 60, but rather to alter the *status quo* in the plaintiff's favour. The plaintiff's contention that the *status quo* was illegal could be met by compensation in the form of a monetary award, and it could not therefore be said that loss of the opportunity to continue to exercise his profession and thereby achieve satisfaction was a matter of irreparable harm. Moreover, the problems encountered by the defendant and the members of the plaintiff's union would be considerable. Frustration of the expectations of junior employees who looked forward to improved job opportunities upon retirement of their seniors could lead to the filing of innumerable grievances. Accordingly, not only did the balance of convenience favour the defendants, but substantial financial loss could be occasioned by continuing the order, and the plaintiff might well be unable to make good on his undertaking to answer for any damages that might result. Moreover, the plaintiff's chance of success in the action was doubtful, and his prospect of success before the Canadian Human Rights Commission was far from overwhelming.

[*Chambers v. Canadian Pacific Air Ltd.* (1981), 128 D.L.R. (3d) 673; *Lamont v. Air Canada et al.* (1981), 34 O.R. (2d) 195, folld; *Board of Governors of Seneca College of Applied Arts & Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193, 22 C.P.C. 130, 37 N.R. 455, 14 B.L.R. 157, 17 C.C.L.T. 106, refd to]

TAB 2

desire to prosecute this proceeding on Robert's behalf and Robert concurs, I need not decide whether or not Robert can apply independently.

The respondent's application to discharge the registrar's order to proceed is therefore dismissed with costs reserved to the judge hearing the application to vary.

Motion dismissed.

RE PACIFIC MOBILE CORPORATION

Supreme Court of Canada, Dickson C.J.C., Beetz, McIntyre, Lamer, Wilson, Le Dain and La Forest JJ. April 4, 1985.

Bankruptcy — Fraudulent transactions — Ordinary course of business — Payment of invoice by debtor made after due date but in accordance with usual practice of parties — Payment made in ordinary course of business — Not fraudulent preference — Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

Hudson v. Benallack et al. (1975), 59 D.L.R. (3d) 1, [1976] 2 S.C.R. 168, [1975] 6 W.W.R. 109, 21 C.B.R. (N.S.) 111, 7 N.R. 119, **distd**

Statutes referred to

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73

APPEAL by a trustee in bankruptcy from a judgment of the Quebec Court of Appeal, 141 D.L.R. (3d) 696, 44 C.B.R. (N.S.) 190, reversing a judgment of Jacques J., 34 C.B.R. (N.S.) 8, in favour of the trustee in bankruptcy in an action to set aside a payment as a fraudulent preference.

Louis Dorion and *Claude Fontaine*, for appellant.

David B. Campbell and *Gaetan Dumas*, for respondent.

BY THE COURT:—This appeal raises two narrow questions in the area of bankruptcy law. First, what is meant by the term "ordinary course of business" in the context of s. 73 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3? Second, was the overdue payment in this case made in the "ordinary course of business"?

We are all of the view, for the reasons set out by Monet J.A. of the Quebec Court of Appeal (reported at 141 D.L.R. (3d) 696, 44 C.B.R. (N.S.) 190), that this appeal must fail.

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on between the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business" at p. 708 D.L.R. (translation), p. 205 C.B.R.:

> From these authorities, it would seem to me that the concept which concerns us is an abstract one and that it is up to the courts to evaluate the particular circumstances of each case in order to determine the *quality* of a given transaction. This is, basically, the perpetual see-saw between law and fact. But, with respect, it is my opinion that one cannot state that a payment which was not made on the due date cannot be deemed to have been made in the ordinary course of business.

In this case, it is clear, based on the evidence adduced, that the payment was made in the ordinary course of business. The late payment by Pacific Mobile to American Biltrite was not only normal in the context of their business relationship, but was also standard for their particular industry.

