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 Section 11 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 other Applicants

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.

B E T W E E N :

GLUSKIN SHEFF + ASSOCIATES INC.

Moving Party

- and -

CANWEST MEDIA INC., and CANWEST PUBLISHING INC.

Responding Parties

BRIEF OF AUTHORITIES OF THE MOVING PARTY
(Motion Returnable June 16, 2010)

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Tab 1

THE LAW OF CONTRACT IN CANADA

by

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Fifth Edition

THOMSON
CARSWELL

had against the third party, for example, to sue for negligence.[87] In this manner equity, if not common law has managed to outflank the strict common-law doctrine of privity in certain situations.[88]

In some situations statute law has been enacted to avoid the consequences of the common-law doctrine of privity, for example, in relation to insurance with respect to injuries caused by driving a motor vehicle. Legislatures have acknowledged the impracticability of the common law in relation to the realities of modern life. However, where a statute does give a third party a right under a contract between other parties, then the right of action has been held to be statutory not contractual (which suggests that the exception or modification of the common-law doctrine is more apparent than real).[89]

Finally, mention must be made of an equitable development which has done much to undermine or limit the strength of the common-law doctrine. By the employment of the *trust* concept, equity has enabled third parties sometimes to acquire enforceable rights under contracts to which they were not signatories or parties.[90]

(b) Some specific qualifications

(i) *Agency*[91]

Under the law of agency, a principal may contract with another party through an agent. In such circumstances, even though the contract is negotiated between the agent and the third party (and may even be signed by the agent, not the principal), the contract which comes about is held to be between the principal and the third party, not the agent and the third party.[92] There are, of course, qualifications to this general principle. Thus, as seen earlier, if the contract is by deed, the agent alone will acquire rights and be subjected to liabilities thereunder.[93] The principal has no direct rights or liabilities with respect to the third party. Secondly, there are situations in which the agent does not drop out, as it were, but remains a party to the transaction,

87 *J. Clark & Son Ltd. v. Finnamore* (1973), 5 N.B.R. (2d) 467 (N.B.C.A.). For the doctrine of subrogation, see Goff & Jones, *Law of Restitution*, 6th ed. (2002), Chapter 3; Fridman, *Restitution*, 2nd ed. (1992), pp. 398-402; Maddaugh & McCamus, *Law of Restitution*, 2nd ed. (2004), Chapter 8.

88 Fridman, *op. cit.*, pp. 412-414.

89 *Metro. Loan Co. v. Can. Security Assur. Co.*, [1934] 2 W.W.R. 422 (Man. C.A.); compare *Davis & Sons v. Taff Vale Ry. Co.*, [1895] A.C. 542 at 560 (H.L.) *per* Lord Macnaghten.

90 Below, pp. 193-196.

91 See, generally, Fridman, *Law of Agency*, 7th ed. (1996). Nothing decided in *London Drugs Ltd. v. Kuehne & Nagel Int. Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.) affects this qualification of the privity doctrine.

92 Fridman, *op. cit.*, pp. 216-222. Of course, it must be shown that the relationship of principal and agent existed, which can cause problems in some circumstances: *ibid.*, pp. 55-61. In this respect can it be said that the requisite relationship existed in *Centennial Realties Ltd. v. Westburn Indust. Enterprises Ltd.* (1978), 31 N.S.R. (2d) 64 (N.S.T.D.), above p. 177. Note also that if an agent employs a sub-agent this may not produce privity between the sub-agent and the principal: Fridman, *op. cit.*, pp. 164-171; *S/S Steamship Co. v. "Alchatby" (The)* (1986), 5 F.T.R. 253 (Fed. T.D.); affirmed (1989), 101 N.R. 384 (Fed. C.A.).

93 Above, p. 183.

capable of suing, and being sued by the third party.[94] However, the more normal position is that the principal, on whose behalf the agent contracts, is the one entitled to take the benefit of the contract so negotiated, as well as being the one liable in the event of default.

This will only be the result when the agent, in contracting, has acted within the scope of his authority.[95] An agent who contracts without authority does not achieve the result of making his principal a party to the contract[96] (and may be liable himself to the third party, on the basis of contract, that is, as the only other contracting party, or for breach of the implied warranty of authority, by representing that he had authority to contract).[97] What is meant by authority? This concept breaks down into various categories, namely, express, implied, usual, customary, and apparent or ostensible authority.[98] As long as the agent has acted in accordance with one of these various types of authority when he contracted, then the contract will bind the principal (though it must be noted that if the agent acted with apparent or ostensible authority this may result in the principal's being liable, without any corresponding right to sue the third party). Mention should also be made of the doctrine of ratification.[99] By virtue of this, an originally unauthorized act or transaction on the part of the agent may become valid by subsequent authorization or ratification, which will have the effect (in almost all cases) of rendering the transaction as good as if the agent had been authorized in advance. This is not always true, for example, where an offer has been accepted subject to ratification and the offer has been withdrawn between the original unauthorized acceptance by the agent and the later ratification by the principal.[100] Nor will an undisclosed principal be able to ratify an unauthorized contract made by his agent.[101]

An important distinction is drawn between a disclosed and an undisclosed principal. An undisclosed principal is one whose existence is not made known by the agent to the third party; the latter therefore is contracting with the agent under the belief that the agent is the other party, that is, a principal in his own right. While, exceptionally, the common law permits an undisclosed principal to acquire rights and be subjected to liabilities as a consequence of a contract made by his agent on his behalf,[102] in some circumstances this will not be so.[103] If the identity of the contracting party is important to the third party transacting with the agent, if the

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94 Fridman, *op. cit.*, pp. 232-243; compare *Holland v. St. John Toyota Ltd.* (1981), 130 D.L.R. (3d) 156 (N.B.Q.B.), above p. 177, note 9.

95 Hence if the agent's authority is *revoked* before he contracts, the principal will not be bound: *McIntyre v. Royal Trust Co.*, [1946] 1 W.W.R. 210 (Man. C.A.).

96 Fridman, *op. cit.*, pp. 217-218.

97 *Ibid.*, pp. 232, 243.

98 *Ibid.*, pp. 61-79, 111-119.

99 *Ibid.*, pp. 84-110.

100 *Ibid.*, pp. 97-103.

101 *Ibid.*, pp. 89-91. See, *e.g.*, *Eckroyd v. Rodgers* (1913),4 W.W.R. 601 (Man. K.B.); *Van Hemelryck v. New Westminister Const. & Enrg. Co.*, [1920] 3 W.W.R. 709 (B.C.C.A.).

102 As long as he or she is an undisclosed principal: see *Alberta U-Drive (1975) Ltd. v. Krause* (1993), 13 Alta. L.R. (3d) 200 (Alta. Q.B.) where the rental agreement entered into by the defendant's husband did not extend to the defendant, his wife who was neither a direct party nor an undisclosed principal.

103 Fridman, *op. cit.*, pp. 258-266.

agent was unauthorized in what he did, if the existence of some other principal is expressly or impliedly excluded by the contract between agent and third party, the undisclosed principal is precluded from being a party to the contract. The anomalous position of the undisclosed principal (which compounds the anomaly of agency) has not been extended to cover all possible situations.

Subject to such limitations, however, namely, authority, disclosure of the existence of a principal, the intention of the parties, the concept of agency, and the rules which have been developed with respect to its use in the law, have made important inroads upon the doctrine of privity of contract. By using someone to transact on one's behalf, even to the extent of concealing that interrelationship, it is possible for one person to be a party to a contract which he has not made. In a sense, however, the exception is more imaginary than real. The true party is the principal; the agent is only a sort of amaneuensis or instrument. The consideration is furnished by the principal; it is only transmitted on his behalf by the agent. What the law of agency achieves, it may be suggested, is a mechanical, rather than a truly substantive qualification of the privity doctrine. Nonetheless, it is important to bear agency in mind; commercially speaking, it may be stated categorically that without the development of the notion of agency, business would have been seriously hampered, the law might have been kept in an immature, undeveloped condition, and it would have been impossible for commerce, trade, and everyday life generally, to have emerged as we know it in modern times.

(ii) *Trust*[104]

In 1893 Street C.J. said in an Ontario case, *Faulkner v. Faulkner*,[105]

> In all the cases since *Tweddle v. Atkinson* . . . in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common-law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favour.

This charming comment, as it was called by Disbery J. in *Tobin Tractor (1957) Ltd. v. Western Surety Ltd.*[106] expresses very succinctly the effect of the English cases from 1880[107] to the 1933 Privy Council decision in the Canadian case of *Vandepitte v. Preferred Accident Insurance Corporation.*[108] In those cases it was held that "where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has

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104 Nothing decided in *London Drugs Ltd. v. Kuehne & Nagel Int. Ltd.* (1992), 97 D.L.R. (4th) 261 (S.C.C.) affects this qualification of the privity doctrine.

105 (1893), 23 O.R. 252 at 258 (Ont. C.A.).

106 (1963), 40 D.L.R. (2d) 231 at 235 (Sask. Q.B.).

107 *Lloyd's v. Harper* (1880), 16 Ch. D. 290 (C.A.); *Re Empress Engineering Co.* (1880), 16 Ch. D. 125 (C.A.); see *Gandy v. Gandy* (1885), 30 Ch. D. 57 (C.A.). For earlier equity cases see *Tomlinson v. Gill* (1756), Amb. 330; *Gregory v. Parker* (1808), 1 Camp. 394.

108 [1933] A.C. 70 (P.C.).

Tab 2

Case Name:

Ryan v. Ontario Municipal Employees Retirement Board

Between
Patrick S. Ryan and Wyman MacKinnon, plaintiffs, and Ontario Municipal Employees Retirement Board, Borealis Capital Corporation, Borealis Real Estate Management Inc., Ian Collier, R. Michael Latimer and Michael Nobrega, defendants

[2006] O.J. No. 618

[2006] O.T.C. 156

51 C.C.P.B. 237

29 C.P.C. (6th) 24

145 A.C.W.S. (3d) 981

2006 CarswellOnt 883

Court File No. 05-CL-6035

Ontario Superior Court of Justice

J.D. Ground J.

Heard: January 13 and 16, 2006.
Judgment: February 16, 2006.

(39 paras.)

Civil procedure -- Parties -- Class or representative actions -- Representative plaintiff -- Application by the plaintiffs to appoint two representative plaintiffs in an action by pension plan members for breach of various duties was allowed in part -- Only one individual was appointed -- Other individual lacked standing and was not appointed because he was not a plan member.

Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Amendment of -- Statement of claim -- Leave to amend -- Court could not deal with the defendants' application to strike the statement of claim for not disclosing a reasonable cause of action -- Plaintiffs were granted leave to amend the claim -- Defendants would be entitled to apply to strike once the amended claim was provided.

Application by the plaintiffs to appoint individuals named Ryan and MacKinnon as their representative plaintiffs -- Application by the defendants to strike the statement of claim for disclosing no reasonable cause of action -- Plaintiffs were members of the Ontario Municipal Employees Retirement System Pension Plan -- Plan had 350,000 members -- Defendant Ontario Municipal Employees Retirement Board entered into an agreement to transfer the management of its real estate properties to a company named Borealis -- It subsequently terminated the agreement and purchased Borealis' shares -- Plaintiffs claimed that these transactions breached trust and fiduciary duties owed to them -- They also claimed that the

individual defendants were unjustly enriched by these transactions -- Ryan was not a member of the Plan -- He was the president of the Ontario division of the Canadian Union of Public Employees -- Many plan members belonged to CUPE -- MacKinnon was a CUPE official -- HELD: Plaintiffs' application allowed -- Defendants' application allowed in part -- Balance of convenience favoured the granting of the representation order -- Enormous expense, inconvenience and time would be incurred to serve all of the Plan members -- Ryan was not appointed -- He lacked standing because he was not a member of the Plan -- He did not have a commonality of interest with the Plan members regarding losses that were caused to it by the defendants' alleged improper actions -- There was no convenience that would result from Ryan's appointment -- MacKinnon qualified as a representative plaintiff -- Regarding the application to strike it was not possible to determine if the claim disclosed reasonable causes of action until it was totally revised to reflect the causes of action and the relief sought by the plaintiffs -- Plaintiffs were granted leave to deliver an amended claim to incorporate the causes of action and the remedies referred to in their factum -- Defendants would then be able to apply to strike it on the basis that it did not disclose a reasonable cause of action

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. C-38, s. 332

Class Proceedings Act, S.O. 1992, c. 6, s. 2(1)

Federal Investment Regulation, s. 16, s. 17

Ontario Municipal Employees Retirement System Act, R.S.O. 1990, c. O-29

Ontario Municipal Employees Retirement System Act Regulations, s. 11.1, s. 29, s. 30(2)

Ontario Rules of Civil Procedure, Rule 9.01, Rule 9.01(2)(d), Rule 10, Rule 12.08, Rule 21, Rule 21.01(1)(b), Rule 21.01(3)(d)

Pension Benefits Act, R.S.O. 1990, c. P-8, s. 8(1)(f), s. 22, s. 22(1), s. 22(5), s. 22(8), s. 22(11)

Pension Benefits Act Regulation, s. 29

Counsel:

Mark Zigler, Celeste Poltak and Lesa MacDonald for the Plaintiffs

Peter H. Griffin for the Defendants, Ontario Municipal Employees Retirement Board, Borealis Capital Corporation, Borealis Real Estate Management Inc.

R. Bruce Smith for the Defendants, Ian Collier, R. Michael Latimer and Michael Nobrega

---

REASONS

1 **J.D. GROUND J.**:-- The motions before this court are the Plaintiffs' motion, (the "Rule 10 motion") for the appointment of Patrick S. ("Sid") Ryan ("Ryan") and Wyman MacKinnon ("MacKinnon") as representative plaintiffs pursuant to Rule 10 to act on behalf of all persons who have a present, future, contingent or unascertained interest in the Ontario Municipal Employees Retirement System Pension Fund (the "Fund") or may be affected by this proceeding (the "Members") and motions brought by the Corporate Defendants and the Individual Defendants to strike the Statement of Claim as disclosing no reasonable cause of action or as frivolous, vexatious or an abuse of power pursuant to Rule 21.01(1)(b) and Rule 21.01(3)(d) (the "Rule 21 motions").

2 On the hearing of these motions, the Defendants' submissions on the Rule 21 motions appeared to concentrate primarily on the Statement of Claim disclosing no reasonable cause of action and, accordingly, should be struck pursuant to Rule 21.01 (1)(b).

3 In the Statement of Claim, the Plaintiffs allege that in entering into a Property Management Agreement in June 2002

whereby the Ontario Municipal Employees Retirement Board ("OMERS") transferred the management of its real estate properties to Borealis Real Estate Management Inc. ("BREMI") and by entering into agreements in February, 2004 (the "Buy Out Agreements"), in connection with the termination of the PMA, to purchase the shares of BOREALIS Capital Corporation ("BCC") for a purchase price of $49.9 million, OMERS breached its trust and fiduciary duties to the Plaintiffs and acted negligently and imprudently. The Plaintiffs further allege in the Statement of Claim that, as a result of such transactions, the Individual Defendants acted in breach of their fiduciary duties to OMERS and were unjustly enriched.

4 The specific remedies sought by the Plaintiffs in the Statement of Claim, as sought to be amended as set out in the Plaintiffs' Factum, are:

> A DECLARATION that the Defendant, Ontario Municipal Employees Retirement System's Board (sic) breached its trust and fiduciary duties, owed to the plaintiffs, as defined below, and acted negligently by entering into imprudent real estate transactions with Borealis Capital Corporation and/or Borealis Real Estate Management Inc., without due care effective on or about June 30, 2002;
>
> A DECLARATION that the Defendants, Ian Collier, Michael Nobrega and R. Michael Latimer (collectively referred to as the "Individual Defendants"), breached their fiduciary duties to OMERS and have been unjustly enriched at the expense of the Ontario Municipal Employees Retirement System Pension Fund;
>
> DAMAGES jointly and severally against the Individual Defendants for breach of fiduciary duty and unjust enrichment in the amount of $50,000,000.00 or in such other amount as the Court may determine following an accounting, reference or such other directions to determine damages under paragraph 1(b);
>
> A DECLARATION that the Defendants, or any one of them, are not entitled to seek recovery of their costs and any expenses, directly or indirectly, related to the defence of this action from the Fund and an injunction prohibiting the payment of any defence costs in respect of this action out of the Fund, including an order that any defence costs already paid out of the Fund be repaid to the Fund;
>
> An ORDER against the OMERS Board, BCC and BREM for an accounting of all payments made between these entities and the Individual Defendants;
>
> A DECLARATION against BCC and BREM and/or their agents, the Individual Defendants, that they either singularly or together breached their trust and fiduciary duties owed to the Members be entering into imprudent real estate transaction agreements;
>
> A DECLARATION that the Management Services Agreement is invalid and unenforceable at law.
>
> A DECLARATION that the Management Services Agreement (the "MSA") is contrary to law and conscionable and therefore incapable of enforcement.

Rule 10 Motion

5 Ryan is not a member of the Ontario Municipal Employees Retirement System Pension Plan (the "Plan") and accordingly, has no interest present, future, contingent or unascertained in the Fund. Ryan seeks to be appointed as a representative plaintiff on the basis that he has been General Vice President of CUPE since 1992 and is President of the Ontario Division of CUPE. More than half of the Ontario members of CUPE are Members of the Plan and the CUPE Members of the Plan constitute more than 45% of the total Members of the Plan. Ryan has been active in raising issues concerning the governance and administration of the Plan including certain of the issues raised in the within action. MacKinnon is a Member of the Plan and is currently the President of CUPE Local 4705 and is Regional Vice President, Northern Ontario of CUPE and a member of National Executive Board.

6 The Plaintiffs submit that the test to be applied in determining whether a representation order should issue is whether the balance of convenience favours the granting of such an order and not whether the members of the plaintiffs group can be found or ascertained. The Plaintiffs point out that the Plan had, at the end of 2004, approximately 355,000 Members and that accordingly, it would be extremely inconvenient, expensive and time-consuming to attempt to serve all Members. I accept that the balance of convenience is the proper test to be applied.

7 The Plaintiffs point out that notice of the Rule 10 motion was published in the Toronto Star on November 14, 2005 giving notice of the return date of the motion and advising Members of their right to appear on the return of the motion to oppose the appointment of Ryan and MacKinnon and that no Member gave notice of his or her intention to do so or appeared on the return date of the motion, thereby indicating no opposition from the Members to the appointment of Ryan and MacKinnon.

8 The Plaintiffs further submit that the action raises issues that are common to all Members of the Plan. The Plaintiffs note that Rule 9.01 permits an action being brought against a trustee without joining all beneficiaries of the trust as parties; however, pursuant to Subrule 9.01(2)(d), that does not apply to a proceeding against an executor, administrator or trustee for fraud or misconduct and accordingly, would not be applicable to the case at bar. The Plaintiffs have also made reference to Rule 12.08, which provides that a member of a trade union may be authorized by the court to bring a proceeding on behalf or for the benefit of members of the union. In my view, Rule 12.08 is not applicable to the case at bar in that this action is brought on behalf of members of a pension plan and not on behalf of members of a trade union in their capacity as members of the trade union.

9 With respect to Ryan not being a Member of the Plan, the Plaintiffs submit that this should not be fatal to the appointment of Ryan as a representative plaintiff in view of his position with CUPE and his background and experience in the negotiation of benefits, including pension benefits, on behalf of members of CUPE.

10 The Defendants submit that this is not a case where a representation order is appropriate in that the Plan is a defined benefit plan and the entitlement of a Member to a pension is determined solely by the formula set out in Regulations passed pursuant to the Ontario Municipal Employees Retirement System Act, R.S.O. (1990) Ch. O.29 (the "OMERS Act") and that accordingly, no member has any personal entitlement, to or ownership interest in, the assets of the Fund. The Defendants further submit that, in any event, Ryan and MacKinnon are not suitable representatives. They submit that Ryan, not being a Member of the Plan has no individual cause of action against OMERS in that no fiduciary duty or duty of care is owed by OMERS to Ryan and he therefore does not have a commonality of interest with the Members of the Plan.

11 The Defendants further submit that Ryan, not being a Member of the Plan, can establish no individual loss resulting from the alleged wrongful acts of the Defendants and, the Plan being a defined benefit plan, MacKinnon cannot demonstrate any individual loss as a result of the alleged improper acts of the Defendants.

12 The Defendants submit that the evidence before this court clearly establishes that Ryan has been actively opposed to government outsourcing of infrastructure and to public/private investments of the nature made by OMERS and to various facets of OMERS' governance and administration and that Ryan has a separate agenda or motive for bringing this action quite apart from the protection or preservation of the Fund for the benefit of the Members of the Plan. They also appear to take the position that MacKinnon is tainted with the same separate agenda on the basis that he is an officer of CUPE, was asked to stand as a representative plaintiff by Ryan and has failed to respond to various questions put to him on cross-examination as to whether he shares Ryan's views with respect to outsourcing, public/private investments and the governance and administration of the OMERS Plan.

13 Finally, the Defendants submit that Ryan and MacKinnon have not adduced any evidence of an ability to satisfy any cost award which might be made against them.

14 I will deal below, in the determination on the Rule 21 motions, as to whether a Statement of Claim discloses a reasonable cause of action. Assuming for the purposes of Rule 10 that the Statement of Claim does disclose a reasonable cause of action, the balance of convenience test must be applied in determining whether a representation order should issue has been met in the case at bar. The test was described by Kiteley J. in Police Retirees of Ontario Incorporated v. OMERS (1997) 35 O.R. (3rd) 177 (Gen. Div.) at page 183 as follows:

> .... the test to be applied in considering a request for a representation order is not whether the individual members of the group can be ascertained or found, bur rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.

15 In view of the fact that the OMERS Plan has some 350,000 members that there has been due notice provided to all

members of the return date of the representation motion and of their right to attend and object to the appointment of the proposed representative plaintiffs and the enormous expense, inconvenience and time that would be involved in attempting to serve all members of the Plan, I am satisfied that the balance of convenience favours the granting of a representation order.

16 With respect to the submission of the Defendants that the OMERS Plan, being a defined benefit plan, no plan member could establish an individual loss and accordingly, has no standing to bring this action before the courts, I am unable to accept this submission as an accurate statement of the law in this province. If it can be established that a trustee or administrator of a pension plan has engaged in negligent or improper conduct with a resulting loss to the pension fund, there must be a remedy available to members of the pension plan even in the case of a defined benefit plan. The beneficiaries of the trust must surely have a cause of action against the trustee or administrator in that case for the loss caused to the trust fund. In any event, in the case at bar, Section 11.1 of the Regulation under the OMERS Act provides that, if an actuarial evaluation reveals an unfunded liability or solvency deficiency in the Fund, OMERS shall increase the rate of contributions by employers and Members, Section 29 of the Regulation provides that in the event that there is a surplus in the fund upon a partial or full winding-up, such surplus shall be shared equally by the Members and by the employers and subsection 30(2) of the Regulation provides that, if on wind-up, the assets of the Fund are insufficient to secure the pension benefit entitlements, the benefits will be reduced in the manner prescribed under the Pension Benefits Act R.S.O. (1990) c. P.8 (the "PBA"). Moreover, the evidence before this court indicates that the OMERS Plan is underfunded at the present time. Accordingly, in my view, the Members have an interest in maintaining the solvency of the Fund and a cause of action based upon any negligent or improper action which may impact upon the financial stability of the Fund.

17 OMERS is the administrator of the Fund pursuant to clause (f), section 8(1) of the PBA. Section 22 of the PBA imposes the following duty of care, diligence and skill on an administrator of a pension plan:

> The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

In my view, members of a pension plan, whether a defined benefit or defined contribution plan, would have a cause of action against the administrator of the plan for breach of such statutory duty of care resulting in a loss to the pension fund. Such action would be brought to defend the security of the assets of the fund to provide their pension benefits.

18 The authorities establish that a person holding title to the assets of a pension fund holds such assets for the benefit of the members of the pension plan (see Huus v. Ontario Superintendent of Pensions) (2002) 58 O.R. (3rd) 380). In the case at bar, OMERS holds title to the assets of the Fund and the members, being the beneficiaries of the Fund, would, in my view, have standing to bring an action against OMERS in the event that any negligent or improper actions of OMERS have resulted in a loss to a Fund.

19 Accordingly, I am satisfied that this is a case where a representation order ought to be made and that Members of the Plan have status to bring this action.

20 I am not, however, satisfied that Ryan is an appropriate person to be appointed as a Representative Plaintiff. Although there are no restrictions in Rule 10 as to who may be appointed as a Representative Plaintiff, Ryan, not being a Member of the Plan does not, in my view, have standing to bring this action in that he does not have a commonality of interest with the Members of the Plan with respect to any loss that may have been caused to the Fund as a result of the alleged improper actions of the Defendants.

21 The Plaintiffs have referred to Police Retirees of Ontario Inc. v. OMERS, supra, where the association ("PRO") was appointed as Representative Plaintiffs for the limited purpose of determining a threshold issue, Kiteley J. stated at page 187:

> Mr. Doane asserts that P.R.O. cannot be appointed because if does not have the same characteristics as the members of the class whom it purports to represent: P.R.O. isn't a retiree and P.R.O. doesn't have a claim against the Excess Funds. If the proposed plaintiff were a natural person, that argument would be attractive. (emphasis added)

In cases such as Police Retirees, supra, where an association or a union has been appointed as representative plaintiff on behalf of its members for certain purposes, there is an element of convenience in appointing an association or union, to which all the members of the plaintiff group belong, to be the representative. There is no such element of convenience in the appointment of Ryan as a representative plaintiff. It would be equally convenient to appoint another Member of the Plan who has an individual interest in the security of the assets of the Plan to bring the action as a Representative Plaintiff. In my view, for an individual to be appointed as a Representative Plaintiff, he or she must represent the plaintiff group in the sense of

having an individual cause of action which is the same cause of action as that of the members of the planned group. Rule 10 is to some extent a precursor to the Class Proceedings Act S.O. (1992) c. 6 which in subsection 2(1) clearly provides that the representative plaintiffs must be members of the class.

22 With respect to the submission of the Defendants that Ryan has a "separate agenda" which ought to disqualify him as a Representative Plaintiff, I am not satisfied that the fact that Ryan may have other issues with respect to the governance and administration of the OMERS Plan should disqualify him as a Representative Plaintiff. The prosecution of such "separate agenda" is, in my view, not in conflict with, or inconsistent with, the prosecution of the claims in the within action.

23 In any event, I am not satisfied that MacKinnon should be tarred with the same brush as Ryan with respect to the "separate agenda". The evidence before this court does not establish that MacKinnon has been actively involved in criticism of, or attach on OMERS, or that he has made any statements which might indicate that this action is brought for a collateral purpose. In my view, the fact that he is an officer of CUPE, was asked by Ryan to stand as a Representative Plaintiff and has refused to answer questions as to whether he shares Ryan's views with respect to the OMERS Plan is not sufficient evidence for this court to conclude that MacKinnon ought not to be appointed a Representative Plaintiff on the basis that he is bringing this action for a collateral purpose. MacKinnon, in my view, qualifies as a Representative Plaintiff.

24 As to the failure of the proposed Representative Plaintiffs to adduce evidence as to their ability to meet any costs award that may be made against them, I am of the view that the representation motion ought not to be dismissed at this stage for that reason but that the Representative Plaintiffs should be given an opportunity to file with this court evidence of their ability to satisfy any costs award that may be made against them.

25 Accordingly, an order will issue that MacKinnon be appointed a Representative Plaintiff for the purpose of the within action and that the Plaintiffs be granted leave to nominate another Member of the Plan as a Representative Plaintiff and to file with this court evidence of the ability of the Representative Plaintiffs to satisfy any costs award that may be made against them.

Rule 21 Motions

26 The test for striking a Statement of Claim pursuant to Rule 21 on the basis that it discloses no reasonable cause of action is that it is plain, obvious and beyond doubt that the claim will not succeed. The Statement of Claim must be given a generous reading and the novelty of the claim will not prevent the action proceeding. The application of this test requires a detailed consideration of the Statement of Claim. The court, in the case at bar, is faced with a dilemma in attempting to deal with the Rule 21 motions brought by the Corporate Defendants and the Individual Defendants because of the divergent views taken by the parties as to the nature of the action. A detailed consideration of the Statement of Claim does not assist the court in resolving this dilemma.

27 The Defendants view the action as, in reality, a claim against the Individual Defendants for benefits they have received as a result of OMERS having entered into improvident transactions in transferring the management of its real estate investments to BREMI through the MSA and in repurchasing the shares of BCC owned by the Individual Defendants. Their position is that the claims brought against the Individual Defendants are really claims that belong to OMERS and that the action is brought as a "common law derivative action". They assert that the declaratory relief sought against OMERS, BCC and BREMI serves no useful purpose and ought not to be granted and that an accounting can only be relevant to the claims against the Individual Defendants. The Defendants note that no remedy in damages is sought against OMERS or the other Corporate Defendants and that, although the Statement of Claim appears to allege breach of duty or negligence on the part of the directors of OMERS, the directors are not Defendants in the action and there is no claim for relief against them personally.

28 The Defendants state that there is no basis for the claim of an agency relationship between OMERS and BCC and BREMI. With respect to BCC, there are no facts pleaded on the basis of which BCC could be held to be an agent to OMERS for purposes of the PBA. With respect to BREMI, the provisions of the MSA preclude any finding that BREMI acted as an agent for OMERS except in very limited circumstances which are not relevant to the claims in this action. The fact that BCC guaranteed the performance of BREMI under the MSA does not, in law, constitute BCC as an agent of OMERS even if it could be found that BREMI was an agent of OMERS in performing its duties under the MSA. Accordingly, neither BCC nor BREMI can be subject to a cause of action for breach of the duty of care imposed on agents of an Administrator of a pension plan pursuant to subsections 22(1) and 22(8) of the PBA.

29 The Defendants note that the claim against the Individual Defendants appears to be for breach of fiduciary duties owed to OMERS and for unjust enrichment at the expense of the Fund. They note that there is no allegation that BREMI or the Individual Defendants mismanaged OMERS real estate investments or failed to comply with the MSA. The Defendants submit that none of the Individual Defendants was ever a director of OMERS and that with the exception of Collier, who was

until February 2001 Vice President of Merchant Banking of OMERS, none of the Individual Defendants could be regarded as having been a senior officer of OMERS. The Defendants state that, in any event, the Individual Defendants owed no fiduciary duty to OMERS with regard to the activities in which they were involved with BREMI. There can be no finding of a duty of care owed by the Individual Defendants to OMERS with respect to the negotiation of the MSA or the Buy Out Agreements. If such a fiduciary duty was owed, it would be owed to OMERS and the Plaintiffs have no standing to bring an action against the Individual Defendants based on a breach of such fiduciary duty. The Defendants also submit that the elements of a claim for unjust enrichment are not present in that the alleged enrichment of the Individual Defendants does not correspond to the alleged deprivation of OMERS and that, in any event, there are juridical reasons for the payments received by the Individual Defendants, through BREMI or directly, in that they are provided for by the MSA and the Buy Out Agreements.

30 The Defendants note that OMERS is a special act corporation established by the OMERS Act and that the Ontario Business Corporations Act, R.S.O. (1990) Ch. C.38 (the "OCA") is applicable to OMERS but that the OCA contains no provision for derivative actions. Section 332 of the OCA, which does apply to OMERS, does provide that a member of a corporation who is aggrieved by the failure of the corporation to perform any duty imposed by the OCA may apply to the court for an order directing the corporation to perform such duty. Such provision, however, is not applicable to OMERS in that OMERS, as a corporation, has no members within the meaning of the OCA. The Plaintiffs are Members of the OMERS Pension Plan but are not members of the OMERS corporation.

31 The Defendants, therefore, submit that there is no basis upon which the causes of action asserted against any of the Defendants can succeed and that the Statement of Claim should be struck in its entirety as disclosing no reasonable cause of action.

32 The Plaintiffs have a totally divergent view of the nature of the causes of action asserted by the Plaintiffs. In their view, the action is essentially an action for breach of trust or fiduciary duties. They assert that OMERS is the Administrator of the Fund pursuant to the provisions of clause (f) of subsection 8(1) of the PBA as "a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan" and has breached its statutory duty under subsection 22(1) of the PBA to "exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person". In addition, the Plaintiffs submit that OMERS is a trustee of the Fund in that it holds title to the Fund assets for the benefit of the Members and has breached its fiduciary duty to the Members. The action is accordingly brought against OMERS in both capacities and the Plaintiffs seek to trace the Fund monies misappropriated, as a result of the breach of duty by OMERS, through to the ultimate beneficiaries of such breach of duty being the Individual Defendants. The action is not, in their view, a "common law derivative action" and the Plaintiffs are not seeking to enforce duties owed by the Individual Defendants to OMERS nor are they relying on any duties owed by BCC or BREMI to OMERS. The Plaintiffs do, however, submit that BREMI was an agent of OMERS for purposes of subsection 22(5) of the PBA in that BREMI was employed "to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund" and that accordingly, pursuant to subsection 22(8) of the PBA, BREMI was subject to the same standards of care as applicable to OMERS pursuant to subsection 22(1) of the PBA. In addition, the Plaintiffs submit that OMERS and BREMI are in breach of subsection 22(11) of the PBA which provides that an agent of the administration of a pension plan is not entitled to payment from the pension fund "other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan" in that the fees agreed to be paid to BREMI pursuant to the MSA are excessive and exorbitant. The Plaintiffs submit that pursuant to Section 29 of the regulation under the PBA, the assets of the pension plan must be invested in accordance with the Federal Investment Regulation (the "FIR"). They submit that BREMI was a "related party" to OMERS, as defined in the FIR, in that BREMI was "a person responsible for holding or investing the assets of the plan". Section 16 of the FIR provides that the Administrator of a plan shall not enter into a transaction with a related party on behalf of the plan; however, Section 17 of the FIR provides that the Administrator may enter into a transaction with a related party if the transaction is required for the operation or administration of the plan and the terms and conditions of the transaction are not less favourable to the plan than market terms or conditions. It is the position of the Plaintiffs that BREMI was a related party and that the fees payable to BREMI under the MSA are excessive in comparison to market terms and conditions. The Plaintiffs therefore state that MSA was entered into in contravention of the regulations under the PBA and is invalid and unenforceable. It is not clear how this reason applies to BCC.

33 With respect to the claim against OMERS for breach of trust, as stated above, it is the position of the Plaintiffs that this action is not analogous to a derivative action brought by shareholders on behalf of a corporation. The Plaintiffs state that the Members, as beneficiaries of the Fund, have rights of a personal nature and are bringing this action for breach of trust and breach of fiduciary duty owed to the Members. They assert that the assets of a pension fund are trust assets in the hands of the Administrator to be used exclusively for the beneficiaries of the plan and accordingly, the principles of trust law govern. They submit that, as the action is an action for breach of trust and breach of fiduciary duty, OMERS is a necessary party and that only declaratory relief is sought against OMERS as there would be no utility in seeking damages against OMERS which would have to be payable out of the Fund, being the only asset of OMERS, and would be payable into the Fund.

34 The Plaintiffs also submit that the declaratory relief sought in the within action would serve a useful purpose in declaring that there has been a breach of trust or breach of fiduciary duty and that accordingly, the Plaintiffs are entitled to the corollary relief of an accounting and tracing. The Plaintiffs further submit that in order to trace the monies misappropriated from the fund by way of excess payments to BREMI and to trace those monies through BREMI to the Individual Defendants, it is necessary to add BCC and BREMI as parties to the action and that it is not clear, obvious and beyond doubt that the declaratory relief sought against BCC and BREMI will not be granted. Again, it is not clear how this reason applies to BCC.

35 The Plaintiffs further submit that they are entitled to trace the trust monies through to the Individual Defendants on the basis that they participated in or were aware, or ought to have been aware, of the breach of trust and that the right to trace the monies through to the Individual Defendants applies whether or not they were agents of OMERS and whether or not they owed any fiduciary duties to OMERS.

36 With respect to the Buy Out Agreements entered into by OMERS to purchase the shares of BCC from the Individual Defendants, the Plaintiffs submit that BREMI is a related party, as defined in the FIR, in that it was responsible for holding or investing assets of the plan and that clause (c) of the definition of "related party" in the FIR includes any officer, director or employee of a person responsible for holding or investing the assets of a pension plan and accordingly, the Individual Defendants are related parties to OMERS. The Plaintiffs state that the Buy Out Agreements are entered into in breach of Section 16 of the FIR and are accordingly, invalid and unenforceable unless the purchase of the shares was on market terms and conditions which is an issue that would have to be determined at trial.

37 With respect to the claim in unjust enrichment, the Plaintiffs submit that the issue of the validity and enforceability of the MSA and of the Buy Out Agreements and therefore whether such contracts constitute a juristic reason for the alleged deprivation of the Fund and the alleged enrichment of the Individual Defendants are issues that must be determined at trial and it is not plain and obvious that the claim in unjust enrichment cannot succeed.

38 With respect to the Rule 21 Motions, it is not possible to make any determination as to whether the Statement of Claim discloses reasonable causes of action until it is totally revised to clearly reflect the causes of action advanced and relief sought by the Plaintiffs. Accordingly, an order will issue that leave is granted to the Plaintiffs to deliver an Amended Statement of Claim to incorporate the causes of action and the remedies referred to in the Plaintiffs' Factum and in their submissions made on the hearing of these motions without prejudice to the right of the Defendants to move to strike the Amended Statement of Claim on the basis that it still does not disclose a reasonable cause of action.

39 Counsel may make brief written submissions to me on the costs of these motions on or before March 10, 2006.

J.D. GROUND J.

cp/e/qw/qlesm/qlmll

Tab 3

Case Name:

Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)

IN THE MATTER OF a decision by the Superintendent of Pensions on August 15, 1997, to permit the transfer of the assets of the Retirement Income Plan for Salaried Employees of Weavexx Corp., Registration No. 0264663 (formerly C-1144) to the BTR Pension Plan for Canadian Employees Registration No. 559716 and other related decisions or omissions

Between

Eystein Huus, Peter Leroy, Michael Marcellus, Don Pierce and Tom Wood, on behalf of the members of the Retirement Income Plan for Salaried Employees of Weavexx Corp., Registration No. 0264663 (formerly C-1144), applicants (respondents in appeal), and

Superintendent of Pensions, Weavexx Corporation, BTR Inc., BTR Canada Holdings Inc., and National Trust Company (as trustee for Plan), respondents (appellants)

[2002] O.J. No. 524

Docket No. C35896 and C35919

Also reported at: 58 O.R. (3d) 380

Ontario Court of Appeal
Toronto, Ontario

Abella, Feldman and MacPherson JJ.A.

Heard: November 19, 2001.
Judgment: February 14, 2002.

(58 paras.)

On appeal from the decision of the Ontario Superior Court of Justice (Divisional Court) (R.J. Flinn, J.R.R. Jennings and D.S. Ferguson JJ.) dated May 30, 2000.

Counsel:

Steve Waller, for the respondents.
Deborah McPhail, for the appellant Superintendent of Pensions.
Bruce Pollock and Gary Nachshen, for the appellants Weavexx Corporation, BTR Inc. and BTR Canada Holdings Inc.

The judgment of the Court was delivered by

MacPHERSON J.A.:--

A. INTRODUCTION

1 When a company wants to transfer pension assets from an existing pension plan to a different pension plan, it must obtain the consent of the Superintendent of Pensions (the "Superintendent")[1] to the transfer. The Superintendent must withhold consent to a transfer "that does not protect the pension benefits of the members and former members of the pension plan": see s. 81(5) of the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "PBA").

2 In the present case, a company proposed a transfer of pension assets into a consolidated plan with a view to harmonizing several pension plans operated by its affiliates in Canada and the United States. The company applied for consent to the transfer by the Superintendent.

3 At about the same time, a Pension Advisory Committee (the "PAC") representing the retired salaried members of the existing pension plan took a different view of the transfer. Concerned that the transfer might remove their potential right to a distribution of the substantial surplus that had accumulated in the plan, the PAC applied to the Superintendent for a partial wind-up of the pension plan pursuant to s. 69 of the PBA.

4 This appeal concerns how the Superintendent dealt with these two requests.

B. FACTS

(1) The parties and the events

5 The appellant, Weavexx Corporation ("Weavexx"), a Canadian corporation, is engaged in the manufacture and distribution of products used in the pulp and paper production process. At all times relevant to this litigation, Weavexx was a majority-owned subsidiary of the appellant BTR Canada Holdings Inc., which in turn was a Canadian affiliate of the appellant BTR Inc., a Delaware corporation (together, "BTR").

6 Weavexx was formed by the amalgamation on October 1, 1992 of two companies in the BTR group, Hucyk Canada Inc. ("Hucyk") and Niagara Lockport Industries Ltd. ("Niagara Lockport"). At the material time, Weavexx had operations in Arnprior, Ontario and Kentville, Nova Scotia formerly operated by Hucyk and in Warwick and Trois-Riviéres, Quebec formerly operated by Niagara Lockport.

7 The respondents, the members of the PAC[2] for retired salaried employees which was established in 1990, wrote to the Pension Commission of Ontario[3] in 1993 advising it that there had been substantial downsizing in the ranks of salaried employees at Weavexx.

8 On October 26, 1995, the PAC, which had got wind of BTR's plan to consolidate the pension plans of all of its affiliates in Canada and the United States, wrote a letter to the Superintendent requesting that the Weavexx Pension Plan be wound up. The letter, signed by the respondent Eystein Huus, stated, inter alia:

> We in the committee strongly believe that this plan now should be wound up. The main reason for this is the severe downsizing which has taken place during the last four years, including two "early retirement windows" - one in early 1992, and one in 1994. The ratio of "Actual Members" to "Retirees" has dropped from 93/46 at the end of 1991 - to 49/72 at the end of 1994. There has also been further downsizing in 1995.
>
> The plan has a very healthy surplus as shown in the enclosed "Report of Operations - for Plan Year ended December 31, 1994". This in spite of the fact that the Company has not contributed to the plan for about 20 years. The surplus therefore comes from employee contributions, wise investments, and a nearly total lack of improvements to the plan. The latter can best be exemplified by the fact that there have been no improvements for the retirees in the last 20 years - in spite of hefty inflation rates in several of those years!

> Our committee believes that this surplus should primarily benefit those who have contributed to it, and who in many cases now live in dire circumstances - rather than end up as an asset for a company which hasn't contributed to it for such a very long time! And for that reason we recommend the plan be wound up.

9 Almost a year later, on October 7, 1996, Mr. Huus again wrote to the Superintendent, informing him that Weavexx had announced that it would close its plant in Arnprior in 1996. He continued: "All production has now ended, and the dismantling of the plant is well under way". On behalf of the PAC, he concluded by urging the Pension Commission to order a partial wind-up of the Weavexx pension plan.