In his factum, as well as in oral argument, the appellant relied upon this court's decision in *Hudson v. Benallack et al.* (1975), 59 D.L.R. (3d) 1, [1976] 2 S.C.R. 168, [1975] 6 W.W.R. 109, to interpret the term "ordinary course of business". He placed particular emphasis on the following passage at pp. 7-8 D.L.R., pp. 175-6 S.C.R.:

> The object of the bankruptcy law is to ensure the division of the property of the debtor rateably among all his creditors in the event of his bankruptcy. Section 112 of the Act provides that, subject to the Act, all claims proved in the bankruptcy shall be paid *pari passu*. The Act is intended to put all creditors upon an equal footing. Generally, until a debtor is insolvent or has an act of bankruptcy in contemplation, he is quite free to deal with his property as he wills and he may prefer one creditor over another but, upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws.

In our view, the appellant has incorrectly interpreted the above passage. *Hudson* dealt with one point only: whether the words "with a view to giving such creditor a preference", contained in s. 73(1) of the *Bankruptcy Act*, require an intention on the part of the insolvent debtor alone to prefer or a concurrent intent on the part of both the debtor and creditor. The court held that only the intention of the debtor was relevant. That case did not, in any way, consider or determine the meaning of the term "ordinary course of business" and is, therefore, not helpful in the resolution of the issues at hand.

Conclusion

For the reasons set out by Monet J.A. of the Quebec Court of Appeal, the payment made by Pacific Mobile to American Biltrite was a payment made in the "ordinary course of business". Therefore, the payment is not void as against the appellant under s. 73 of the *Bankruptcy Act*. The appeal is accordingly dismissed with costs.

Appeal dismissed.

TAB 3

Case Name:

Air Canada (Re)

APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, as amended
IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.36, as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C.44, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Air Canada and those subsidiaries listed on Schedule "A"*

[2004] O.J. No. 303

47 C.B.R. (4th) 169

128 A.C.W.S. (3d) 1067

2004 CarswellOnt 469

Court File No. 03-CL-4932

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: January 16, 2004.
Judgment: January 16, 2004.

(16 paras.)

Insolvency law -- Practice -- Administration of the estate -- Application to court for directions.

Application for directions on the entering into certain agreements by Air Canada.

HELD: Application granted. The agreements were beneficial to Air Canada and its stakeholders.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, RSC 1985.

Counsel:

Sean F. Dunphy and Ashley John Taylor, for Air Canada.
Peter J. Osborne and Peter H. Griffin, for the Monitor.
Howard Gorman, for the Ad Hoc Unsecured Creditors Committee.
Aubrey Kauffman, for the Ad Hoc Committee of Various Creditors.
Jay Swartz, for Deutsche Bank.
Mark Gelowitz, for Trinity Time Investments.
Robert Thornton and Gregory Azeff, for GE Capital Aviation Services Inc.
J. Porter, for Cerberus.
Kevin McElcheran, for CIBC.
Murray Gold, for CUPE.
Ian Dick, for AG Canada.
James Tory, for Air Canada Board.
Joseph J. Bellissimo, for the Aircraft Lessor/Lender Group.
Terri Hilborn, for Unionized Retiree Committee.
William Sasso and Sharon Strosberg, for Mizuho International, PLC.
Jim Dube, for Deutsche Lufthansa A.G.

[* Editor's note: Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

1 **FARLEY J.**:-- These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

(1) the Merrill Lynch (ML) indemnity;
(2) the entering into the amendments to the Trinity Agreement; and
(3) the Global Restructuring Agreements (GRA).

ML Indemnity

2 There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

3 As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became in-

volved when it was appreciated that there were some difficulties with the practical implementation of the process.

4 I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

5 I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see 820099 Ontario Ltd. v. Harold E. Ballard Ltd., [1991] O.J. No. 266, (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), aff'd, [1991] O.J. No. 1082, (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

6 There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis) relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para. 22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

7 At paragraph 71 of its 19th report, the Monitor stated:

> 71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selec-

tion of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

8 I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

9 As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see Northland Properties Ltd. v. Excelsior Life Ins. Co. of Canada (1989), 73 C.B.R. (N.S.) 195 at 201 (B.C.C.A.). In Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Blair J. at p. 316 adopted the principles in Royal Bank of Canada v. Soundair Corp. (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In Re Sammi Atlas Inc. (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), I observed at p. 173 that in considering what is fair and reasonable 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 the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in Sammi, equitable treatment is not necessarily equal treatment.