10 In the same 1995-1996 time frame, the appellants had been moving on an entirely different track. In September 1995, Weavexx notified its employees and retirees of BTR's intention to consolidate the pension plans of all its affiliates, including Weavexx. More than a year later, on December 30, 1996, Weavexx made a formal application to the Superintendent to transfer its pension assets into the consolidated BTR plan. The proposed effective date of the transfer was January 1, 1996 (almost a year earlier). The surplus in the Weavexx plan on January 1, 1996 was $4,216,300.

11 In considering the appellants' application for a transfer, the Superintendent was required to consider s. 81(5) of the PBA which provides:

> 81(5) *The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan* or that does not meet the prescribed requirements and qualifications. [Emphasis added.]

12 On August 15, 1997, the Superintendent approved the transfer of pension funds from the Weavexx plan to the BTR plan. The amount of the approved transfer was $14,661,282. The Superintendent communicated his consent to the transfer to the appellants but not to the respondents.

13 The Superintendent appears never to have made a formal decision concerning the respondents' request for a partial wind-up of the Weavexx pension plan.

(2) The litigation

14 On June 30, 1998, the respondents brought an application for judicial review of the Superintendent's decision dated August 15, 1997 approving the transfer of the assets of the Weavexx pension plan to the consolidated BTR pension plan. In a decision dated May 30, 2000, the Divisional Court (Flinn, Jennings and Ferguson JJ.) set aside the Superintendent's consent and ordered the return of the assets to the Weavexx plan.

15 In an addendum to the reasons for judgment dated November 16, 2000, dealing with the question of remedy, the court said that any new decision of the Superintendent dealing with the wind-up or partial wind-up of the Weavexx plan was to be referred to the Financial Services Tribunal (the "Tribunal"), the successor since 1997 of the Pension Commission.

16 In the same addendum, the court awarded the applicants their costs on a solicitor and client basis against the Superintendent and BTR fixed at $54,294.06.

17 The appellants appeal against all aspects of the decision of the Divisional Court - i.e. the merits, the remedy and costs.

ISSUES

18 The issues on the appeal are:

(1) Did the Divisional Court err by setting aside the decision of the Superintendent dated August 15, 1997?

(2) Did the Divisional Court err by ordering that the issue of wind-up or partial wind-up be determined by the Superintendent and reviewed by the Tribunal?

(3) Did the Divisional Court err by awarding costs to the respondents on a solicitor and client basis payable by the Superintendent and BTR?

D. ANALYSIS

(1) The consent to transfer issue

(a) General

19 The appellants contend that the Divisional Court made several errors when it set aside the Superintendent's decision dated August 17, 1997 approving the transfer of pension assets from the Weavexx plan to the consolidated BTR plan. They submit that the Divisional Court erred by holding that the Superintendent exceeded his jurisdiction by failing to give adequate consideration to the trust provisions of the Weavexx plan and to the accrued surplus in the prior plan. The appellants also submit that the Divisional Court erred by holding that the Superintendent exceeded his jurisdiction by approving the transfer without taking account of a post-transfer development, namely the closure some months later of the Arnprior plant. The appellants also contend that the Divisional Court erred by concluding that the Superintendent did not accord the respondents their rights of procedural fairness. Finally, the appellants contend that the Divisional Court erred by concluding that BTR owed, and breached, a duty of procedural fairness to the appellants. In summary, the appellants contend that the Divisional Court erred in its interpretation of substantive pension law and erred in its analysis of the process issue.

20 I do not think that the appellants have accurately characterized the decision of the Divisional Court. My reading of the decision is that the Divisional Court disposed of the application entirely on the process issue. It is true that the court referred to the substantive pension law issues, including the trust provisions of the Weavexx plan and the legal nature of a surplus. However, these references were made in the context of explaining the arguments the appellants wanted to make to the Superintendent. In my view, this is clear from the final two paragraphs of the court's reasons on the validity of the Superintendent's decision. The court stated its conclusion in this fashion:

> Accordingly, the court concludes that the Superintendent exceeded his jurisdiction when he did not give adequate consideration to the question of wind-up and the trust provisions of the Weavexx plan with its surplus and further failed to observe their fiduciary duties to the applicants.
>
> Without deciding how far the Superintendent had to go with respect to procedural fairness in dealing with the request of the applicants and a number of members of the pension plan of Weavexx, procedural fairness was not accorded to these members of the plan by either the Superintendent or BTR.

21 I do not read this passage as representing a decision by the Divisional Court on the substantive pension law issues arising from the fiduciary duties of pension administrators, the interpretation of the trust provisions of the Weavexx pension plan or the legal nature of, and entitlement to, a pension plan surplus. Rather, the court is saying that because the PAC was not accorded procedural fairness, it was not able to argue, and the Superintendent did not therefore "give adequate consideration to", those substantive issues. It goes without saying that if the PAC had been given the opportunity to advance these arguments, the Superintendent might well have decided them against the PAC.

(2) Standard of review

22 Although the Divisional Court employed excess of jurisdiction' language on occasion in its reasons for judgment, which might raise the spectre of a correctness standard of review, the court's reasons read as a whole make it clear that it was applying a reasonableness standard to its review of the merits of the Superintendent's decision. Indeed, the court stated this explicitly: "The court takes the view that the standard to be applied to the Superintendent should be that of reasonableness". The appellants agree that this is the appropriate standard, although they contend that the court actually applied the higher correctness standard. The respondents do not challenge the reasonableness standard.

(b) Standard of review

23 In Hinds et al. v. Superintendent of Pensions et al[4] ("Hinds"), this court held that the standard of review of a decision of the Superintendent made pursuant to s. 80 of the PBA is reasonableness simpliciter. Since s. 81(5) is identical to s. 80(5), the same standard should apply.

(c) Merits

24 The Superintendent's decision approving the transfer of assets from the Weavexx pension plan to the consolidated BTR

pension plan was made pursuant to s. 81 of the PBA. Section 81(5) of the PBA requires the Superintendent to refuse consent if the proposed transfer of assets "does not protect the pension benefits of the members and former members of the employer's pension plan".

25 I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611 at 646:

> In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.

26 Similar statements have been expressed by this court in several cases. In Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:

> [T]he Pension Benefit Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members
> and former members of pension plans ....

27 In Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122 at 127 (C.A.) ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n particular ... evinces a special solicitude for employees affected by plant closures". In the present case, it was the downsizing and then closure of the Arnprior plant which clearly played a role in the retirees' concern and in the employer's transfer application.

28 The implication of these authorities is that the Superintendent owes a high duty to employees with Ontario pension plans. As for the nature and consequences of this duty, I would adopt, as I did in Hinds, the eloquent language used by Reid J. in Re Collins and Pension Commission of Ontario (1986), 56 O.R. (2d) 274 at 285 (Div. Ct.) ("Collins"):

> [I]t appears that the commission was established to ensure that certain interests were protected. While there is no doubt that those interests included the employer's, there appears to be equally no doubt that the commission was established to safeguard the plan members' interests as well ... While the commission may not, strictly speaking, be a trustee for the members, for it holds no money belonging to the plan, it would be artificial to conclude that the commission's obligation to members is lower than the high standard of fiduciary obligation imposed on trustees.

29 The chronology and contents of the record establish that the Superintendent focussed almost exclusively on the employers' transfer application made pursuant to s. 81 of the PBA, but ignored almost entirely the retirees' request for a wind-up or partial wind-up of the pension plan with a view to a distribution to them of the surplus that had accumulated in the plan.

30 Sections 80 and 81 of the PBA are the principal provisions dealing with transfers. Section 69 of the PBA relates to the winding-up of pension plans. It provides, inter alia:

> 69.(1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,
>
> (a) there is a cessation or suspension of employer contributions to the pension fund; ...
> (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer ...;
> (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued ....

31 All of these sub-sections were in play in the 1995-1997 period. The corporate appellants admitted that the employer made no contributions to the pension plan after 1983: see the affidavit of Emily Van Vleet, Director of Employee Benefits at BTR, paragraph 13. Thus s. 69(1)(a) of the PBA was a potential source for a wind-up order by the Superintendent. As well, throughout the early 1990s there was significant downsizing at Weavexx's Arnprior plant and it was closed in late 1996.

Accordingly, s. 69(1)(d) and (e) were also potential bases for a wind-up order.[5]

32 Against the backdrop of the availability of both transfer and wind-up of the Weavexx pension plan, I turn to the chronology of events and the Superintendent's role and responses. The PAC moved first. It wrote to the Superintendent in 1993, alerting him to the substantial downsizing at the Arnprior plant. It wrote again on October 26, 1995 informing the Superintendent that it had been notified by BTR of its proposal to consolidate various pension plans, including the Weavexx plan. The PAC informed the Superintendent that they "strongly believe that this plan now should be wound up". The Superintendent acknowledged their letter on November 28, 1995 and said: "I would like to assure you that your representation on behalf of the Pension Advisory Committee will be taken into consideration when we review any application that is filed in respect of the proposed consolidation". On October 7, 1996, the PAC again wrote to the Pension Commission and requested that the Commission order a partial wind-up.

33 The corporate appellants did not make their transfer application until December 30, 1996, more than a year after the first request by the PAC for a wind-up.

34 The appropriate documents were sent to the Superintendent. However, the corporate appellants did not send them to the PAC until May 7, 1997, even though the subject matter of the application was employee and retiree pensions, there was a $4,216,300 surplus in the plan, there was a PAC which had been established pursuant to s. 24 of the PBA, and the PAC had corresponded extensively with Weavexx and BTR about the proposed transfer and consolidation.

35 Because the PAC was having difficulty communicating with the Pension Commission, it contacted the area M.P.P., W. Leo Jordan, and asked for his assistance. The result was a letter from the Superintendent to Mr. Jordan dated June 11, 1997, stating, inter alia:

> We have reviewed the reported annual membership for the above named pension plan and other related documents filed with the Pension Commission of Ontario for the periods between January 1, 1991 to December 31, 1995 and cannot establish any reason why the plan should have been wound up or even partially wound up at any time during the above described period.
>
> We have also reviewed the documents filed for the plan consolidation (merger) effective January 1, 1996 and conclude that the consolidation meets the requirement of the Pension Benefits Act. ...
>
> A letter has been sent to the plan administrator [Ms. Van Vleet at BTR] requesting confirmation of the closure of the Arnprior Plant of Weavexx Corporation since a partial wind up may be warranted under subsection 69(1) of the Act. This would not have any effect on the consolidation ... as the partial wind up of the plan would be subsequent to the consolidation of the plans. To date we have not received confirmation that a partial wind up is warranted.

36 The timing and the contents of this letter are a cause of concern. On June 11, 1997, the Superintendent is informing an M.P.P. that a wind-up or partial wind-up based on downsizing is not warranted. This decision was not, however, formally communicated to the PAC which made the formal request for a wind-up. In the same letter, the Superintendent is informing an M.P.P. that the proposed consolidation complies with the PBA. This was not, however, communicated to the corporations which made the application until the Superintendent made his formal decision on August 15, 1997. Moreover, the decision made on that date was never communicated formally to the PAC, even though it was its members' pensions which lay at the heart of the application and even though the PAC had corresponded extensively with the Superintendent about the proposed transfer and consolidation.

37 The third paragraph of the Superintendent's letter (set out above) is also interesting. It refers to a letter that Steve Young, the Pension Officer with carriage of the file, had sent to Ms. Van Vleet on May 30, 1997 requesting information about the closure of the Arnprior plant. In the letter Mr. Young said:

> If certain conditions are met, the Superintendent of Pensions may order the wind up of a pension plan, in whole or in part, pursuant to authority under section 69 of the Pension Benefits Act. ...
>
> Please provide us with the name and registration number of any pension plan in which employees affected by the above event [the plant closure] participated. Also advise us as to your company's intentions with respect to these pension plans and the affected members. If it is not your company's intention to voluntarily declare a wind up of the plan, either in whole or in part, we would ask that you provide us with details of the events affecting the members. The information is being requested to

> determine if any of the conditions under section 69 of the Act for the Superintendent to exercise his authority to order a wind up have been satisfied.

38 Ms. Van Vleet responded to this letter on June 19, 1997. She indicated that Weavexx had initiated a full wind-up with respect to hourly employees. She said: "the Arnprior Hourly Plan is significantly overfunded with a surplus of $2.9 million. We have approached the Union and are currently negotiating with them regarding a proposed distribution of that surplus". In other words, for the hourly workers, BTR was contemplating a wind-up, acknowledged a surplus, and was negotiating a distribution of the surplus with the members of that plan.

39 With respect to the salaried employees, Ms. Van Vleet communicated the following:

> The closure also affected seven salaried employees who are participating in the BTR Pension Plan for Canadian Employees registration number 0559716. We do not intend to declare a formal partial windup of this plan in respect of the seven individuals involved, but we will grant these members full vesting and growth rights.

40 It will be recalled that the surplus in the Weavexx pension plan for salaried employees was approximately $4.2 million. There is nothing in Ms. Van Vleet's letter to explain why a surplus of $2.9 million in the pension plan for hourly workers suggests a full wind-up, whereas a surplus of $4.2 million in the pension plan for salaried workers does not suggest any kind of wind-up.

41 The Superintendent made his formal decision approving the transfer application on August 15, 1997. There is nothing in that decision about the PAC's request for a wind-up or partial wind-up of the pension plan. The Superintendent's decision was not sent to the respondents.

42 Based on this review, mostly chronological, of the major events, I share the Divisional Court's discomfort with the process adopted by the Superintendent in this case.

43 On the transfer side of the equation, the Superintendent engaged in a review of the application and made a formal decision. However, I question whether this decision was anything more than a formality given that the Superintendent presaged his final decision in a letter to an M.P.P. two months before the formal decision.

44 On the wind-up side of the equation, the Superintendent's performance was genuinely troubling. There was little and poor communication with the PAC, even though the PAC was established pursuant to s. 24 of the PBA and requested the Superintendent to consider a wind-up more than a year before the corporate appellants made their transfer application. The only substantive communication the Superintendent ever made about the merits of the PAC's request was in a letter to the M.P.P. from the PAC's constituency. The Superintendent appears never to have made a formal decision about the wind-up request. Indeed, it is unclear whether the Superintendent was seriously considering the wind-up issue. Pension Officer Young's letter to Ms. Van Vleet at BTR on May 30, 1997 seems to suggest that he was:

> The information is being requested to determine if any of the conditions under section 69 of the Act for the Superintendent to exercise his authority to order a wind-up have been satisfied.

However, in his letter to the M.P.P. just 11 days later, on June 11, 1997, the Superintendent stated that a partial wind-up would be subsequent to the consolidation and that "[t]o date, we have not received confirmation that a partial wind up is warranted", which seems to suggest that the Superintendent regarded his role on the wind-up issue as reactive - and, indeed, reactive to the employer, not the requesting PAC.

45 There was a good deal at stake in this merger/consolidation/wind-up matter. There was a surplus of more than $4.2 million in a plan to which, on its own evidence, the employer had not contributed for 13 years previous to its consolidation application. I do not say that this is unlawful. Rather, I do say that the Superintendent ignored the PAC's request for a wind-up decision as he considered that application. Moreover, on the record, it is unclear how the Superintendent viewed the relationship between the employers' s. 81 transfer and consolidation application and the employees' s. 69 wind-up request. Finally, it appears that the Superintendent never made a decision on the employees' request. All of this was, in my view, starkly contrary to the observation of Blair J.A. in Firestone, supra, that the PBA "is clearly intended to benefit employees" and "[i]n particular ... evinces a special solicitude for employees affected by plant closures". Accordingly, I think that the Divisional Court was correct to conclude that the Superintendent's decision of August 15, 1997 was unreasonable. The Superintendent's failure to consider the partial wind-up request prior to, or in conjunction with, deciding the transfer application rendered unreasonable his consent to the transfer.

46 Turning to a different issue, the Divisional Court also concluded that BTR had not accorded procedural fairness to the respondents. In my view, this conclusion is in error. The decision that is the subject matter of the application for judicial review and this appeal is the Superintendent's decision. BTR was the applicant, not the decision-maker. Hence it did not owe the respondents any duty of procedural fairness related to that decision.

(2) The remedy issue

47 On the subject of remedy, the Divisional Court ordered that the consent of the Superintendent to the transfer of assets be set aside. The court also ordered that the pension assets be returned to the Weavexx plan. Finally, the court ordered the Superintendent to consider the wind-up issue. Any decision by the Superintendent (or failure to make a decision) would then be referred to the Tribunal. The appellants challenge the second and third components of this decision - i.e. the return of the assets to the Weavexx plan and the compulsory role of the Tribunal in the resolution of the wind-up issue.

48 On the return of the assets issue, the appellants contend that the Divisional Court only had jurisdiction to quash the Superintendent's consent to the transfer; it did not have the authority to take the additional step of returning the assets to the Weavexx plan. Specifically, the appellants contend that the Divisional Court's order breached s. 81(6) of the PBA:

> 81(6) The Superintendent by order may require the transferee to return to the pension fund assets ... transferred without the prior consent of the Superintendent . ...

According to the appellants, this provision requires that the Superintendent, not the Divisional Court, decide whether the pension assets should be returned to the Weavexx plan.

49 I disagree. On the specific point, I agree with the analysis of the Divisional Court:

> Insofar as the transfer of assets is concerned the argument that s. 81(6) and (7) apply, is, in our view, in error. These sections refer to the situation where assets are transferred "without the prior consent of the Superintendent ...." That is not the case here, the assets were transferred with the consent of the Superintendent.

50 On the general point, I see no principled basis for interfering with the Divisional Court's decision to order the return of the pension assets to Weavexx. Once the Superintendent's decision was set aside, an order which had the effect of returning the parties to their original positions can hardly be viewed as frustrating the purposes of the PBA.

51 On the component of the decision according a compulsory role to the Tribunal on any future decision on the wind-up issue, the respondents in effect concede in their factum that the Divisional Court erred:

> The Superintendent has pointed out that interpreted liberally, the reasons of the Divisional Court would require that any future decision by the Superintendent on the request for a partial wind up must be referred to a Tribunal hearing, regardless of whether any party requests a hearing. This could not reasonably have been intended by the Divisional Court. All parties agree that the decision of the Superintendent with respect to the wind up request should be referred to the Tribunal only at the request of one of the affected parties.

52 This is a fair concession. Section 89 of the PBA permits a party affected by a potential wind-up order by the Superintendent to request a hearing by the Tribunal. The Divisional Court erred by making such a hearing mandatory.

(3) The costs issue

53 The Divisional Court awarded costs on a solicitor and client scale "for a number of reasons":

(a) The matter was indeed a complex one made more complex by the lack of support given by both the office of the superintendent and BTR.

(b) This attitude was demonstrated by the manner in which the assets were finally merged,

notwithstanding the original representation that they would be kept separate and apart and the lack of information given to the applicants by the Superintendent and, indeed, to their counsel when it appeared that litigation was being contemplated.

(c) The fact that it is not clear whether or not the Superintendent had taken any position with respect to the wind-up of the Weavexx plan.

(d) Finally, by the fact that BTR would not support these retirees by providing them with funds in order to retain counsel to make submissions on their behalf.

54 In my view, the record supports these four reasons. The Superintendent appears never to have made a decision on the wind-up request made by the respondents. The appellant corporations also did not treat the respondents properly. They did not send a copy of the valuation report to the PAC until almost five months after the transfer application was filed, even though they knew that the PAC was deeply concerned about the matter. They did not assist the PAC with legal representation, even though the pension plan had a surplus of $4.2 million and Weavexx had not contributed a penny to it for 13 years.

55 In summary, although solicitor and client costs should be awarded only in exceptional cases, I can see no basis for interfering with the Divisional Court's conclusion that this was such a case.

E. DISPOSITION

56 I would allow the appeal in part. I would set aside those components of the Divisional Court's decision in which the court concluded that the corporate appellant BTR had not accorded procedural fairness to the respondents and ordered that any future decision made by the Superintendent on the wind-up issue be automatically referred to the Financial Services Tribunal.

57 In all other respects, I would dismiss the appeal.

58 The respondents have been substantially successful on the appeal. I would award them costs of the appeal payable by all of the respondents.

MacPHERSON J.A.
ABELLA J.A. -- I agree.
FELDMAN J.A. -- I agree.

cp/e/nc/qlrme/qlmjb/qlkjg/qlhjk

1 Now the Superintendent of Financial Services.

2 The respondent Tom Wood passed away in 1998.

3 Now the Financial Services Commission of Ontario.

4 Released today, [2002] O.J. No. 525.

5 I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the PBA envisions a wind-up process initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

Tab 4

Indexed as:

Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.

IN THE MATTER OF the Trustee Act, R.S.O. 1990, c. T.23
Between
Deloitte & Touche Inc. as Administrator of Anova Inc. Employee Retirement Pension Plan, applicant, and The Manufacturers Life Insurance Company, Peat Marwick Limited, as Receiver and Manager of Anova Inc., The Pension Commission of Ontario, The Superintendent of Pensions for Ontario, Kurt E. Petersen, William C. Curry, Thomas E. Squires, Terry J.T. Mark, and all other members and former members of The Anova Employee Retirement Pension Plan, as set out in Schedule "A" attached, respondents

[1994] O.J. No. 2938

121 D.L.R. (4th) 162

11 C.C.P.B. 67

52 A.C.W.S. (3d) 57

Court File No. RE 3484/83

Ontario Court of Justice - General Division
Toronto, Ontario

German J.

Heard: September 28, 29, 1994.
Judgment: December 16, 1994.

(37 pp.)

Master and servant -- Remuneration -- Pension benefits -- Variation or amendment of plan -- Validity of plan -- Payment of benefits to shareholders.

The administrator of A Inc. Employee Retirement Pension Plan sought advice and direction of the Court to determine whether certain amendments to the BDW Plan were valid. The plan was brought into effect on July 1961 and was amended at times. In 1985 BDW, concerned about its business reversals, hired new management and C was offered early retirement. An amendment was made to the BDW Pension Plan to provide C with a retirement pension at an assessed cost of $195,700. The Pension Commissioner accepted the amendment. The affairs of BDW continued to deteriorate and the shares were sold to A Inc. Part of the surplus assets in the BDW Pension Plan were used to enhance the pension benefits of the controlling shareholders of BDW, some of whom were not employees. An amendment to the Plan was made for that purpose after which the surplus was reduced to $5,600. There was no evidence that the members of the Plan received notice of the amendment. The Pension Commissioner refused to approve the amendment because it did not provide the same benefits to all members in

the same class. A Inc. did not succeed and a receiver and manager was appointed. There were insufficient funds in the Plan to pay the benefits.

HELD: The amendment regarding C was valid. It was made in accordance with the contractual terms. The enhanced pension benefits to the shareholders could not stand since the remaining employees would suffer. The benefits were made to the respondents as shareholders and not as employees. The Plan was for employees. The grant was void ab initio according to equitable principles. It did not comply with the contractual terms. It had to be set aside and the annuities liquidated.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 14.03(d) 14.05(3)(a), 39.01(4).
Pension Benefits Act, R.S.O. 1990, c. P-8.
Trustee Act, R.S.O. 1990, c. T.23, s. 60.

Mark Zigler and Michael Mazzuca, for the applicant.
Neil Finkelstein, for the respondent, The Manufacturers Life Insurance Company.
Harold Springer, for the respondent, Peat Marwick Limited.
Paul Dempsey, for the respondent, Pension Commission of Ontario.
D. Ross Peebles, for the respondent, The Superintendent of Pension for Ontario.
Hilary E. Clarke, for the respondents, Thomas E. Squires, Kurt E. Petersen, William C. Curry and J.T. Mark.

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1 **GERMAN J.**:-- This is an application by Deloitte & Touche Inc. (the applicant) as administrator of Anova Inc. Employee Retirement Pension Plan (the B.D. Wait Plan or the Anova Plan) for inter alia the advice and directions of the court to determine whether certain amendments to the B.D. Wait Plan (the amendments) are valid. The application is brought pursuant to s. 60 of the Trustee Act, R.S.O. 1990, c. T.23 and rule 14.05(3)(a) of the Rules of Civil Procedure.

2 The respondents on this application have disputed the jurisdiction of the court to hear the application and have moved for an order dismissing the application on the ground that the Superintendent of Pensions for Ontario (the superintendent) has not refused to register the amendments. In the alternative, if the superintendent has refused to register the amendment, the respondents' position is that they are entitled to a hearing before the Pension Commission of Ontario and the respondents ask for an adjournment of this application pending such hearing.

3 The respondents have moved for an order striking out paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 and Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N and O to the affidavit of Robert Paul, sworn March 28, 1994 and Exhibits 14, 21 and 29 to the affidavit of Robert Paul sworn December 9, 1993 on the ground that Mr. Paul has no personal knowledge of matters contained in the affidavit and has not provided the source of his information and belief.

4 There is no doubt that the affidavits of Robert W. Paul, sworn March 28, 1994 and December 9, 1993 do not conform to rule 39.01(4), however, I am not prepared to grant the motion by the respondents because it is obvious that Robert W. Paul, who is an officer of the applicant, must be acting upon information and belief. While counsel for the applicant can be criticized for not following the rules, I am not disposed to ignore the fact that the respondents have had both affidavits in their possession for a number of months, have cross-examined the affiant and the notice of motion is dated September 22, 1994. I suspect the motives of the respondent were to cause delay and I am not impressed with this manoeuvre on the part of the respondents which will do nothing but increase costs. I note the affiant has included the source of his information and I agree with counsel for the applicant that facts on this application are not contentious.

5 Pierson et al. v. Bent et al., 13 O.R. (3d) 429 dealt with an affidavit to be used on a motion for summary judgment where the real purpose of the affidavit was to put contents of medical reports before the court and the contents were not presented so as to constitute the best evidence.

6 In all of the circumstances, although I do not wish to be considered as approving the form of the affidavits submitted by the applicant, the motion is dismissed.

7 In dealing with the question whether I have jurisdiction to hear the application pursuant to rule 14.03(d) and section 60 of the Trustee Act, it is necessary to deal with the history of the B.D. Wait Company and its pension plan.

8 I am indebted to counsel for both the applicant and the respondents for the information as to the facts summarized in

their factums and I rely on them.

9 B.D. Wait carried on business as a manufacturer and distributor of gas barbecues, space heaters, refrigerators, humidifiers and other gas appliances. B.D. Wait was a profitable company up to 1981-82 when for reasons not related to this application the company suffered financial reverses. During the good times for the company, it established a pension plan for salaried workers entirely funded by employer contributions. All salaried employees received pension benefits calculated according to the same formula.

10 Referring to the plan that was brought into force on July 1, 1961, a copy of which appears at Tab 5 of the application record, there are the following sections that are or may be relevant to this application.

> SECTION III CONTRIBUTIONS
>
> 1. The Company shall from time to time (not less frequently than annually) make payments to the Trustee to be added to the Trust Fund in such amounts, based upon the advice of the Actuary, as are required to provide the retirement benefits of all employees. In addition, the Company will pay the entire cost of administering the Plan.
> 2. Members shall not be required or permitted to make any contributions under the Plan.
>
> SECTION IX GENERAL PROVISIONS
>
> 5. The administration, interpretation and application of the Plan shall be the sole responsibility of the Company and, subject to its provisions, the Company may from time to time enact rules and regulations relating to the operation of the Plan.
>
> SECTION X FUTURE OF THE PLAN
>
> 1. The Company intends to maintain the Plan in force indefinitely but necessarily reserves the right at any time or times without the consent of any Member or Employee, to amend, suspend, merge or terminate the Plan in whole or in part as the Company shall in its absolute discretion determine.
> 2. No amendment, suspension, merger or termination of the Plan shall be made by the Company which would cause or permit any portion of the contributions made to the Plan to the date of such amendment, suspension, merger or termination to be diverted to purposes other than to the exclusive benefit of the Members.
> 3. Should the Plan be terminated, contributions made by the Company cannot be withdrawn, but must be used to provide retirement benefits for Members in an equitable manner as determined by the Company in consultation with the Actuary, or if the Company shall have been wound up or have become bankrupt, by its successor and assigns or by the liquidator or trustee in bankruptcy of the Company, as the case may be. No liability shall attach to the Company or to the liquidator or to the trustee in bankruptcy in connection with the distribution unless it is not made in good faith.

11 The B.D. Wait Plan was amended and restated as at January 1, 1976 (the 1976 B.D. Wait Plan).

12 The sections of the B.D. Wait Plan that are relevant in this application are found at Tab 6 of the application record and are as follows:

> ARTICLE II - ELIGIBILITY AND MEMBERSHIP
>
> 4. Explanation to Members
>
> Within six months of any amendment to the Plan, the Company shall provide a similar explanation of the amendment to each Member and eligible Employee affected by the amendment.
>
> ARTICLE VII - EARLY RETIREMENT

1. Early Retirement

A Member may retire early at any time after attainment of age 55 and completion of 10 years of Continuous Employment and before his Normal Retirement Date.

ARTICLE XIV - RIGHTS ON DISCONTINUANCE OF PLAN

2. If the funds remaining for any class are not sufficient to provide full benefits under the Plan, the funds available for such class shall be allocated to each Member in such class in the same proportion that the actuarial value of the full benefit for each Member bears to the total actuarial value of full benefits for all Members within such class.
5. NOTWITHSTANDING THE AFORESAID, THE PLAN WILL BE TERMINATED IN ACCORDANCE WITH THE REQUIREMENTS OF THE PENSION BENEFITS ACT AND THE LEGISLATION AND REGULATIONS OF ANY OTHER COMPETENT JURISDICTION.

ARTICLE XVI - ESTABLISHMENT, INVESTMENT AND ACCOUNTING OF PENSION FUND

1. The Fund shall be established and administered by the Fund Manager, in accordance with the terms of an agreement executed between the Company and the Fund Manager.
2. All contributions made after the Effective Date in accordance with the terms of the Plan by the Company shall be paid into the Fund.

ARTICLE XVII - ADMINISTRATION AND PROCEDURES

1. The Company is hereby appointed the administrator of the Plan and it shall cause to be maintained and make available such records as are required by the Actuary for the purposes of making actuarial valuations and estimates of required contributions by the Company.
4. The Company may direct the Fund Manager to apply sufficient moneys from the Fund to pay any benefit or to purchase any pension or annuity in whole or in part from an Insurer, at such time before or after retirement as the Company may in its discretion determine.
8. Notwithstanding anything in the Plan to the contrary, no cash settlement shall be paid under the terms of the Plan where such payment would be contrary to the provisions of the Pension Benefits Act or the statutory requirements of any other competent jurisdiction including such administrative rules as are issued and enforced by the Department of National Revenue, Taxation, pertaining to the registration of employees' pension plans under the Income Tax Act.

ARTICLE XIX - AMENDMENTS

1. Notwithstanding anything herein contained, but subject to Section 3 of this Article, the Plan may be amended at any time and from time to time by the Company, and all such amendments shall be binding on the Company and on every Member.
2. Notice of every such amendment shall forthwith be given to the Fund Manager. If the amendment directly or indirectly affects the benefits due to the Members, notice thereof shall be given to the Members.
3. No such amendment shall adversely affect the right of a Pensioner to continue to receive his pension under the Plan, or adversely affect any vested right as the same exists under the Plan at the date of such amendment, or reduce the benefits which the Member has accrued by reason of service to the date of the amendment, except as provided under Article XIV (RIGHTS ON DISCONTINUANCE OF PLAN).

13 The B.D. Wait Pension Plan was amended by amendment no. 2 dated 4/01/80, but the amendments are not relevant on

this application.

14 The B.D. Wait Pension Plan was established as a trust and Montreal Trust Company was the trustee.

15 The trust agreement is included in the application record and contains provisions relevant to this application as follows:

> FIRST: The Trustee shall receive any contributions paid to it in cash or other property acceptable to it. All contributions so received together with the income therefrom (hereinafter referred to as the "Trust Fund") shall be held, invested, managed and administered pursuant to the terms of this Agreement. The Trustee shall not be responsible for the collection of any funds required by the Plan to be paid to the Trustee.
>
> SECOND: Subject to the provisions of Article THIRD hereof, the Trustee shall from time to time, on the written directions of the Company certified to be in accordance with the terms of the Plan, make payments out of the Trust Fund to such persons, in such manner, in such amounts and for such purposes as may be specified in such written directions and upon any such payment being made, the amount thereof shall no longer constitute a part of the Trust Fund. The Trustee shall be under no liability for any payment made by it pursuant to the written direction of the Company, and shall not be under the duty of making inquiries with respect to whether any payment directed by the Company is made in pursuance of the provisions of the Plan.
>
> THIRD: Anything contained in this Agreement to the contrary notwithstanding, no part of the Trust Fund (other than such part as is required to pay taxes and administration fees and expenses) shall be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan or their beneficiaries or estates.
>
> TWELFTH: This trust and Agreement may be terminated at any time by the Company and upon such termination or upon the dissolution or liquidation of the Company, the Trust Fund shall be paid out by the Trustee as directed by the company subject to the provisions of Article THIRD hereof.
>
> THIRTEENTH: This Agreement shall supersede all prior agreements between the Company and the Trustee respecting the Trust Fund and the Trustee hereby agrees to hold the Trust Fund in accordance with all the terms and conditions of this Agreement.

16 The trust agreement by an agreement made the 9th day of July, 1969.

17 Both trust agreements prohibited payments out of the trust fund for any purposes other than the Plan, but on termination of the Plan any funds left in the fund after all claims and liabilities to the Plan have been satisfied may be paid to the company.

18 The actuarial valuation report prepared for B.D. Wait by its actuaries as at December 31, 1984 indicated there were surplus funds in the trust of $768,363.00. B.D. Wait being in need of additional financing, the company applied to the Pension Commission and received permission to withdraw and did withdraw $440,822.00 of surplus funds. A copy of the actuary's request to withdraw surplus appears at Tab 11 of the application record and the written consent to the withdrawal is at Tab 12.

19 Unfortunately, the company's financial affairs continued to decline and in 1986 when it appeared there was a surplus in the Fund, the company notified its employees it would be seeking to withdraw further funds from the surplus. A copy of the letter appears at Tab 15 of the applicant's record.

20 In 1986, the company purported to amend the B.D. Wait Plan by a document which is included as Tab 7 of the Application Record. The relevant provisions of this document read as follows:

> SECTION 2 - GENERAL

2.1 This document constitutes the Plan and replace as of May 1, 1986 any prior plan text and amendment thereto.

2.2 It is the intention of the Employer to have the Plan approved as a registered pension plan for the purposes of Applicable Legislation by the authorities empowered by such legislation, and thereafter to maintain the registered status of the Plan.

2.3 All matters relating to the administration, interpretation, overall operation or application of the Plan shall be the Employer's responsibility. Whenever a question arises which cannot be settled or determined by reference to the Plan, the Employer may settle or determine such question at its discretion in any manner consistent with the intent of the Plan.

2.4 This Plan is issued as the successor plan to the Prior Trust Fund held and administered by Montreal Trust Company, which became effective July 1, 1961, and as amended, January 1, 1976 and January 1, 1979.

Benefits banned under the prior plan to January 1, 1986 have been purchased as deferred life annuities from The Manufacturers Life Company GA 22040.

SECTION 11 - PENSION FUND

11.1 All contributions, investment income and any other assets received for the purposes of the Plan will be deposited in the Pension Fund, and monies required to provide all benefits under the Plan will be withdrawn therefrom. At no time shall any part of the corpus or income of the Pension Fund be used for or directed to any purpose other than for the exclusive benefit of Members, Retired Members, Terminated vested Members and their beneficiaries and contingent annuitants entitled to benefits under the Plan, except as hereinafter provided under this Section 11 and Section 12 thereof.

11.5 At intervals not exceeding three years, the Employer will cause the Actuary to value the assets and liabilities under the Plan and to report on the status of the Pension Fund. If such valuation reveals a surplus of assets over liabilities, the employer may utilize such surplus or part thereof in any manner permitted under, or required by, Applicable Legislation provided that, no refund of surplus will be made to the Employer without the prior written approval of the appropriate authorities under Applicable Legislation. If a valuation reveals an unfunded liability and/or an experience deficiency, special contributions must be made by the Employer to liquidate such liability or deficiency in accordance with Section 4.1 hereof.

SECTION 12 - AMENDMENT OR TERMINATION OF THE PLAN

12.1 The Employer intends that the Plan shall be a permanent plan for the exclusive benefit of its Members, Retired Members, Terminated vested Members and their beneficiaries and contingent annuitants.

12.2 Notwithstanding Section 12.1 hereof, the Employer, by action of the Board of Directors, reserves and retains the right to amend or terminate the Plan in whole or in part at any time and from time to time in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) No amendment shall have the effect of reducing any Member's Retired Member's, Terminated vested Member's, beneficiary's or contingent annuitant's then accrued benefits under the Plan.

(b) No amendment shall have the effect of diverting any part of the assets of the Pension Fund for any purpose or purposes other than for the exclusive benefit of the Members, Retired Members, Terminated Vested Members and their beneficiaries or contingent annuitants under the Plan prior to the satisfaction of all liabilities with respect to such persons immediately before such amendment.

12.3 In the event the Plan shall at any time be terminated or contributions thereunder discontinued, the assets of the Pension Fund shall be applied for the benefit of the Members, Retired Members, Terminated vested Members and their beneficiaries and contingent annuitants (to the extent the value of same may permit) in such manner and order of priority as may be recommended by the Actuary, approved by the Employer and subject to Section 6.5 hereof and Applicable Legislation. Any surplus remaining after the satisfaction of all liabilities towards Members, Retired Members, Terminated Vested Members and their beneficiaries and contingent annuitants will be refunded to the Employer, subject to prior written approval of the appropriate authorities under Applicable Legislation.

12.4 An Employer who has adopted the Plan for its Employees reserves the right at any time, by action of its Board of Directors, to terminate its participation and its Employees' participation in the Plan.

If such Employer terminates its participation in the Plan hereunder with respect to itself and its Employees, the then market value of the assets of the Pension Fund shall be determined as of the date of such termination and assets equivalent to the market value of the interest in the Pension Fund of such Employer and its Employees shall be allocated and distributed for the benefit of such Members in the manner so provided by Section 12.3 hereof.

12.5 The application of this Section 12 does not limit the Company's right to surplus utilization as permitted under Section 11.5.

There is no evidence that this amended plan was registered.

21 To what was undoubtedly the company's disappointment, the Pension Commission notified the company that it was unable to process the application to withdraw surplus because there was a moratorium in effect. While there was a suggestion in the letter, a photocopy of which appears at Tab 16 of the application record, that a judicial determination would have been required, there is no suggestion in the letter that there was not a surplus of funds.

22 The letter reads in part as follows:

Entitlement to a refund of surplus assets in an ongoing situation is not clearly defined in the plan. Prior to the issue of the plan amendment No. 3, which was signed in October 1986, the Plan Text and Trust Agreement were both silent on the subject of refundable surplus (the amendment would be viewed by the Commission as being effective on a prospective basis from its issue date). This in combination with the representations from five of the plan members stating their objections to the withdrawal of surplus, almost certainly would have caused, in our opinion, the Commission to decide on a judicial determination for the surplus refund request.

In view of the fact that a moratorium is now in effect on all surplus refund applications with respect to ongoing plans, we must advise you that we are unable to process the Company's application at this time.

23 There is no evidence that the company took any further steps to obtain judicial authority to remove the surplus or obtain approval of the Pension Commission.

24 It is clear that the employees had no entitlement to the surplus funds, if any, and the first two plan documents did not refer to ownership rights in the surplus, but regardless of this omission, the Pension Commission did approve a withdrawal of surplus funds in 1984 even though there would not appear to have been notice to the employees as required under the terms of the plan in force at that time.

25 In 1985, the company concerned about its business reversals and on the recommendation of its auditors hired new management, Bruce McNicholls as President and Chief Executive Officer, and Ken Bradley as the new Vice President Finance and Treasurer. Their responsibilities included the administration of the pension plan. Probably it should not come as a surprise that the new management team at the company and Mr. William Curry, Vice President Manufacturing, encountered difficulties in working together and Mr. Curry was offered early retirement. Some of the surplus funds in the pension were used to purchase an unreduced early retirement pension. While there is some question as to which pension plan was in effect at the time, Mr. Curry retired, early retirement was permitted under both the 1976 pension plan and the 1986 pension plan.

26 Amendment no. 4 to B.D. Wait Pension Plan was amended to deal with Mr. Curry's pension as follows:

> In consideration of William Curry's long service with the Company, the Plan is amended as of March 1, 1987 as follows:
>
> Notwithstanding anything to the contrary in Article V, VI and VII hereof, WILLIAM CURRY will receive a monthly pension of $2,200.00, Joint and Survivor with no reduction upon Mr. Curry's death and guaranteed for 10 years commencing at his early retirement date of March 1, 1987.
>
> The foregoing revisions having been duly adopted by the Employer, the Employer has: caused this Amendment Number 4 to be duly executed in the name of and on behalf of the Employer by its officer(s) duly authorized by its Board of Directors.

27 The cost of the additional pension benefit was assessed at $195,700 and no extra contribution was made by the company to the plan. The Pension Commission accepted the amendment no. 4 and wrote to the Manufacturer's Life Insurance Company that the Plan remained qualified for registration and a copy of this letter is found at Tab 21 of the applicant's record.

28 The affairs of B.D. Wait continued to deteriorate and negotiations were undertaken to sell the company to Anova Inc. All of the issued shares of B.D. Wait were owned by Oakline Investments Limited. Eight-five percent of the issued shares of Oakline were owned by Kurt E. Petersen, William C. Curry, Thomas E. Squires, and Terry J.T. Marks.

29 On October 7, 1987 the shares of B.D. Wait were sold to Anova by the shareholders of Oakline. As part of the consideration for the sale of the shares of B.D. Wait, part of the surplus assets in the B.D. Wait Pension Plan were used to increase the pension benefits of Messrs. Petersen, Curry, Squires and Marks.

30 A photocopy of the resolution of the Directors of B.D. Wait appears at Tab 26 of the application record of the applicant and reads as follows:

> "Amendment Number 8 to the Retirement Pension Plan for Employees of B.D. Wait Co. Limited
>
> 1. RESOLVED that in order to improve the pension benefits of Kurt E. Petersen and Thomas E. Squires, the Plan is amended as of October 7, 1987 as follows:
> (a) To reduce the Normal Retirement Date of Mr. Petersen and Mr. Squires to age 60.
> (b) To change their normal form of pension to a Life Annuity guaranteed for 10 years.
> (c) The total amount of the pension payable to each of Mr. Petersen and Mr. Squires shall be increased by 4% on the first anniversary of the dates of the commencement of such pensions and on each subsequent anniversary thereof the amount of pension payable immediately prior to such anniversary date; provided that such increases shall

commence not earlier than the pensioner's 60th birthday.

(d) Mr. Petersen will receive an initial monthly pension of $3,962.22 based on the above for his credited service prior to October 7, 1987, and Mr. Squires will receive an initial monthly pension of $3,630.60 based on the above for his credited service prior to October 7, 1987. For their credited service after October 7, 1987, their annual benefit will be 1% of Pensionable Earnings for each year of Credited Service (completed months proportionately) and based on the above.