10 The Monitor's 19th report at paragraphs 20-21 indicates that:

> 20. The GRA provides the following benefits for Air Canada:
>
> * The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
> * The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;

* Exit financing of approximately US $585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
* Aircraft financing up to a maximum of US $950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
* The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.

21. In return for these restructuring and financing commitments, the GRA provides for the following:

* Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;
* The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the "B747 Restructuring) including one note convertible into equity of the restructured Air Canada at GECC's option;
* The delivery of stock purchase warrants (the "Warrants") for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
* The cross-collateralization of all GECC and affiliate obligations (the "Interfacility Collateralization Agreement") on Air Canada's emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada's obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US $585 million of exit financing and US $950 million of regional jet aircraft financing are significant and critical to the Company's emergence from CCAA proceedings in an expedited manner. In the Monitor's view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants' estate arising as a result of the cross collateralization benefit provided to GECC

under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

11 The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC's position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

12 I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of $1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is "past history" that GE has compromised a significant portion of its $2 billion claim for existing commitments down to $1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

13 With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight "advantage" to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone's best interests - and that everyone should focus on that and give every reasonable assistance and cooperation.

14 With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it as a side note that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements

in the definition of Events of Default; that of course may only be commercial reality - and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

15 I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC's entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in Trinity Amendments.

16 Orders accordingly.

FARLEY J.

cp/e/nc/qw/qlrme/qlhcs/qlmjb

drs/e/qlmxk/qlcdv/qlliq

TAB 4

Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, Applicants

[2007] A.J. No. 923

2007 ABQB 504

415 A.R. 196

33 B.L.R. (4th) 68

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

161 A.C.W.S. (3d) 369

2007 CarswellAlta 1050

Docket: 0501 17864

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E. Romaine J.

Heard: July 24, 2007.
Judgment: July 31, 2007.

(82 paras.)

Civil procedure -- Settlements -- Approval -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

Insolvency law -- Property of bankrupt -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

Insolvency law -- Proposals -- Court approval -- In this insolvency proceeding, the court approved a settlement between Canadian and U.S. debtors -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved.

In this complex insolvency proceeding, the "Calpine Applicants" and the U.S. debtors applied to the present court and the U.S. Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which were hoped to break the deadlock -- The Monitor unequivocally endorsed the settlement agreement -- The Ad Hoc Committee, however, argued that the Canadian creditors would receive less than full recovery and that, therefore, their claims had been compromised -- HELD: The court approved the settlement -- The agreement was a reasonable and necessary path out of the deadlock -- It was a remarkable step forward in resolving the CCAA filing -- It eliminated roughly $7.5 billion in claims against the CCAA debtors, and resolved the major issues between the CCAA debtors and the U.S. debtors that had stalled progress in asset realization and claims resolution -- Most significantly, it unlocked the Canadian proceeding and provided the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities -- The Monitor had concluded that its likely outcome was the payment in full of all Canadian creditors -- The sale of the CCRC ULC1 Notes was a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale could not occur otherwise than in the context of a settlement with those parties whose claims directly affected the Notes themselves -- While it did not guarantee full payment of claims, it substantially reduced the risk that this goal would not be achieved -- Without that resolution, the Canadian creditors faced protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that had plagued these proceedings on both sides of the border.

Statutes, Regulations and Rules Cited:

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

Counsel:

Larry B. Robinson, Q.C., Sean F. Collins, Jay A. Carfagnini, Fred Myers, Brian Empey and Joseph Pasquariello for the CCAA Debtors.

Patrick McCarthy, Q.C. and Josef A. Krueger for the Monitor.

Robert I. Thornton, John L. Finnigan and Rachelle F. Moncur for the Ad Hoc Committee.

Sean F. Dunphy and Elizabeth Pillon for the ULC2 Trustee.

Howard A. Gorman for the ULC1 Noteholders Committee.

Peter H. Griffin and Peter J. Osborne for the U.S. Debtors.

Peter T. Linder, Q.C. and Emi R. Bossio for the Fund.

Ken Lenz for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee.

Jay A. Swartz for Lehman Brothers.

Rinus De Waal for the Unsecured Creditors' Committee.

Neil Rabinovitch for the Unofficial Committee of 2nd Lien Debtholders.

B.A.R. Smith, Q.C. for Alliance Pipelines.

Douglas I. McLean for TransCanada Pipelines Limited.

Reasons for Judgment

B.E. ROMAINE J.:--

Introduction

1 This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

2 Both Courts approved the settlement. These are my reasons for that approval.

Background

3 Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership ("CESCA"), Calpine Canada Natural Gas Partnership ("CCNG") and Calpine Canadian Saltend Limited Partnership ("Saltend LP"). The Monitor's 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the "CCAA Parties" and to those parties together with the Calpine Applicants as the "CCAA Debtors". Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U.S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Cal-

pine Corporation ("CORPX"), the primary party in the U.S. insolvency proceedings, and its U.S. subsidiaries collectively as the "U.S. Debtors".

4 During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the "Fund"), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. ("CCPL") in the Fund to HCP Acquisition Inc. ("Harbinger") in February 2007, a sale that closed simultaneously with Harbinger's takeover of the publicly-held units in the Fund.

5 In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following "material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors":

a. The Hybrid Note Structure ("HNS") and whether Calpine Canada Energy Finance ULC ("ULC1"), including the holders of the 8 1/2% Senior Notes due 2008 (the "ULC1 Notes") issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
b. The sale by Calpine Canada Resources Company ("CCRC") of its holdings of U.S.$359,770,000 in ULC1 Notes (the "CCRC ULC1 Notes") and the effect of the U.S. Debtors' so-called Bond Differentiation Claims ("BDCs") on such a sale;
c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
e. The priority of the claim of Calpine Canada Energy Limited ("CCEL") against CCRC;
f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the "Greenfield Action");
g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
i. Marker claims filed by the ULC1 Indenture Trustee.

6 In the Report, the Monitor describes the settlement process that led to this application as follows:

> 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.

11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the "Preliminary ULC1 Settlement"). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
13. As a result of the above discussions and negotiations, [a settlement outline (the "Settlement Outline")] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the "GSA")] ...
17. The [GSA] is subject to the following conditions:

    a. The approval of both this Court and the U.S. Bankruptcy Court;
    b. The execution of the [GSA]; and
    c. The CCRC ULC1 Notes being sold.

7 As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U.S. Debtors. The Report describes the "key elements" of the GSA as follows:

a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee's proof of claim ... against CORPX which results in a total claim against CORPX in the amount of US$3.505 billion (the "ULC1 1.65x Claim"). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;

b The withdrawal of the BDCs advanced by the U.S. Debtors ...;

c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;

e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors' creditors' claims:

    i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively "Alliance") for repudiation of certain long-term gas transportation contracts held by CESCA;
    ii. The claims of NOVA Gas Transmission Ltd. ("NOVA") for the repudiation of certain long-term gas transportation contracts held by CESCA;
    iii. The claims of TransCanada Pipelines Limited ("TCPL") for the repudiation of certain long-term gas transportation contracts held by CESCA;
    iv. The claims of Calpine Power L.P. [the "Fund"] for the repudiation of the tolling agreement between [the Fund] and CESCA (the "CLP Toll Claim");
    v. The claims of [the Fund] and Calpine Power Income Fund ("CPIF") relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the "Island Transfer Fee Claim"); and
    vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the "Heat Rate Penalty Claim"); and

f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;
g. The settlement of the Greenfield Action;
h. The withdrawal of the UL1 Indenture Trustee Marker Claim;
i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;
j. The resolution of the quantum of the cross-border intercompany claims ... ;
k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;
l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the "ULC2 Make-Whole Premium"). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the

date of distribution to the ULC2 direct creditors, an amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan ... ;

n. Resolution of all jurisdictional issues between Canada and the U.S.; and

o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. ("TTS").