The Plan is further amended effective October 7, 1987 in order to increase the monthly pension of a retired Member, William Curry, as follows:

> "William Curry will receive an additional $809.80 per month, joint and survivor with no reduction upon Mr. Curry's death and guaranteed for 9 years and 4 months commencing November 1, 1987."

The amount of annual pension payable to each of Mr. Petersen, Mr. Squires and Mr. Curry in accordance with the Plan shall not exceed the maximum annual pension permitted by the Department of National Revenue.

The Plan is further amended effective October 7, 1987 in order to improve the pension benefits of Terry Mark, as follows:

(a) To reduce his Normal Retirement Date to age 60.

(b) To change his normal form of pension to a Joint and Survivor, reduced by 40% on Mr. Mark's death.

(c) Mr. Mark shall receive an initial monthly pension of $1466.77 based on (a) and (b) above. The amount of pension payable to Mr. Mark shall be increased by 4% on the first anniversary of the date pension payments commence, and on each subsequent anniversary thereof the amount of pension payable shall be increased by 4% of the amount payable immediately prior to such anniversary date; provided that such increases shall commence not earlier than Mr. Mark's 60th birthday. Mr. Mark's pension benefit shall be based on 2% of the average of his best 3 consecutive years earnings, as specified by the Employer, for each year of Continuous Service. The amount of monthly pension set out in this paragraph is based on the assumption that Mr. Mark's wife is 3 years younger than Mr. Mark. If otherwise, the amount of monthly pension will be adjusted accordingly.

(d) Mr. Mark may elect, in lieu of the above monthly pension, to transfer a lump sum amount equal to the single premiums which have been paid to purchase the benefits hereunder plus interest at 6% per annum, to a noncommutable registered retirement savings plan or to a registered pension plan where it will continue to be subject to Applicable Legislation.

The Plan is further amended effective October 7, 1987 in order to change Section 8.1 with regards to Kurt E. Petersen, Thomas E. Squires, and Terry Mark, as follows:

> "Upon receipt of proof satisfactory to the Employer of the death of Mr. Petersen, Mr. Squires, or Mr. Mark before commencement of their pension payments or Normal Retirement Date, whichever is earlier, there shall be payable to their beneficiary a lump sum amount Actuarially Equivalent to their Earned Benefit provided such Earned Benefit has not already been purchased from a company licensed to issue annuities in Canada. The death benefit in respect of benefits which have been purchased shall be governed by the terms of the purchase."

2. Any officer or director of the Corporation is authorized and directed to execute and deliver the Amendment on behalf of and under the seal of the Corporation with such amendments or variations as he may approve, such approval to be conclusively evidenced by his execution of the Amendment; and

3. Any officer or director of the Corporation is authorized and directed to execute, under

> the seal of the Corporation or otherwise, all such other documents and do all such other acts as, in his opinion, may be necessary or desirable to give effect to the terms of the Amendment.n
>
> The undersigned Secretary of B.D. WAIT CO. LIMITED hereby certifies that the foregoing is a true and correct copy of a resolution passed by the directors as of the 7th day of October 1987 and that such resolution is in full force and effect, unamended on the date thereof.
>
> DATED the 8th day of October, 1987.

31 The cost to the plan to increase the benefits for Messrs. Petersen, Curry, Squires and Marks was $716,200, leaving, according to the actuarial report, a surplus in the pension plan of $5,600.00.

32 There is no evidence that the members of the plan received notice of the amendment.

33 By letter dated June 12, 1989, the Pension Commission of Ontario refused to approve amendment no. 5 to the B.D. Wait Pension Plan because it did not provide the same benefits to all plan members in the same class.

34 The B.D. Wait plan had only one class of members.

35 On August 21, 1989, B.D. Wait amended the pension plan as of October 7, 1987 by adding to the definition of Members Class A, Class S, and Class C Members. There is an indication that a copy of the amendment was sent to the Pension Commission, but there is no evidence of a reply either positive or negative' from the Commission or the superintendent.

36 Unfortunately, Anova was no more successful in running the business than B.D. Wait had been and on August 30, 1989 Peat Marwick was appointed receiver and manager of Anova. There is undisputed evidence that Anova failed to make any contributions to the B.D. Wait Pension Plan (now called the Anova Inc. Employee Retirement Pension Plan but for convenience, referred to as the B.D. Wait Pension Plan). The respondents' objection to this application on the grounds that there is no entity known as B.D. Wait Pension Plan and that the application should be dismissed on that ground is admired for the courage of its proponents in arguing it, but dismissed as having no merit.

37 There is evidence from Thomas E. Squires that he has received 75% less of his early retirement benefit since he turned 60.

38 A photocopy of an internal memorandum from David Gordon to Sheila Fish is included at Tab 20 of the application record of the applicant, which merits detailed consideration and reads in part as follows:

> ANALYSIS:
>
> In respect of the shareholders' increases I do not feel we can reasonably take any action to negate the increases. They were done prior to proclamation of the PSA, 1987 with its gradual and uniform requirements. In addition, when the increases were done the plan was fully funded in accordance with the legislation in force at that time.

39 In addition, there is a photocopy of a letter from D. Ross Peebles, Superintendent of Pensions, at Tab C of the application record of the respondent which reads as follows:

> Based on the documents in our files and in exercise of the authority granted to me under Subsection 71(3) of the Pension Benefit Act, 1987, I hereby approve the commencement of pension payments to Mr. Ted Squires. His pension should be paid at the rate of 75 per cent of the benefit accrued to the end of 1987, with any applicable adjustment for early retirement. This approval is granted pending the review of the wind up report.
>
> If the Commission may be of further assistance, please contact Mr. K. David Gordon of this office at 972-5824.

40 The company had not been permitted to withdraw surplus from the pension plan, but an ingenious arrangement was

entered into whereby the surplus could be used to facilitate the sale of B.D. Wait to Anova. By using the surplus in the pension plan to give the controlling shareholders of B.D. Wait enhanced pension benefits, the controlling shareholders could receive fewer dollars as a purchase price from Anova and both sides would be satisfied.

41 As it turned out, of course, the new owners of B.D. Wait were no more successful in running the combined business and are now in receivership, and what is more serious for the employees of B.D. Wait, Anova failed to make contributions to the B.D. Wait Plan (now continued under the name Anova Plan) and there are insufficient funds in the plan to pay the benefits.

42 In order to resolve the issues on this application, the pension documents must be analyzed to determine if the pension funds are impressed with a trust.

43 Schmidt v. Air Products Canada Ltd., unreported decision of Supreme Court of Canada, released June 9, 1994, Cory J. as follows:

> [para88] In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.
>
> [para89] If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan.
>
> [para90] If, however, the fund is impressed with a trust, different considerations apply. The trust is not a trust for a purpose, but a classic trust. It is governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. However an employer may explicitly limit the operation of the trust so that it does not apply to surplus.
>
> [para91] The employer, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment.

44 In examining the pension documents in this case, the agreement between B.D. Wait Co. Ltd. and Montreal Trust reads as follows:

> FIRST: The Trustee shall receive any contributions paid to it in cash or other property acceptable to it. All contributions so received together with the income therefrom (hereinafter referred to as the "Trust Fund") shall be held, invested, managed and administered pursuant to the terms of this Agreement. The Trustee shall not be responsible for the collection of any funds required by the Plan to be paid to the Trustee.
>
> FOURTH: The Trustee shall have, in addition to any other powers and authority to which trustees may be entitled at law, the following powers and authority in the administration of the Trust Fund, all of which powers and authority shall be exercised as provided in Article FIFTH thereof:
>
> A. With any cash at any time held by it to purchase or subscribe for any securities or other property and to retain in trust such securities or other property.
> B. To sell for cash or on credit, convert, redeem, exchange for other securities or other property, or otherwise dispose of any securities or other property at any time held by it and otherwise generally to act as owner and to exercise all rights incident to ownership thereof.
> C. To settle, compromise or submit to arbitration, any claims, debts or damages,

due or owing to or from the trust, to commence or defend suits or legal proceedings and to represent the trust in all suits or legal proceedings.

D. To exercise any conversion privilege and/or subscription right available in connection with any securities or other property at any time held by it; to consent to the reorganization, consolidation, merger or readjustment of the finances of any corporation, company or association any of the securities of which may at any time be held by it or to the sale, mortgage, pledge or lease of the property of any such corporation, company or association, and to do any act with reference thereto, including the exercise of options, the making of agreements or subscriptions and the payment of expenses, assessments or subscriptions, which may be deemed necessary or advisable in connection therewith, and to hold and retain any securities or other property which it may so acquire.

E. To vote personally or by general or limited proxy, any securities which may be held by it at any time, and similarly to exercise personally or by general or by limited power of attorney any right appurtenant to any securities or other property held by it at any time.

F. To borrow money in such amounts and upon such terms and conditions as it shall deem advisable and to pledge any securities or other property for the repayment of any such loan.

G. To renew or extend or participate in the renewal or extension of any mortgage, upon such terms as may be deemed advisable, and to agree to a reduction in the rate of interest on any mortgage or to any other modification or change in the terms of any mortgage or of any guarantee pertaining thereto, in any manner to any extent that may be deemed advisable for the protection of the Trust Fund or the preservation of the value of the investment; to waive any default whether in the performance of any covenant or condition of any mortgage or in the performance of any guarantee or to enforce any such default in such manner and to such extent as may be deemed advisable; to exercise and enforce any and all rights of foreclosure, to bid in property on foreclosure, to take a deed in lieu of foreclosure with or without paying a consideration therefor and in connection therewith to release the obligation secured by such mortgage and to exercise and enforce in any action, suit or proceeding at law or in equity any rights or remedies in respect of any such mortgage or guarantee.

H. To hold all of any part of the Trust Fund uninvested.

I. To employ such agents, lawyers, accountants and other persons as may be selected by the Trustee to pay out of the Trust Fund their reasonable expenses and compensations and to rely and act on information and advise furnished by such persons or to refrain from acting thereon.

J. To register any securities held by it hereunder in its own name or in the name of a nominee or nominees with or without the addition of words indicating that such securities are held in a fiduciary capacity and to hold any securities in bearer form.

K. To make, execute and deliver, as Trustee, any and all deeds, leases, mortgages + (*veyances, contracts, waivers, releases or other instruments in writing necessary or proper for the accomplishment of any of the foregoing powers.

L. To keep such portion of the Trust Fund, as may from time to time be deemed by it to be in the best interests of the Trust Fund, on deposit in a chartered bank or Government Savings Bank in Canada at such rate of interest, if any, as may be allowed thereon, or on demand deposit at an agreed interest rate with any Trust Company (including the Trustee) then licensed under the laws of Canada or any Province thereof to carry on business as such.

M. To deposit any securities documents of title held by it hereunder with any banker or other depository.

45 A perusal of the plan documents, including the agreement with Montreal Trust, makes it abundantly clear that the pension funds were impressed with a trust.

46 There is no validity to the respondents' argument that the applicants are not entitled to bring an application under section 60 of the Trustee Act, but even if there were, it is not fatal to this application because the application may be brought

under rule 14.05(3)(a) or (h).

47 I am satisfied that I have jurisdiction to hear and decide this application. I see no merit in transferring the issues to the Pension Commission because it would probably be necessary to have a judicial determination in any event and the result would only be an increase in costs, which would be regrettable.

48 Relying on the issues from K. David Gordon, I am satisfied that the amendment complied with the Pension Benefits Act in force at the time and there was no requirement on the Pension Benefits Commissioner to apply trust principles. However, that does not oust the jurisdiction of the courts and I am satisfied there always was a fiduciary obligation as the trustees and the administrators of the plan.

49 Having found that the plan funds are subject to a trust, it is, as stated by Mr. Justice Cory, subject to equitable principles which must prevail if they are in conflict with plan provisions.

50 It is significant in the determination of the issue in this case that the amendments to the retirement benefits to the plan which enhanced the pension benefits of the respondents were made during the continuance of the plan and not upon its termination. As stated by Mr. Justice Cory in Schmidt,

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence.

51 In assessing the enhanced benefits granted to the respondents, it is necessary to analyze whether the contractual terms of the pension plan permit the granting of the enhanced benefits. If so, do those contractual terms conflict with the equitable principles applicable in this case?

52 In order to decide the issues, I believe it is appropriate to separate the enhanced benefits into two categories: the first being the early retirement benefit granted to Mr. Curry effective March 1, 1987, and the second being the enhanced benefits granted to the respondents in October 7, 1987.

53 Dealing then with the March 1, 1987 early retirement benefit to Mr. Curry, there is no dispute that the company had the power to make the March 1, 1987 amendment. In addition, this March 1, 1987 amendment was registered by the Pension Commission of Ontario pursuant to the Pension Benefits Act.

54 The undisputed evidence was that it was decided by the company that it would be to the advantage of the company if Mr. Curry took early retirement and in fact the evidence is that Mr. Curry retired February 28, 1987. There were funds available in the Plan to purchase the annuity for Mr Curry. I am satisfied the March 1, 1987 amendment was made in accordance with the contractual terms and next issue is whether it is in conflict with the applicable equitable principles.

55 I agree with the applicant's counsel as set out in the applicant's factum that an amendment of the Plan which violates the fiduciary duties owed to the members of the Plan is not sustainable. The third paragraph of the trust agreement made July 9, 1969 states, "...no part of the Trust Fund... shall be used for, or diverted to, purposes other than those set out in the Plan.

56 Article VII of the Plan contains the following provision:

> However, if the Member's early retirement was requested or initiated by the Company, the Company may in its sole discretion waive part or all of the reduction in pension normally consequent on early retirement.

57 I do not believe that the Company was in breach of its fiduciary duties at this time. The evidence was that this was done for the benefit of the company which would benefit all the employees. There were funds available which at that date would not impair the ability of the company to meet its obligations to all members.

58 I am satisfied and find that the grant of the early retirement benefits to Mr. Curry on March 1, 1987 are valid.

59 In turning then to the enhanced benefits given to the respondents on or about October 7, 1987, it is a difficult decision because both the respondents and the remaining employees have merit in their claims. At the time the enhanced benefits were given to the respondents, there was an actuarial surplus which would allow these benefits to be given without prejudicing the

employees, but as events have occurred if they are allowed to stand, the remaining employees will suffer. However, while I have sympathy for the respondents, I believe the grant of the enhanced benefits to them was a breach of the fiduciary duties owed to the remaining employees and was not in accordance with the terms of the Plan.

60 I would like to quote from Mr. Justice Adams' decision in Bathgate et al. v. National Hockey League Pension Society et al. (1992), 11 O.R. (3d) 450 (Gen. Div), affirmed 16 O.R. (3d) 761 (C.A.), leave to appeal to S.C.C. denied July 28, 1994, at pg. 511:

> Employers and trustees must appreciate the central importance of pension arrangements to all employees and be vigilant of the dependent interest engrained in these plans.

61 The granting of the enhanced benefits was made to the respondents in their capacity as shareholders, not as employees, and this was The Retirement Pension Plan for Employees of B.D. Wait Co. Limited. Two of the respondents were not even employed at the time. The grant was void ab initio according to equitable principles. The interest that the company had in selling the business does not outweigh their duty to act fairly towards all employees.

62 The approval by the Pension Commissioner of the payment to Mr. Squires does not validate the grant which was done in breach of the trustee's duties, but rather signifies that it was in compliance with the legislation in force at the time. The memo from David Gordon upon which it would appear Mr. Peebles possibly relied was certainly not an unqualified endorsement. The trustees owe a duty to all the employees who were members of the B.D. Wait Pension Plan. It is understandable that the use of the funds sitting in the Plan and surplus to its need according to the actuary would be almost irresistible to the officers of a company in financial difficulties, but those funds are not money in the bank, as it were, until the plan is wound up. It was open to the company to continue their efforts to get permission from the Pension Commission of Ontario to withdraw the funds which had been designated as surplus by the actuary, but instead the company used this ingenious method of granting the enhanced benefits. Unfortunately, the grant to the shareholders did not comply with the contractual terms of the Plan and I find it was in breach of the fiduciary obligations owed to the employees. On the evidence before me, I am satisfied that the Administrators of the Plan were in a fiduciary relationship with the employees as well as the trustees and were in breach of their obligations and the amendment must be set aside and the annuities liquidated. While I was not asked to consider what should happen if there is a surplus after the annuities purchased for the respondents are liquidated, I cannot resist making the suggestion that I believe these funds should go to the respondents on a pro rata basis and not to Anova. The respondents transferred their shares in B.D. Wait in return for the enhanced benefits and there is no suggestion they were acting in bad faith. While I have sympathy for them, however, it must also be recognized that they would not likely be in any better position if the sale to Anova had not taken place because B.D. Wait would probably have become insolvent and their shares worthless and if they had taken shares in Anova as part payment they would probably also be worthless now.

63 It may be that some special arrangement will be required with respect to Mr. squires because he has received payments on his pension, but I make no order in this regard, but I may be spoken to if the parties are unable to agree.

64 In conclusion then to answer the questions asked by the applicant,

65 a) The amendment to the Retirement plan for Employee of B.D. Wait Co. Limited, now the Anova Employee Retirement Pension Plan as of March 1, 1987, granting early retirement benefits to William Curry, being Exhibit 16 to the affidavit of Robert Paul and found at Tab 18 of the application record, is valid.

66 The amendments to the Plan as of October 1, 1987, being Exhibit 24 to the affidavit of Robert Paul and found at Tab 26 of the application record, which purport to enhance the pension benefits of Messrs. Petersen, Curry, Squires and Mark are invalid.

67 b) Save and except for the amendment of March 1, 1987, the commuted values of pension benefits for Messrs. Petersen, Curry, Squires and Mark are to be determined on the basis as all other members of the pension without regard to the amendments of October 7, 1987.

68 c) It is ordered that the respondent, Manulife, liquidate all annuities purchased respecting the October l, 1989 amendments to Messrs. Petersen, Curry, Squires and Mark, plus accrued interest calculated in accordance with the regulation under the Pension Benefits Act, R.S.O. 1990, c. P-8, and deposit the funds to an account as directed by the applicant.

69 I may be spoken to with respect to the surplus (if any) and with respect to costs.

GERMAN J.

qp/s/mes/DRS/DRS/DRS

Tab 5

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

By

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contributes on the same basis but guarantees a pension determined by a formula that reflects the employee's salary levels over a period of time and years of service. Here risk of investment return falls on the employer. This is the "defined benefit" plan. The trust in either case will usually incorporate the plan.

Whatever the structure of the trust, however, the investment clause is a key part of the trust indenture; indeed, the indenture itself is of key importance because it determines the role and duties of the trustee, the employee risk and the employee enjoyment rights. It has been said that "in the larger pension schemes the indenture of trust is more like a carefully drafted contract representing the very special needs of the funding party."[26] Employees' benefit rights usually cover such matters as the right of the employee in his early years of employment to have back his own contributions on his leaving his employment, and in some instances he is entitled to have his years of employment with a previous employer credited to him in the pension plan of his succeeding employer. But so far as his interest in the trust fund is concerned, the usual arrangement is for the beneficiary to have an interest in the fund expressed as the proportion of his own contributions and the contributions on his behalf in relation to the net value of the trust fund as a whole. In the case of investment trusts (or mutual funds) which solicit funds from the investing public, contributors will have unit interests – in England these investment trusts are explicitly referred to as unit trusts – but this feature will hardly ever be found with pension plan trusts. The primary reason for this in Canada is that pension plan benefits are not intended by the federal government or employers as portfolio investments with which the beneficiary can trade. Rather they are seen as an earmarked provision for the particular beneficiary's years of retirement.

The popularity of the trusteed pension plan undoubtedly stems from the fact that the funds supplied for pension purposes are separately held by the trustee or trustees

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[26] D.J. Baum, "Profit Sharing and Pension Plans in Canada: Profile in Action: A Melding of Interests" (1971) 6 Texas Int. Law Forum 165 at 172. A question that frequently arises is who is entitled to any surplus in a defined benefit plan. Has the employer contracted, with employee contributions, to pay a formula-fixed pension for the employee, or do all moneys paid into the trust fund, including all investment earnings of that fund, automatically thereby become the property of the trust beneficiaries (i.e., the employees)? This has been a continuous problem and the source of frequent litigation in Canada. No rule exists; it is a question of the intent of the party or parties who created the particular trust. There is an evident tension between contract law and trust law in this pension plan context, which has been the subject of frequent debate in other jurisdictions. However, in common law Canada the trust analysis, subject to contrary intent, is entrenched: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.). On the treatment of pension surpluses see, e.g., Mary Louise Dickson, "Pension Surplus" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 132; Eileen E. Gillese, "Pension Plans and the Law of Trusts" (1996) 75 Can. Bar. Rev. 221 (also in Special Lectures of the Law Society of Upper Canada, *Estates* (Toronto: Carswell, 1996) at 199); and Dona L. Campbell, "Preparing for Successful Pension Litigation: An Analysis of the Implications of Trusts vs. Insurance Contracts for Entitlements to Pension Surplus" (1996) 15 E.T.P. 331. On pension trusts in Quebec, see Michel Benoit, "The Development of the Concept of Pension Trust Under Quebec Civil Law" (1998) 17 E.T.P.J. 203. See also R.E. Scane, "Occupational Pension Schemes: Is the Trust an Adequate Mode of Provision" in Donovan W.M. Waters (ed.), *Equity, Fiduciaries and Trusts*, 1993 (Toronto: Carwswell, 1993) at 359.

so that all growth adheres to the trust fund,[27] and the employee is not essentially dependent for pension upon the continued solvency of the employer. The scope of the investment policy can also be determined by the funding party whose obvious interest is maximum return.