8 The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

9 The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

10 The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

11 The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the "*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company" (the "Ad Hoc Committee"). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the Ad Hoc Committee states that it "is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power, L.P.". Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the "Opposing Creditors" hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

12 The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analyzed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of $7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

> ... While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U.S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.

b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors' creditors. According to the Monitor's conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

13 The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S. $650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

14 This submission is misleading. The $650 million refers to two elements of the GSA: a payout to the U.S. Debtors of $75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corpo-

ration claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of $575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's $2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCA shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCA (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional $50 million of claims against CESCA advanced by the U.S. Debtors have been postponed to the claims of other CESCA creditors.

15 The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

16 As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

17 The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCA, arguing that those creditors face a potential shortfall of at least $175 million. The cited shortfall of $175 million is again misleading, failing to take into account that the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCA, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCA of $25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately $2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately $23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

18 The shortfall, if any, to which the creditors of CESCA will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from $142 million to $378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth $200 million or less, all of the CESCA creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's

"high" recovery scenario, all creditors of CESCA will receive full payment even if the CLP Toll Claim is worth as much as $300 million.

19 Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

20 The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

21 The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only $25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX guarantees under the "low" scenario, and those only to the extent of a $15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

22 The Ad Hoc Committee argues that CORPX's guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX's guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor's expectation that these claims will be paid in full, the U.S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

23 The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of

the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders' claims.

24 Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

25 Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

26 I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately $3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

27 As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed "briefly" for the calling of a vote and the determination of the ULC2 entitlements and the Fund's claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The "brief" adjournment thus suggested amounts to a delay of roughly 3 2 months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U.S. Court.

The Fund's Objections

28 As noted in its brief, the Fund "fully supports" the position of the Ad Hoc Committee. However, it says it has additional objections.

29 The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA's major creditor, the Fund is thereby prejudiced.

30 Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that $15 million of the possible $90 million priority claim to be paid to the U.S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

31 The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA

when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund's claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

32 The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX's guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the $7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

33 The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of $10.5 million on the "high" scenario basis or $19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

34 The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

35 The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts

owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

36 In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

37 I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the UCL2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

38 While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

39 With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

40 The ULC2 Trustee also objects to the timing of the payment of $75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the $75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

41 It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster* 1999 ABCA 178 (CanLII), (1999), 244 A.R. 93 (C.A.) at para. 13.

42 The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* reflex, (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J.) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

43 The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

44 The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

45 The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

46 In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky ... contingent claimants, and ... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan ... without the right to vote on the proposal."

47 The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

48 These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U.S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

49 Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

50 It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

51 The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

52 The Opposing Creditors rely on *Cable Satisfaction International, Inc. v. Richter Associés Inc.* 2004 CanLII 28107 (QC C.S.), (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This

comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

53 There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

54 It is surely not the case that an arrangement or compromise need be labelled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

55 I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCA whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of $25,000 in CCPL. The creditors of CESCA who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCA gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

56 The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Re Playdium Entertainment Corp.* reflex, (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]) at paras. 11 and 23 and *Re Air Canada* reflex, (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

57 In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* re-

flex, (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

58 Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

59 In *Air Canada*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Red Cross* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

> ... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd.* ... In *Sammi Atlas Inc., Re* reflex, (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable 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 the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

60 The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

61 Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

62 This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

63 I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

64 The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

65 In *Red Cross*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

66 Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

67 The objecting claimants in *Red Cross* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

68 Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

69 He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

70 Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

71 Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be "grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA'."

72 At para. 45, Blair J. made the following comments, which resonate in this application:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* reflex, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement

> which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> [Emphasis in *Red Cross*.]

73 Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price "would in the circumstances be folly".

74 While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross, Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

75 That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

76 In this case, as in *Red Cross*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

77 The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* reflex, (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J., [2005] O.J. No. 4309, approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco's assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the

many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

78 At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

> In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...
>
> In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

79 The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

80 Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately $7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the

context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

81 I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analyzed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

82 The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

B.E. ROMAINE J.

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