2. Profit-Sharing Trusts

The trust is also employed in connection with plans to secure employee benefits and profit-sharing. A company engaged in a cyclical industry may set up and fund a trust whose income will provide remuneration for employees during the company's low periods of operation. Such schemes often result from arbitration with unions; the object of all such trusts is to provide supplementary or unemployment income to employees. Profit-sharing trusts are set up by companies for their employees. The employer and the employee each makes a contribution to the trust fund, and the trustee will purchase shares in the company from the employer. The list of permitted investments is normally supplied to the trustee by the employer, and the shares of the company are included in that list. Again it is likely that arbitration will determine the terms of the trust indenture.

3. Registered Retirement Savings Plan Trusts

Registered retirement savings plans, which qualify for tax relief under the *Income Tax Act*,[28] may take the form of a contract with an insurance company, a trust administered by a trust company, or a "deposit arrangement" with a bank. In the trust form they are unit investment trusts, or self-administered investment trusts. In the case of the unit investment trust, the trust company or a banking corporation sponsors the trust with an initial investment portfolio, units of which are sold to the investing public so that eventually the trust is self-generating. The investment portfolio is vested in the trust company which acts for a fee as an investment manager on behalf of the unit holders, the trust beneficiaries, who are free to sell their units to the trust company at the prevailing market value of the units or to purchase further units.[29] Purchasers of units while the trust is in being thus also become trust beneficiaries. In the case of a self-administered trust, the future retiree transfers moneys to the trustee, and under the terms of the trust indenture into which he and the trustee have entered, he accepts personal responsibility for selecting the investments of the trust. These investments, however, must be within the limits of investments permitted by the *Income Tax Act* for all retirement savings plans. In effect the trustee in this case is merely a custodian of the investments, and accepts no responsibility for their

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[27] The contrast is with insurance annuity contracts where contributions are merely paid into the particular company's account.

[28] *Supra*, note 4, ss. 60(i), 146, 14.3. This is also the case under the Quebec *Taxation Act*, R.S.Q., 1977, c. I-3, as amended, ss. 339 and 905.1.

[29] The prevailing market value of the trust unit, a figure reflecting the value of the portfolio investments, is announced monthly.

Tab 6

Case Name:

Morneau Sobeco Limited Partnership v. Aon Consulting Inc.

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 Slater Steel Inc., Slater Stainless Corp., Sorel Forge Inc., 833840 Ontario Inc., 1124207 Ontario Inc. and 3014063 Nova Scotia Company, Applicants
AND IN THE MATTER OF Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Slater Steel Corporation
Between
Morneau Sobeco Limited Partnership by its General Partner Morneau Sobeco Corporation, Plaintiff (Respondent), and
Aon Consulting Inc. and J. Melvin Norton, Defendants (Appellants)

[2008] O.J. No. 1022

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65 C.C.P.B. 293

40 C.B.R. (5th) 172

65 C.C.L.I. (4th) 159

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164 A.C.W.S. (3d) 878

291 D.L.R. (4th) 314

237 O.A.C. 267

Dockets: C47155 and C47235

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O. and E.E. Gillese and

P.S. Rouleau JJ.A.

Heard: February 21, 2008.
Judgment: March 19, 2008.

(51 paras.)

Civil litigation -- Civil procedure -- Parties -- Third party procedure -- Striking out or setting aside -- Appeal by Aon and Norton from the dismissal of their motions to institute third party actions with respect to the alleged underfunding of two pension plans -- The chambers judge found that the proposed third party claims did not disclose a proper cause of action because, in order for the underlying action to succeed, reasonable reliance on the part of the respondent had to be proven -- Appeal allowed -- The chambers judge erred when he assumed that reasonable reliance on the part of the respondent had to be proven.

Insolvency law -- Legislation -- Companies' Creditors Arrangements Act -- Appeal by Aon and Norton from the dismissal of their motions to institute third party actions with respect to the alleged underfunding of two pension plans -- Respondents claimed that orders granted under the Companies' Creditors Arrangements Act prevented the claims from being brought -- Appeal allowed -- The proposed third party claims were not be barred by the orders under the Act because the claims did not relate to the respondent's personnel in their roles of directors and officers but, rather, as individuals.

Appeal by Aon and Norton from the dismissal of their motions to institute third part actions with respect to the alleged underfunding of two pension plans. Slater was the sponsor and administrator of the pension plans. Norton was the Plans' actuary at the relevant times and Aon was his employer. Slater was granted protection under the Companies' Creditors Arrangement Act in 2002. On September 8, 2004, after a settlement under the Superintendent of Financial Services, Morneau was appointed as the successor administrator of the Plans. On November 18, 2005, Morneau brought an action against Norton and Aon in which it claimed damages of $20 million, the amount by which the Plans were underfunded as a result of the allegedly improper actuarial reports prepared by Norton. Aon and Norton each sought to institute third party proceedings against former directors, officers or employees of Slater or a related corporation, Slater Stainless, who served on Slater's Audit Committee. Slater, as administrator of the Plans, had given the Audit Committee responsibility for management and administration of the Plans. Consequently, the members of the Audit Committee performed Slater's duties as the Plan administrator at the relevant times. In the proposed third party claims, Aon and Norton sought to claim against the Slater personnel on the basis that the Slater personnel, as employees or agents of Slater, were the governing mind of Slater and had caused or contributed to the alleged deficit. Aon and Norton relied on their statutory and common law rights to seek contribution and indemnity from the Slater personnel for any liability they are found to have in the Morneau action. The Slater personnel objected to the issuance of the proposed third party claims. They maintained that orders granted under the Act prevented such claims from being brought. Aon and Norton brought motions for declarations that the Act did not apply or, alternatively, for leave to bring their claims. The chambers judge found that the proposed third party claims did not disclose a proper cause of action because, in order for the Morneau action to succeed, reasonable reliance on the part of Slater had to be proven.

HELD: Appeals allowed, and Aon and Norton were allowed to commence third party proceedings. The chambers judge erred when he assumed that in order for the Morneau action to succeed, reasonable reliance on the part of Slater had to be proven. The Morneau claim was asserted on behalf of the Plans' members and beneficiaries. The success of the Morneau claim was not dependent on establishing that Slater reasonably relied on the reports. It was dependent on establishing that the allegedly negligent reports played a role in enabling Slater to avoid making the required payments. Further, as the successor administrator, Morneau could sue for redress for acts of improper administration by a prior administrator much in the same way that a subsequent trustee could sue a prior trustee for breach of trust. Moreover, the absence of reasonable reliance was not a complete defence to the Morneau action which asserted a number of other claims. Accordingly, it could not be said that it was plain and obvious that the proposed third party claims could not succeed. The proposed third party claims were not be barred by the orders under the Act because the claims did not relate to the Slater personnel in their roles of directors and officers but, rather, as individuals who were the agents and employees of Slater, the Plans' administrator. Consequently, leave would not be necessary to bring the proposed third party claims.

Appeal From:

On appeal from the order of Justice J.M. Spence of the Superior Court of Justice dated April 13, 2007, with reasons reported at (2007), 59 C.C.P.B. 286.

Counsel:

Ian Dick and Elizabeth Brown for the appellant J. Melvin Norton.

Barry Bresner and Markus Kremer for the appellant Aon Consulting Inc.

Edward Babin and Jim Bunting for the Proposed Third Parties.

A.J. Esterbauer for the plaintiff Morneau Sobeco Limited Partnership by its General Partner, Morneau Sobeco Corporation.

Michael McGraw for the Monitor.

Deborah McPhail for the Superintendent of Financial Services.

The judgment of the Court was delivered by

1 **E.E. GILLESE J.A.:--** These appeals involve the alleged underfunding of two pension plans. They raise a question that sounds more like a riddle than a legal question: when are directors and officers *not* directors and officers? The question is complicated by the fact that it arises in largely uncharted legal waters - a lawsuit brought by a successor pension plan administrator.

BACKGROUND

2 Slater Stainless Corp. was the sponsor and administrator of certain pension plans (the "Plans"). J. Melvin Norton was the Plans' actuary at the relevant times and Aon Consulting Inc. was his employer.

3 By order dated June 2, 2003 (the "Initial Order"), Slater was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

4 Prior to the making of the Initial Order, Slater had dealings with the Superintendent of Financial Services (the "Superintendent") and the Financial Services Commission ("FSCO") over alleged improprieties in the Plans' actuarial reports which had been prepared by Norton.

5 In the Initial Order, a charge of up to $17.5 million (the "D&O Charge") was made against the Slater property to indemnify the Slater directors and officers for claims that might be asserted against them (the "D&O Claims"). A process to resolve claims against the directors and officers (the "Claims Bar Process") was established by order dated April 30, 2004 (the "Claims Bar Order"). The Claims Bar Order also provided that Slater's directors and officers would be released from all claims for which the directors and officers were liable in their capacity as such and for which no claims notices had been filed by the deadline.

6 The Superintendent filed a D&O Claim (the "FSCO Claim") in which it set out a number of regulatory and compliance issues in relation to Slater's administration of the Plans. One aspect of the FSCO Claim related to the asset valuation methods adopted in the actuarial valuation reports that Slater had filed with FSCO. The reports were said to have contravened the requirements of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*") and *Regulation 909*, R.R.O. 1990. It was alleged that had proper reports been filed, Slater would have been required to make additional contributions to the Plans, thereby reducing or eliminating the alleged deficits in the Plans. Pursuant to s. 109(1) of the *PBA*, the alleged contraventions constitute an offence.

7 The FSCO Claim asserted, pursuant to s. 110(2) of the *PBA*, that the Slater directors and officers were also guilty of offences under the *PBA* because they "caused, authorised, permitted, acquiesced or participated in" Slater's various contraventions and failed to take reasonable care to prevent Slater from committing the contraventions.

8 The FSCO Claim sought a fine of $100,000 against the directors and officers for the alleged offences. It also sought an order that the directors and officers pay $18 million plus interest into the Plans, that being the amount of the unremitted contributions to the Plans.

9 The *CCAA* proceedings were unsuccessful in that no plan of compromise or arrangement was reached. By order dated

August 30, 2004, the *CCAA* proceedings were terminated (the "Termination Order"). Pursuant to a further order made that day under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, Slater was put into receivership. The Termination Order ended the provisions in the Initial Order that had granted Slater creditor protection. However, it allowed the Claims Bar Process to continue for certain claims already underway.

10 The FSCO Claim was settled. By order dated December 9, 2004, the settlement was approved in the *CCAA* proceedings (the "Settlement Order"). The Settlement Order required the receiver for Slater to pay $100,000 to FSCO from Slater's operating reserve, in lieu of a fine under the *PBA*. As well, judgment against Slater was ordered for the lesser of $18.3 million or the deficiencies in the Plans. The judgment had the status of an unsecured judgment; there are no funds available for distribution to Slater's unsecured creditors.[1]

11 On September 8, 2004, the Superintendent appointed Morneau Sobeco Limited Partnership as the successor administrator of the Plans.

12 On November 18, 2005, Morneau brought an action against Norton and Aon in which it claimed damages of $20 million, the amount by which the Plans are underfunded as a result of the allegedly improper actuarial reports prepared by Norton. The Morneau action relates to the same actuarial reports and deficiencies as were the subject of the FSCO Claim and the Settlement Order. The Morneau action alleges, among other things, that Norton breached the duties he owed to the Plans' members and beneficiaries by preparing actuarial valuations that overstated the value of the Plans' assets and enabled Slater to avoid making additional contributions to the Plans before becoming insolvent.

13 Aon and Norton each sought to institute third party proceedings (the "Proposed Third Party Claims") against certain individuals (the "Slater Personnel"). The Slater Personnel are former directors, officers or employees of Slater or a related corporation, Slater Stainless Inc., who served on Slater's Audit Committee. Slater, as administrator of the Plans, had given the Audit Committee responsibility for management and administration of the Plans. Consequently, the members of the Audit Committee performed Slater's duties as the Plan administrator at the relevant times.

14 In the Proposed Third Party Claims, Aon and Norton seek to claim against the Slater Personnel on the basis that the Slater Personnel, as employees or agents of Slater, were the governing mind of Slater *qua* administrator and caused or contributed to the alleged deficit. Aon and Norton rely on their statutory and common law rights to seek contribution and indemnity from the Slater Personnel for any liability they are found to have in the Morneau action.

15 The Proposed Third Party Claims allege that the Slater Personnel, in their capacity as agents or employees of the administrator, acted negligently and in breach of statutory and fiduciary duties, induced or committed breaches of fiduciary duty, placed themselves in a position of conflict of interest and engaged in wilful misconduct. The allegations include that the Slater Personnel followed a deliberate strategy to minimize the contributions that Slater would be required to make to the Plans when they knew, or ought to have known, that Slater was insolvent or on the brink of insolvency. This strategy allegedly included instructing Norton to prepare the solvency valuation using an asset "smoothing" method that adjusted the value attributed to the Plans' assets, without disclosing to Norton or Aon that there were doubts as to whether Slater would remain a going concern. The strategy also allegedly included instructions by the Slater Personnel to Norton in his dealings with the Superintendent and deliberately delaying the proceedings with FSCO in order to avoid having Slater make pension plan contributions prior to seeking protection from its creditors.

16 The Slater Personnel objected to the issuance of the Proposed Third Party Claims. They maintained that the *CCAA* orders prevented such claims from being brought. In particular, they relied on paras. 15 and 16 of the Termination Order. Those paragraphs read as follows:

> 15. THIS COURT ORDERS that any person who served as an officer or director of any of the Applicants prior to and from and after June 2, 2003 is hereby released, remised and forever discharged of and from all claims, liabilities, obligations, demands or causes of action of whatever nature, including, without limitation, any and all claims in respect of potential statutory liabilities, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising by reason of, out of or in connection with, such service with respect to any act or omission, transaction or dealing or other occurrence existing or taking place prior to the date of this Order, and including any claim or demand for contribution or indemnity in respect of any act or omission, transaction or dealing or other occurrence which occurred in whole or in part prior to the date of this Order, provided that this paragraph shall not extend to any person that actively and knowingly participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct and provided that this paragraph shall be without prejudice to the rights of any person whose claim against such directors and officers has been allowed, partially allowed or is being disputed in accordance with the Claims Bar

Order.

16. THIS COURT ORDERS that, until further order of this Court, any and all persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, including, without limitation, administrative hearings or orders, declarations or assessments, against any or all past, present or future directors or officers of any of the Applicants in respect of any matters referred to in paragraph 15 above, save and except claims brought in accordance with the procedures contained in the Claims Bar Order.

17 Aon and Norton brought motions for declarations that the *CCAA* orders did not apply or, alternatively, for leave to bring their claims (the "Underlying Motions"). The Slater Personnel brought a cross-motion for an order striking the Proposed Third Party Claims as disclosing no reasonable cause of action.

18 In two orders, both of which are dated April 13, 2007, Spence J. dismissed the Underlying Motions and the cross-motion (the "Orders"). He was of the view that the determinative issue on the Underlying Motions and the cross-motion was whether the Proposed Third Party Claims disclosed a "proper cause of action". He held that they did not. Having decided the Underlying Motions and cross-motion on that basis, the motions judge did not address the *CCAA* issues.

19 Aon and Norton appeal. The Slater Personnel bring a motion to quash the appeals, contending that the Orders are decisions made under the *CCAA* and, thus, leave to appeal the Orders is necessary. They submit that as Aon and Norton did not seek leave to appeal the Orders, the appeals are not properly before this Court and should be quashed.

20 For the reasons that follow, I would dismiss the motion to quash and allow the appeals.

THE ISSUES

21 In effect, the motion judge struck the Proposed Third Party Claims on the basis that they failed to disclose a reasonable cause of action. Consequently, to decide these appeals, two issues must be addressed:

1. Do the Proposed Third Party Claims disclose a reasonable cause of action?
2. If so, are they precluded by the *CCAA* orders?

THE PROPOSED THIRD PARTY CLAIMS

22 There is no dispute about the principles that apply on a motion to strike pleadings for failure to disclose a reasonable cause of action pursuant to rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The claim is to be read generously, with allowance for inadequacies in drafting; the material facts pleaded are to be taken as true unless they are patently ridiculous or incapable of proof; and, the threshold is a high one as pleadings are to be struck only in the clearest of cases. Put another way, for the Proposed Third Party Claims to be struck on the basis they did not disclose a reasonable cause of action, the motions judge had to have concluded that it was "plain, obvious and beyond doubt" that Aon and Norton could not succeed in the claims they advanced in those pleadings.

23 In my view, it was an error for the motions judge to have reached this conclusion.

24 I understand the chain of reasoning behind the motions judge's determination that the Proposed Third Party Claims are "fundamentally defective" to be as follows.

- Aon and Norton can be held liable in the Morneau action only if they are found to have caused the Plans to suffer damage. In order to find that Aon and Norton caused the Plans to suffer damage, the court must find that Slater[2] reasonably relied on advice provided by Aon and Norton, and that the advice fell below the requisite standard of care.
- Aon and Norton have defended the Morneau action on the basis that Slater did not rely on their advice. That is, Aon and Norton defend on the basis that even if they were negligent in the preparation of the actuarial reports, it was not their negligence which caused damage. Rather, it was the improper actions of Slater that caused the Plans to suffer harm.
- If Aon and Norton succeed in convincing the court that Slater did not rely on their advice when deciding how much to contribute to the Plans, reasonable reliance on the part of the Slater will not be established. If there is no reasonable reliance, there can be no loss as a consequence of the advice, even if the advice is found to have fallen below the requisite standard. The Morneau action would fail and there would be no liability on the part of Aon and Norton. If there is no

liability on the part of Aon and Norton, there is no basis on which to seek a finding of concurrent liability on the part of the Slater Personnel.

- If, however, there was reasonable reliance on the part of the Slater, then the Proposed Third Party Claims cannot succeed. That is because the Proposed Third Party Claims are based on the allegation that the Slater Personnel caused the damage. It is not possible to find both that Slater reasonably relied on Aon and Norton's advice and that Slater caused the damage.
- Consequently, the Proposed Third Party Claims were not proper claims for contribution and indemnity.

25 The motions judge erred in assuming that in order for the Morneau action to succeed, reasonable reliance on the part of Slater must be proven. The erroneous assumption flows from a failure to distinguish between Morneau's role as a successor administrator and Slater's role as the Plans' administrator, and to understand the true nature of the claims asserted.

26 If Slater had sued Aon and Norton, depending on the nature of the claim asserted, reasonable reliance might have been necessary for success.[3] But, it is not Slater that is suing. It is Morneau that is suing. Morneau may, as the successor plan administrator, pursue any claims that Slater might have taken. In addition, however, Morneau has the right to bring suit on behalf of the Plans' beneficiaries. Fundamentally, it is the latter which lies at the heart of the Morneau claim. The Morneau claim is asserted on behalf of the Plans' members and beneficiaries, the people who suffered or will suffer as a result of the underfunding of the Plans due to the allegedly negligent preparation of the solvency valuations. The success of the Morneau claim is not dependent on establishing that Slater reasonably relied on the reports. It is dependent on establishing that the allegedly negligent reports played a role in enabling Slater to avoid making the required payments.

27 Further, as the successor administrator, Morneau may sue for redress for acts of improper administration by a prior administrator much in the same way that a subsequent trustee can sue a prior trustee for breach of trust.

28 Moreover, the absence of reasonable reliance is not a complete defence to the Morneau action which asserts a number of other claims, including breach of fiduciary and statutory duties. If relevant at all, reliance is not determinative of those claims.

29 Accordingly, it cannot be said that it is plain and obvious that the Proposed Third Party Claims could not succeed; the cross-motion to strike the claims on that basis must be dismissed.

THE IMPACT OF THE *CCAA* ORDERS

30 In my view, the *CCAA* Orders ought not to preclude the issuance of the Proposed Third Party Claims. I come to this view for three reasons:

1) It is not clear to me that the Proposed Third Party Claims are barred by para. 15 of the Termination Order.
2) The bulk of the claims in the Proposed Third Party Claims fall within the "carve-out" in para. 15 and, thus, are not barred.
3) Even if the stay imposed under the *CCAA* Orders applies, the court's discretion should be exercised and the stay lifted.

The Proposed Third Party Claims May Not be Barred

31 Paragraph 15 of the Termination Order protects the directors and officers from claims arising from their service as directors and officers. In the Proposed Third Party Claims, the Slater Personnel are not being sued in their capacity as directors and officers of Slater. Rather, the claims are made against them as individuals, in their capacity as agents and employees of Slater *qua* administrator.

32 The Slater Personnel argue that they served on the Audit Committee because they were directors and officers.[4] That may be so. However, this argument fails to account for the change in role that took place when the members of the Audit Committee administered the Plans. At that point, the Audit Committee became the agents and employees of the then-administrator of the Plans, Slater.

33 Recognizing the different roles that the Slater Personnel fulfilled while on the Audit Committee makes sense of the inherent conflict of interest that otherwise existed for them. Here is one example of the conflict of interest that would exist if these different roles are conflated. The Audit Committee had to decide how much money Slater would contribute to the Plans

annually. If the Slater Personnel, in the guise of the Audit Committee, made that decision in their capacity as directors or officers of Slater, they did so while owing a duty to Slater. Given the financial difficulties that Slater faced, that duty would have led them to minimize the amount that Slater contributed to the Plans.

34 However, when the Audit Committee made decisions on the quantum of Slater's contribution to the Plans, it did so in order to fulfill Slater's obligations as administrator of the Plans. An administrator owes a fiduciary duty to the members of the Plans. The Audit Committee "stood in the shoes" of Slater *qua* administrator when making the decision; therefore, it too owed a fiduciary duty to the Plans' members. Fulfillment of that duty would have led to maximizing the contributions that Slater would make to the Plans as that would best protect the Plans members' pensions. In light of Slater's precarious financial position -- a fact that was known or ought to have been known by the Slater Personnel -- this duty was heightened because the need for solvency funding should have been apparent.

35 If the Slater Personnel are treated solely as directors and officers, they were in an impossible position. They could not fulfill their duties both to Slater and to the Plans' members. That impossibility is obviated if the roles played by the Slater Personnel are kept separate. Viewed in this way, although the Slater Personnel were appointed to the Audit Committee by virtue of their positions as directors and officers, when making decisions in respect of the Plans' administration they did so as agents and employees of Slater *qua* administrator - not as directors and officers.

36 Accordingly, the Proposed Third Party Claims would not be barred by the *CCAA* orders because those claims do not relate to the Slater Personnel in their roles of directors and officers but, rather, as individuals who were the agents and employees of Slater, the Plans' administrator. Consequently, leave would not be necessary to bring the Proposed Third Party Claims and there would be no need to lift the stay.

37 These comments are not intended to be determinative of this issue. They are offered only to explain why I do not view the Proposed Third Party Claims as necessarily within the scope of para. 15 of the Termination Order.

A Majority of Claims in the Proposed Third Party Claims are not Barred

38 Recall the "carve-out" in para. 15 of the Termination Order, which reads as follows:

> ... this paragraph shall not extend to any person that actively and knowingly participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct ....

39 It can be seen that the carve-out provides that the release in para. 15 does not extend to claims against those who "actively and knowingly" participated in the breach of fiduciary duties or who had been grossly negligent or guilty of wilful misconduct. Many of the allegations in the Proposed Third Party Claims fall within the scope of the carve-out. Consequently, even if the stay otherwise operates, it does not preclude such claims.

Lifting the Stay if Necessary

40 Further, and in any event, I would lift the stay if that were necessary.

41 The Slater Personnel acknowledge that even if the *CCAA* orders otherwise prevent the Proposed Third Party Claims from being initiated, para. 16 of the Termination Order gives this court the power to lift the stay and allow the claims to proceed. They argue that the court should not exercise its discretion because:

1. the allegations in the Proposed Third Party Claims are frivolous, without merit and do not establish a *prima facie* case, and
2. since Slater no longer exists, the directors and officers cannot seek indemnity from it. Whatever claims the directors and officers might have against Slater if the Proposed Third Party Claims are permitted to proceed, in effect, those claims are foreclosed as a result of the *CCAA* orders and the liquidation of Slater's assets.

42 I see no merit in the first objection. As the material facts pleaded in the Proposed Third Party Claims are neither patently ridiculous nor incapable of proof, at this stage they are taken to be true. On that basis, the claims for indemnity and contribution cannot be said to be frivolous or without merit.

43 The second objection is founded on the prejudice that the Slater Personnel may suffer if the stay is lifted. In my view, in considering this objection, the court must balance that prejudice against the prejudice that Aon and Norton may suffer if the

stay is not lifted. A weighing of such prejudice leads me to conclude that the balance is in favour of Aon and Norton and, therefore, in favour of lifting the stay, if that is necessary.

44 If the stay is lifted, the Slater Personnel will face significant financial exposure for conduct that occurred while they were directors and officers of Slater or its affiliates. If they are found liable, they will be unable to seek redress from Slater. On the other hand, Aon and Norton face significant financial exposure in the Morneau action. If the stay is not lifted, they will be unable to claim against the very individuals they say caused or contributed to the damages for which they may be held liable in the Morneau action.

45 If the analysis of prejudice ended there, one might conclude that the balance is roughly even. That, however, would be to ignore the legal proceedings which bring the parties to this point. The Slater Personnel fully participated in the proceedings that now prevent them from looking to Slater for indemnification. Their interests were protected and their voices heard.

46 The same is not true for Aon and Norton. Morneau brought its action against Aon and Norton almost fifteen months after the Termination Order was issued. Aon and Norton had no notice of the *CCAA* proceedings and no opportunity to make submissions in respect of the *CCAA* Orders. They had no knowledge, or means of acquiring knowledge, of any possible claims against them and no ability to assert a D&O Claim. Unlike the Slater Personnel, they were not involved in the FSCO Settlement nor were they given the opportunity to be involved in that process. If the stay is not lifted, Aon and Norton face substantial liability for which they may not claim contribution and indemnity from the very persons whom they say caused the Plans' deficits. Their legitimate claims will have been barred by a process in which they never had the opportunity to participate.

47 In the circumstances, as I have said, the balance is in favour of Aon and Norton. Accordingly, I would lift the stay, if that is necessary.

The Court's Jurisdiction to Make the CCAA Orders

48 Aon and Norton also argue that if the *CCAA* Orders purport to bar actions against the Slater Personnel, they ought to be held to beyond the jurisdiction of the court because the *CCAA* proceedings were terminated and no proposal or compromise had been sanctioned. In light of the conclusions reached above, there is no need to address these jurisdictional arguments.

DISPOSITION

49 Accordingly, if leave to appeal is necessary, I would grant leave. It follows that I would dismiss the motion to quash.

50 I would allow the appeals and set aside the Orders, apart from those parts of the Orders which dismiss the cross-motion. I would grant the Underlying Motions and declare that Aon and Norton may initiate third party claims. Aon's third party claim is to be substantially in the form of its First or Second Proposed Claim. Norton's claim is to be substantially in the form attached to its Notice of Motion. Having said that, Aon and Norton may advance any legal ground available to them - they are not limited to those that fall within the carve-out. I would extend the time for initiating a third party claim to fourteen days from the date of release of these reasons.

51 Aon and Norton are entitled to their costs below and of these appeals from the respondents, the proposed third parties. If those parties are unable to agree on costs, they may make brief written submissions on the same within fifteen days of the date of release of these reasons. I would make no costs order in respect of the plaintiff, the Monitor and the Superintendent.

E.E. GILLESE J.A.
D.R. O'CONNOR A.C.J.O.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.

cp/e/qlaxs/qlpxm/qlcam/qlmzp/qlrxg/qljxl/qlcas

1 Para. 24 of the Monitor's Nineteenth and Final Report to the Court dated August 17, 2006.

2 The motions judge treats Slater and the Slater Personnel as interchangeable. For ease of reference, when summarizing the motions judge's reasoning, when I refer to Slater, it encompasses both.

3 Although I fail to see what damages Slater could sue for: if there was negligence in the preparation of the report, it appears that Slater benefited from it.

4 One member of the Slater Personnel, Doug Brown, was neither a director nor officer.

Tab 7

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"

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

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of

Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred

shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

> (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
>
> (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;

(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;

(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and

(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such

> manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior

written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the

agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

cp/e/qlrds/qljxr/qlced/qlaxw/qlcas

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

Tab 8

Indexed as:

Lehndorff General Partner Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990, c. C. 43
AND IN THE MATTER OF a plan of compromise in respect of Lehndorff General Partner Ltd., in its own capacity and in its capacity as general partner of Lehndorff United Properties (Canada) Lehndorff Properties (Canada)
- and -
Lehndorff Properties (Canada) II and in respect of certain of their nominees Lehndorff United Properties (Canada) Ltd., Lehndorff Canadian Holdings Ltd., Lehndorff Canadian Holdings II Ltd., Baytemp Properties Limited and 102 Bloor Street West Limited and in respect of The Lehndorff Vermogensverwaltung GmbH in in its capacity as limited partner of Lehndorff United Properties (Canada)
Applicants

[1993] O.J. No. 14

9 B.L.R. (2d) 275

17 C.B.R. (3d) 24

37 A.C.W.S. (3d) 847

Court File No. B366/92

Ontario Court of Justice - General Division
Toronto, Ontario

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants.

L. Crozier, for the Royal Bank of Canada.
R.C. Heintzman, for the Bank of Montreal.
J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation.
Jay Schwartz, for Citibank Canada.
Stephen Golick, for Peat Marwick Thorne Inc., proposed monitor.
John Teolis, for the Fuji Bank Canada.
Robert Thorton for certain of the advisory boards.

FARLEY J.:-- These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA") and the Courts of Justice Act, R.S.O. 1990, c. C. 43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;
(b) a declaration that the applicants were companies to which the CCAA applies;
(c) authorization for the applicants to file a consolidated plan of compromise;
(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;
(e) A stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and
(f) certain other ancillary relief.

The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issued under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermogensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the Limited Partnership Act, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the Partnership Act, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and

unsecured.

(b) The restructuring of existing project financing commitments.
(c) New financing, by way of equity or subordinated debt.
(d) Elimination or reduction of certain overhead.
(e) Viability of existing businesses of entities in the Lehndorff Group.
(f) Restructuring of income flows from the limited partnerships.
(g) Disposition of further real property assets aside from those disposed of earlier in the process.
(h) Consolidation of entities in the Group; and
(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA maybe made on an ex parte basis (s. 11 of the CCAA; Re Langley's Ltd., (1938) O.R. 123, (1938) 3 D.L.R. 230 (C.A.); Re Kennoch Development Ltd. (1991), 8 C.B.R. (3d) 95 (N.S.S.C.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (Re Inducon Development Corporation (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op (1988), 67 C.B.R. (N.S.) 44, at pp. 55-6, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 at pp. 165-6; Re Stephanie's Fashions Ltd. (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) at pp. 250-1; Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); Ultracare Management Inc. v. Gammon (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

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 and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., (1934) S.C.R. 659 at p. 661; 16 C.B.R. 1; (1934) 4 D.L.R. 75; Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Group Ltd., (1984) 5 W.W.R. 215 at pp. 219-20; Norcen Energy Resources v. Oakwood Petroleums Limited. et al. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Alta., Q.B.), at pp. 12-13 (C.B.R.); Re Ouintette Coal Limited (1990), 2 C.B.R.(3d) 303 (B.C.C.A), at pp. 310-1, affirming Ouintette Coal Limited v. Nippon Steel Corporation et al. (1990) 2 C.B.R. (3d) 291, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.).; Elan, supra at p. 307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

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. See Elan, supra at pp. 297 and p. 316; Stephanie's, supra, at pp. 251-2 and Ultracare, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see Meridian, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see Ouintette, supra, at pp. 108-110; Chef Ready Foods Ltd. v. Hongkong Bank of Canada (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (B.C.C.A.), at pp. 315-318, (C.B.R.) and Stephanie's, supra, at pp. 251-2.

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the Bankruptcy Act, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the Bankruptcy and Insolvency Act ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the CCAA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See Chef Ready, supra, at p. 318 and Re Assoc. Investors of Can. Ltd. (1987), 67 C.B.R. (N.S.) 237 at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See Assoc. Investors, supra, at p. 318; Re Amirault Co. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

> 11. Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either or them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affects the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See Norcen, supra at pp. 12-7 (C.B.R.) and Ouintette, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and Meridian, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see Chef Ready, supra, at p. 320 where Gibbs J.A. for the Court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be

conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and Ouintette, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see Sklar-Peppler Furniture Corporation (1992), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 8. This act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see Ouintette, supra, at pp. 312-4 (B.C.C.A.).

It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see In the Matter of the Proposal of Norman Slavik, unreported, [1992] B.C.J. No. 341. However in the Slavik situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the Court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the Companies' Creditors Arrangement Act, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these. (Emphasis added).

I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in Campeau v. Olympia & York Developments Ltd. unreported, (1992) O.J. No. 1946 at pp. 4-7.

> The Power to Stay
>
> The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of

that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60 (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

> s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

...

The Power to Stay in the Context of CCAA Proceedings:

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77).

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at

> pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from Empire-Universal Films Limited et al. v. Rank et al., (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also McCordic et al. v. Township of Bosanquet (1974) 5 O.R. (2d) 53 (H.C.) and Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982) 29 C.P.C. 60 (H.C.) at pp. 65-6.

Montgomery J. in Canada Systems, supra, at pp. 65-6 indicated:

> Goodman J. (as he then was) in McCordic v. Bosanquet (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in Edmeades v. Thames Board Mills Ltd., [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in Edmeades was approved by Lord Justice Davies in Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).
>
> ...
>
> In Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
>
> > "The principles which must govern in these matters are clearly stated in the case of Empire Universal Films Ltd. et al. v. Rank et al., [1947] O.R. 775 at p. 779, as follows [quoting St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al., [1936] 1 K.B. 382 at p. 398]:
> >
> > '(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'"

Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-a-vis any proceedings taken by any party against the property assets and Undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with

limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Depburn, Limited Partnerships, De Boo (1991), at p. 1-2 and 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the Bankruptcy Act (now the BIA) sections 85 and 142.

A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario Rules of Civil Procedure, O. Reg. 560/84 Rules 8.01 and 8.02.

It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia (1979), 13 B.C.L.R. 137 (S.C.) affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in Re Thorne between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in Ruzicks unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the Canada Business Corporation Act [S.C. 1974-75, c. 33] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, The Control Test of Investor Liability in Limited Partnerships (1983), 21 Alta L. Rev. 303; E. Apps, Limited Partnerships and the "Control" Prohibition: Assessing the Liability of Limited Partners (1991), 70 Can. Bar. Rev. 611; R. Flannigan, Limited Partner Liability: A Response (1992), 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner - the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: Control Test, (1992), supra, at pp. 524-5. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-a-vis) any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to

vote on the reorganization plan itself.

It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. I seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

The order is therefore granted as to the relief requested including the proposed stay provisions.

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:

   (a) borrow such additional sums as it may deem necessary,
   (b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,
   (c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and
   (d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

   the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of

the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.

7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

   (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and

   (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

   but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.

9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

    (a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, R.S.C. 1985, c. W-11 or otherwise shall be stayed and suspended;

    (b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;

    (c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;

    (d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

    (e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;

(f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect ,of any of the Property, as the case may be;

(g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and

(h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.

14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.

15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.

16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.

17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

Tab 9

Case Name:

Carey Canada Inc. (Re)

IN THE MATTER OF s. 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1995, c. C-36, as amended AND IN THE MATTER OF Carey Canada Inc.

[2006] O.J. No. 4905

29 C.B.R. (5th) 81

153 A.C.W.S. (3d) 777

2006 CarswellOnt 7748

Court File No. 04-CL-05660

Ontario Superior Court of Justice
Commercial List

S.N. Lederman J.

Heard: November 28, 2006.
Judgment: December 8, 2006.

(18 paras.)

Civil procedure -- Trials -- Stay of proceedings -- Application by a company subject to a stay under the Companies' Creditors Arrangement Act to stay two actions against it dismissed -- Respondents were entitled to seek judgment against the applicant and to enforce it only against the applicant's liability insurance policies.

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Application by a company subject to a stay under the Act to stay two actions against it dismissed -- Respondents were entitled to seek judgment against the applicant and to enforce it only against the applicant's liability insurance policies.

Insurance law -- Actions -- By third parties against insurer -- Application by a company subject to a stay under the Companies' Creditors Arrangement Act to stay two actions against it dismissed -- Respondents were entitled to seek judgment against the applicant and to enforce it only against the applicant's liability insurance policies.

Application by Carey Canada Inc. for an order to permanently stay claims asserted by the respondents against it in two actions commenced in Ontario -- Actions were commenced in March and May 2004 and arose out of the alleged environmental contamination of property -- Carey obtained an order under the Companies' Creditors Arrangement Act in 2005 -- Order recognized and enforced in Canada the General Claims Bar Order and Confirmation Order issued by the United States Bankruptcy Court in connection with a joint plan of reorganization of Carey and its parent company -- Both orders contained terms that set out comprehensive stays of proceedings and injunctions against any action to be taken against Carey -- Respondents applied to lift the stay and to continue the actions against Carey for the limited purpose of obtaining judgments against Carey which would be enforceable only against its liability insurance policies -- HELD: Carey's application dismissed -- Respondents' application allowed -- It was appropriate to lift the stay because the Act was meant to protect debtors like Carey -- It was not meant to insulate its insurers from providing appropriate indemnification -- There was no prejudice to Carey in lifting the stay to allow the respondents to pursue the insurance proceeds -- Insurers would also

not be prejudiced because their rights and options were the same whether or not Carey was subject to proceedings under the Act -- Insurers would be able to assert why the claims against Carey were not covered by the policies -- Respondents could therefore pursue the actions to obtain judgment against Carey and to enforce it only against any relevant insurance policies and not against Carey's current or future assets.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6, s. 18.6(4)

Insurance Act, R.S.O. 1990, c. I-8, s. 132(1)

Counsel:

Andrea Burke, for Canplas Industries Ltd.

Eric Golden, for Her Majesty the Queen in Right of the Province of Ontario As represented by the Minister of Transportation

Robert Frank, for ITW Canada Management Company

Craig Hill, for Cary Canada Inc.

ENDORSEMENT

S.N. LEDERMAN J.:--

Nature of the Motions

1 Carey Canada Inc. ("Carey") brings a motion for an order permanently staying the claims asserted by the Respondents against Carey in two related actions commenced in Ontario in March 2004 and May 2004 arising out of the alleged environmental contamination of property.

2 In 2005, Carey sought and obtained from the Ontario Superior Court of Justice, an order pursuant to section 18.6(4) of the *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as amended (the "CCAA") recognizing and enforcing in Canada the General Claims Bar Order and Confirmation Order, issued by the U.S. Bankruptcy Court in connection with the modified Joint Plan of Reorganization of Carey's parent and Carey. Both of the orders contained terms setting out comprehensive stays of proceedings and injunctions against any action to be taken against Carey. Carey relies upon the Recognition Order of Hoy J. dated April 4, 2005 as the basis for permanently staying the Respondents' claims against Carey.

3 The position of the Respondents is that there should not be a stay as:

(1) the U.S. Bankruptcy Court orders on which Carey relies in seeking the stay do not capture the Respondents' claims against Carey within their scope; and
(2) the relevant circumstances do no justify this court exercising its discretion to grant a stay.

4 In the alternative, the Respondents bring a cross-motion for an order lifting any stay and permitting them to continue the actions against Carey for the limited purpose of allowing them to obtain judgments against Carey which shall be enforceable only against the liability insurance policies naming Carey as an insured or that otherwise provide coverage for Carey in respect of the matters in issue in the Ontario actions.

Hoy J's Order

5 In granting the Recognition Order, Hoy J. expressly stated that she was not deciding the issue of whether the claims set out in the Ontario actions come within the provisions of the U.S. Bankruptcy Court orders and are, therefore, stayed. She indicated that that issue would be left to be argued on another occasion, but in the meantime, she ordered that the Ontario actions were exempted from the stay on the terms and conditions that there be production of any relevant insurance policy and the delivery of an Affidavit of Documents by Carey in the actions which might on consideration make any further motion

unnecessary. The following paragraphs in Hoy J.'s reasons state as follows:

> [13] Carey withdraws its request for an order specifically staying the claims of the Respondents, without prejudice to its right to subsequently seek such an order. Carey's position, however, is that the effect of the order sought would be to stay the Respondents' claims. Carey also advises that its request for recognition is restricted to the Orders.
>
> ...
>
> [36] In addition, assuming, but not determining, that the Orders apply to the Actions, the order shall specifically exempt the Actions from its application on the following terms and conditions:
>
> 1. If it has not already done so, Carey shall promptly provide to the Respondents a copy of the insurance policy in respect of the Barrie property, and copies of the correspondence from the insurer denying coverage.
> 2. Save as hereinafter provided in paragraph 3 below, Carey shall provide its Affidavit of Documents, and copies of all documents referred to therein, to the Respondents within 90 days.
>
> ...
>
> [39] Carey takes the position that the Orders capture the claims in the Actions, but the issue was not canvassed before me because Carey abandoned its request for an order specifically staying the Actions. It was content to leave that issue for another day.
>
> [40] I am hopeful that the terms and conditions on which I have specifically exempted the Actions from the application of the order will avoid the need for Respondents to argue that the claims in the Actions are not captured by the Orders. However, given that the matter was not fully addressed before me, the foregoing provisions are without prejudice to the Respondents' right to argue that the Orders do not apply to the claims advanced by them against Carey in the Actions and that the terms and conditions I have imposed with respect to the Actions are therefore not applicable.

Disposition

6 Much argument on the motions before me was devoted to whether, in fact, the environmental claims in issue in the actions fall within or outside the definition of "Claims" as set out in the U.S. Bankruptcy Court orders. It becomes unnecessary for me to decide this issue as I am of the view that even if they do fall within the purview of the stay provisions in the U.S. orders there is justification for lifting any such stay, based on the principles set out by the Court of Appeal in *Algoma Steel Corp. v. Royal Bank of Canada*, et al. (1992), 8 O.R. (3rd) 449.

7 In that case, the court held that the protection afforded by the CCAA was meant for the debtor seeking its protection and not to insulate insurers from providing appropriate indemnification.

8 In *Algoma Steel, supra*, the debtor obtained protection under the CCAA. A creditor sought to amend a court sanctioned Plan of Arrangement and lift the stay of proceedings for the limited purpose of proving its claim and of availing itself of an Algoma insurance policy. However, the Algoma Plan provided *inter alia*, that "all Claims of Specified Unsecured Creditors will be released, discharged, and cancelled" upon payment by Algoma to a trustee of a certain sum in payment of the claims of specified unsecured creditors.

9 The Court of Appeal ordered that the Algoma Plan be amended and the stay of proceedings under the CCAA be lifted, but only for the limited purpose of allowing a creditor to proceed with its action, so that it could attempt to:

> (1) establish its claim against the debtor; and
> (2) enforce any judgment against the debtor's insurance policy.

10 The Court of Appeal held that there was no prejudice to the debtor as the order lifting the stay of proceedings would explicitly state that any judgment against the debtor was only enforceable against the insurance proceeds (if any) available to the debtor and not as against the debtor's current or future assets.

11 The Court of Appeal then considered the issue of potential prejudice to the insurer and took into account section 132(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, and concluded that since the insurer's liability to the applicant in that case was "subject to the same equities as the insurer would have if the judgment had been satisfied", the insurer's prejudice, in a legal sense, was non-existent. The insurer's rights and options would be the same whether the debtor was or was not the subject of a CCAA proceeding.

12 In the instant case, assuming Carey's insurers choose to deny the claims and not defend Carey in the actions, the Respondents would first seek to obtain judgment against Carey and then bring an action against the insurers pursuant to section 132(1) of the *Insurance Act*. At that point, the insurers would have every opportunity to assert their positions as to why the claims against Carey are not covered under the relevant insurance policies.

13 In *Algoma Steel, supra*, the Court of Appeal lifted the stay and made an order with the "technical effect" of amending the Plan so that the applicant could seek recovery against the debtor's insurance policy. In doing so, the court acknowledged that generally it would not do so if it would prejudice the interests of the debtor company or the creditors, but stated at page 453:

> But where no prejudice would result and the needs of justice are to be met, the court may act if the *CCAA*, properly interpreted, authorizes intervention.

14 Counsel for Carey, Mr. Hill, does not take issue with the principles set out in *Algoma Steel, supra*, but points out that the motion to lift the stay was brought before the very court that had created the stay. In the instant case, the Ontario Court is being asked to lift the stay of proceedings created by the U.S. Bankruptcy Court in the context of the U.S. bankruptcy proceedings. He submits that its not consistent with the principles of comity for the Respondents to ask a Canadian court to pick and choose which provisions should be enforced and which should not. He argues that it is fundamental to the cross-border insolvency process that principles of comity are applied on a two-way street to ensure that the principal matters in the restructuring remain within the control of the court with primary jurisdiction over the debtor's proceedings. He submits that, accordingly, the motion should be brought in the jurisdiction that initiates the stay of proceedings, not the jurisdiction that recognizes and enforces the stay created in the foreign jurisdiction. In that way, the court with primary jurisdiction has the ability to assess a motion to lift the stay of proceedings in the context of the overall restructuring process.

15 However, there are numerous factors in this case that suggest that it is appropriate for the Canadian court to consider the lifting of the stay motion:

(a) it was Carey itself that initiated the motion before the Ontario court expressly seeking a stay of the Ontario actions and accordingly, it is appropriate in the response to that motion for the Respondents to bring this cross-motion;
(b) Ontario is the "natural forum" because Ontario parties and the consideration of environmental claims in respect of property located in Ontario are involved; and
(c) in particular, the application of Ontario law, i.e. section 132(1) of the *Insurance Act*, is best dealt with in this jurisdiction.

16 Accordingly, an Ontario Court may entertain the cross-motion and grant the stay sought on the basis of the *Algoma Steel* principles. The cross-motion is identical to the circumstances in the *Algoma Steel* case in that lifting any stay of proceedings for the limited purposes outlined in the notices of cross-motion and the "technical" amendment of the Carey Plan will have no effect on the debtor company or its creditors. However, it will allow the actions to proceed so that indemnification may be sought by the Respondents from insurers for the remediation of an environmentally contaminated property.

17 Accordingly, I grant the exemption of the actions from any stay of proceedings that may have resulted from the U.S. Bankruptcy Court orders and the Recognition Order as sought in the notices of cross-motion but only for the limited purpose of allowing the Respondents to seek judgment against Carey and to enforce it only against any relevant insurance policy and not against Carey's current or future assets.

18 If the parties cannot agree as to costs, written submissions may be made within 30 days.

S.N. LEDERMAN J.

cp/e/qlbxm/qlcem

Tab 10

Case Name:

United Properties Ltd. (Re)

IN THE MATTER OF the Companies' Creditors' Arrangement Act R.S.C. 1985, C. c.-36
And In the matter of the Company Act, R.S.B.C. 1996, c. 62
AND IN THE MATTER OF
United Properties Ltd.
United Properties (Crowne) Ltd.
United Properties (Oliver's Landing) Ltd.
United Properties (Sunset) Ltd.
United Properties (Whistler) Ltd.
United Properties (Windance) Ltd.
United Properties (Westwood) Ltd., petitioners
(Registry No. L011950)
Between
The Owners, Strata Plan LMS 240, plaintiff, and United Properties Ltd. and New Home Warranty Program of British Columbia and The Yukon, A Division of New Home Warranty of British Columbia Inc., defendant,
and
The Corporation of the District of North Vancouver, third party
(Registry No. C982110)
And between
The Owners, Strata Plan LMS 240, and the Individuals Listed on the Attached Schedule "1", plaintiffs, and The District of North Vancouver, Victor David Setton, Architectura Planning Architecture Interiors Inc. (Formerly known as Waismain Dewar Grout Carter Inc.), Stephen B. Sewall, Glotman Simpson Group, Glotman Simpson Consulting Engineers, Locke Mackinnon Domingo Gibson & Associates Ltd., Emmanuel A. Domingo, G.C.W. Consultants Ltd., Trow Consulting Engineers Ltd., C.M.C. Consultants Ltd., Jack Lott, Altech Aluminium Ltd., Peter Ross Limited, Expert Siding & Carpentry Co. Ltd., Milestone Projects Ltd., John Doe #1 doing business as Consolidated Roofing Services Inc., Transwest Applicators Ltd., Superior Masonry Ltd., John Does #2-20, and Others, defendants
(Registry No. S043278)
And between
The Owners, Strata Plan LMS 2503, plaintiff, and United Properties (Terravita) Ltd. and United Properties Ltd., defendant
(Registry No. S041406)

[2005] B.C.J. No. 3012

2005 BCSC 1858

22 C.B.R. (5th) 274

151 A.C.W.S. (3d) 160

2005 CarswellBC 3411

Vancouver Registry Nos. L011950, C982110, S043278 and

S041406

British Columbia Supreme Court
Vancouver, British Columbia

Bauman J.
(In Chambers)

Oral judgment: October 21, 2005.
Released: June 14, 2006.

(23 paras.)

Counsel:

Counsel for LMS 240: D.L. Miachika
G.H. Mayovsky

Counsel for United Properties: C.A.B. Ferris

Counsel for LMS 2503: T.A.M. Peters

Counsel for David Setton, Architectura, and Stephen B. Sewall: E.A. Stock

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1 BAUMAN (orally):-- As noted in submissions, an immediate decision on these applications, while not absolutely required, is certainly extremely desirable in the circumstances to allow scheduled mandatory mediation conferences to proceed in a timely fashion. And I recognize how difficult it is to schedule those multiparty proceedings. Accordingly, I'm trying to respond to those time constraints.

2 This is an application by various plaintiffs in three actions at least, perhaps four, involving so-called "leaky condo" litigation, to have the stay of proceedings in United Properties Ltd. CCAA proceedings lifted, so that the plaintiffs before me might pursue the company and Mr. Setton, one of the principals in the company, to the extent discussed in the submissions.

3 Let me deal with the Terra Vita plaintiffs first, and its application to lift the stay of proceedings in the UPL CCAA proceedings. They do so to the extent noted in paragraph 5 of their Chambers Brief:

> The strata corporation seeks to lift the stay of proceedings ordered in the matter herein, and add United to the United Properties action. The lifting of the stay is to be conditional on the strata corporation

limiting the claims therein to United's available liability insurance, if any.

4 Mr. Peters has made brief submissions in writing on the law, as it applies to his application. Because they are so brief and pithy, I am able, as a result, to say that I adopt the thrust of those submissions. The applicant has met the burden as described in the ***Algoma Steel Corp.*** case, citation in Mr. Peters' submission.

5 This case, in my respectful view, is nothing like that before Justice Farley in the ***Air Canada*** CCAA proceedings. The decision in question on point is at [2004] O.J. No. 527. At [paragraph] 6 of Justice Farley's Reasons at that citation, he says this:

> The reorganization stay provision has to be viewed in light of the Parliamentary objectives of the CCAA. ...

6 As to the stay itself, Justice Farley quoted Gibbs, J.A., of our Court of Appeal, for the court in ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada.*** (1990), 4 C.B.R. (3d) 311, at p. 5, where he observed:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the court is called upon to play a kind of supervisory role to preserve the status quo, and to move the process along to the point where a compromise or arrangement is approved, or it is evidence that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

7 Here, we're talking about lifting a stay of proceedings three years after the Plan of Arrangement was approved and where, as I understand it, --and there's not much evidence of it before me -- but based on my knowledge of the Plan of Arrangement in the proceedings before me, in the CCAA proceedings, the plan must be very close to completion.

8 In my view, lifting the stay in those circumstances does no violence whatever to the principles founding the CCAA discussed by Justice Farley there, and discussed in other cases like ***Chef Ready Foods Ltd.,*** which was cited by Justice Farley in that paragraph. In [paragraph] 7 of his Reasons, Justice Farley says this:

> As it appears envisaged by the plaintiffs, they wish to proceed unimpeded by either the claims process in place or otherwise, in pursuing their litigation against A[ir] C[anada] and U[nited] A[irlines] "in the ordinary course." As discussed, that litigation would be of major proportions, complexity, and importance to these insolvent but attempting to reorganize corporations and their stakeholders. The effect on these restructuring efforts would be a fairly large multiple of cuts in the death of a thousand cuts which I was concerned about in Re Air Canada (Regulators' Motions) released July 21, 2003.

9 Again, I say that is not the case in this litigation, or with this company, UPL, contrasted against the progress made under the Plan of Arrangement to date.

10 The same concern was expressed, that is Justice Farley's concern was expressed at paragraph 24 of Mr. Ferris' brief, where he cites ***Campeau v. Olympia & York Developments Ltd.***, [1992] O.J. No. 1946 (Gen. Div.), and ***Lando & Partners Ltd v. Upshall***, [1983] O.J. No. 530. Again, the concern there was lifting the stay allowing litigation which would seriously impair the debtor's ability to focus and concentrate its efforts on its business plan.

11 At this stage of this Plan of Arrangement, in the circumstances before me, I don't perceive that as a significant prejudice here. Nor, it is interesting to note, do I have evidence from Mr. Setton, to that effect. Nor do I have evidence from the monitor, to that effect. Nor -- and I interject here to note all of the creditors have been served, as I understand it, with these applications, and not one of them is here in opposition.

12 Lifting the stay of proceedings to the extent requested by Mr. Peters, is not here preferring one creditor over another, because I am simply allowing access by that one potential creditor to a fund of insurance proceeds. Those are not insurance proceeds that are available to the other creditors in any event. So this is not a case like ***Quintette Coal***, which was also cited by Mr. Ferris, in submissions to me.

13 Finally, the risk of the insurer having a claim for uncovered defence costs, which in turn might prejudice creditors in the

plan, in my respectful view, in light of where they would rank, in light of the funds, the maximum funds that might be available to that rank of creditor, in light of all the eventualities that would have to come to pass before any such claim could be advanced against that limited fund, is a potential prejudice to the plan that is so remote that the *de minimus* principle is engaged.

14 With respect to Mr. Peters' application to add United and the other relief sought in this regard, that is allowed without prejudice to any limitation defence which may have accrued to United in the meantime.

15 As to Parkgate, in my respectful view, the same considerations apply. The same exercise of discretion is engaged. The same considerations move me to exercise my discretion in the same manner.

16 The application to lift the stay against United and Mr. Setton is allowed, to the extent that the claims of the plaintiffs' against Mr. Setton and United are found to be within the Plan of Arrangement, as determined by the trial judge; and I say that that appears to me to be an issue that only he or she can determine, after all of the evidence is in, to the extent that the claims are within the Plan, the stay is allowed on condition that the plaintiffs limit their claims against United and Mr. Setton to any amounts which can be recovered under any policies of insurance in favour of United and Setton.

17 The application to join the individual plaintiffs is allowed on condition that any limitation defences that may have accrued to any of the parties with respect to these plaintiffs are preserved.

18 The application to have all the proceedings heard at the same time is allowed, subject to the direction of the trial judge.

19 My ruling is without prejudice to Mr. Setton's ability to advance an argument that the suit against him is a nullity, as it was allegedly begun in the face of a stay order. I think, in the circumstances, costs should be in the cause of the various proceedings.

20 **MR. MIACHIKA**:-- My Lord, can I ask one clarification? In the addition of the individual plaintiffs, the order you made as it applies to all defendants is reserving the limitation rights --

21 **THE COURT**: Well, Ms. Stock had risen, and I --

22 **MR. MIACHIKA**: I have no problem with it being with respect to Mr. Ferris's clients, and with her clients. But all the other defendants were served. Absolutely had the opportunity. And any joinder application, that's for those parties to raise it to appear and oppose. And they didn't do it on that basis, so I would ask that it be limited only to preserving limitation rights as against their clients.

23 **THE COURT**: I take it neither of you have a submission on that? It's their lookout. Okay. I'll limit it to the parties that appeared before me. Thank you very much for your submissions.

BAUMAN J.

cp/i/qw/qlemo

Tab 11

Indexed as:

Campeau v. Olympia & York Developments Ltd.

Between
Robert Campeau, Robert Campeau Inc., 75090 Ontario Inc., and Robert Campeau Investments Inc., Plaintiffs, and
Olympia & York Developments Limited, 857408 Ontario Inc., and National Bank of Canada, Defendants

[1992] O.J. No. 1946

14 C.B.R. (3d) 303

14 C.P.C. (3d) 339

1992 CarswellOnt 185

35 A.C.W.S. (3d) 679

Action Nos. 92-CQ-19675 and B-125/92

Ontario Court of Justice - General Division
Toronto, Ontario

Blair J.

September 21, 1992

(14 pp.)

Practice -- Insolvency -- Stay of proceedings -- General principles -- Defendant protected by Companies' Creditors Arrangement Act.

Application for lifting a stay imposed by an order granted under section 11 of the Companies' Creditors Arrangement. The second defendant also applied for an order staying the separate action against it. The plaintiffs' action against the defendants was for the sum of $1 billion for damages allegedly suffered following breaches of contract and fiduciary duties by the defendants. The plaintiffs' claim against the second defendant directly involved certain acts of the first defendant.

HELD: Application dismissed. The second defendants' application allowed. There might be great prejudice to the first defendant if its attention was diverted from the corporate restructuring process. There was no prejudice to the plaintiffs whose rights were not precluded but merely postponed. The courts' power under section 11 extended to restraining conduct which could impair the debtor's ability to focus on the business purpose of negotiating a compromise.

STATUTES, REGULATIONS AND RULES CITED:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.
Courts of Justice Act, R.S.O. 1990, c. C-43, s. 106.
Personal Property Security Act, R.S.O. 1990, c. P.10, s. 17(1).
Ontario Rules of Civil Procedure, Rule 6.01(1).

Stephen T. Goudge, Q.C. and Peter C. Wardle, for the Plaintiffs.
Peter F.C. Howard, for the Defendant, National Bank of Canada.
Yoine Goldstein, for the Defendants, Olympia & York Developments Limited and 857408 Ontario Inc.

BLAIR J.:-- These Motions raise questions regarding the Court's power to stay proceedings. Two competing interests are to be weighed in the balance, namely,

a) the interests of a debtor which has been granted the protection of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, and the "breathing space" offered by a s. 11 stay in such proceedings, on the one hand, and,
b) the interests of a unliquidated contingent claimant to pursue an action against that debtor and an arms length third party, on the other hand.

At issue is whether the Court should resort to an interplay between its specific power to grant a stay, under s. 11 of the CCAA, and its general power to do so under the Courts of Justice Act, R.S.O. 1990, Chap C-43 in order to stay the action completely; or whether it should lift the s. 11 stay to allow the action to proceed; or whether it should exercise some combination of these powers.

Background and Overview

This action was commenced on April 28, 1992, and the Statement of Claim was served before May 14, 1992, the date on which an Order was made extending the protection of the CCAA to Olympia & York Developments Limited and a group of related companies ("Olympia & York", or "O & Y" or the "Olympia & York Group").

The plaintiffs are Robert Campeau and three Campeau family corporations which, together with Mr. Campeau, held the control block of shares of Campeau Corporation. Mr. Campeau is the former Chairman and CEO of Campeau Corporation, said to have been one of North America's largest real estate development companies, until its recent rather high profile demise. It is the fall of that empire which forms the subject matter of the lawsuit.

The Claim against the Olympia & York Defendants

The story begins, according to the Statement of Claim, in 1987, after Campeau Corporation had completed a successful leveraged buy-out of Allied Stores Corporation, a very large retailer based in the United States. Olympia & York had aided in funding the Allied takeover by purchasing half of Campeau Corporation's interest in the Scotia Plaza in Toronto and subsequently also purchasing 10% of the shares of Campeau Corporation. By late 1987, it is alleged, the relationship between Mr. Campeau and Mr. Paul Reichman (one of the principals of Olympia & York) had become very close, and an agreement had been made whereby Olympia & York was to provide significant financial support, together with the considerable expertise and the experience of its personnel, in connection with Campeau Corporation's subsequent bid for control of Federated Stores Inc (a second major U.S. department store chain). The story ends, so it is said, in 1991 after Mr. Campeau had been removed as Chairman and CEO of Campeau Corporation and that Company, itself, had filed for protection under the CCAA (from which it has since emerged, bearing the new name of Camdev Corp.).

In the meantime, un September, 1989, the Olympia & York defendants, through Mr. Paul Reichman, had entered unto a shareholders' agreement with the plaintiffs in which, it us further alleged, Olympia & York obliged itself to develop and implement expeditiously a viable restructuring plan for Campeau Corporation. The allegation that Olympia & York breached this obligation by failing to develop and implement such a plan, together with the further assertion that the O & Y Defendants actually frustrated Mr. Campeau's efforts to restructure Campeau Corporation's Canadian real estate operation, lies at the heart of the Campeau action. The Plaintiffs plead that as a result they have suffered very substantial damages, including the loss of the value of their shares in Campeau Corporation, the loss of the opportunity of completing a refinancing deal with the Edward DeBartolo Corporation, and the loss of the opportunity on Mr. Campeau's part to settle his personal obligations on terms which would have preserved his position as Chairman and CEO and majority shareholder of Campeau Corporation.

Damages are claimed in the amount of $1 billion, for breach of contract or, alternatively, for breach of fiduciary duty. Punitive damages in the amount of $250 million ore also sought.

The Claim against National Bank of Canada

Similar damages, in the amount of $1 billion (but no punitive damages), are claimed against the Defendant National Bank of Canada, as well. The causes of action against the Bank are framed as breach of fiduciary duty, negligence, and breach of the provisions of S. 17(1) of the Personal Property Security Act. They arise out of certain alleged acts of misconduct on the part of the Bank's representatives on the Board of Directors of Campeau Corporation.

In 1988 the Plaintiffs had pledged some of their shares in Campeau Corporation to the Bank as security for a loan advanced in connection with the Federated Stores transaction. In early 1990, one of the Plaintiffs defaulted on its obligations under the loan and the Bank took control of the pledged shares. Thereafter, the Statement of Claim alleges, the Bank became more active in the management of Campeau, through its nominees on the Board.

The Bank had two such nominees. Olympia & York had three. There were twelve directors in total. What is asserted against the Bank is that its directors, in cooperation with the Olympia & York directors, acted in a way to frustrate Campeau's restructuring efforts and favoured the interests of the Bank as a secured lender rather than the interests of Campeau Corporation, of which they were directors. In particular, it is alleged that the Bank's representatives failed to ensure that the DeBartolo refinancing was implemented and, indeed, actively supported Olympia & York's efforts to frustrate it, and in addition, that they supported Olympia & York's efforts to refuse to approve or delay the sale of real estate assets.

THE MOTIONS

There are two motions before me.

The first motion is by the Campeau Plaintiffs to lift the stay imposed by the Order of May 14, 1992 under the CCAA and to allow them to pursue their action against the Olympia & York defendants. They argue that a plaintiff's right to proceed with an action ought not lightly to be precluded; that this action is uniquely complex and difficult; and that the claim is better and more easily dealt with in the context of the action rather than in the context of the present CCAA proceedings. Counsel acknowledge that the factual bases of the claims against Olympia & York and the Bank are closely intertwined and that the claim for damages is the same, but argue that the causes of action asserted against the two are different. Moreover, they submit, this is not the usual kind of situation where a stay is imposed to control the process and avoid inconsistent findings when the same parties are litigating the same issues in parallel proceedings.

The second motion is by National Bank, which of course opposes the first motion, and which seeks an order staying the Campeau' action as against it as well, pending the disposition of the CCAA proceedings. Counsel submits that the factual substratum of the claim against the Bank is dependent entirely on the success of the allegations against the Olympia & York defendants, and that the claim against those defendants is better addressed within the parameters of the CCAA proceedings. He points out also that if the action were to be taken against the Bank alone, his client would be obliged to bring Olympia & York back into the action as third parties in any event.

The Power to Stay

The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. (1982), 29 C.P.C. 60 (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, which provides as follows:

> s. 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:

> s. 11 Notwithstanding anything in the Bankruptcy Act or the Winding-up Act, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the Bankruptcy Act and the Winding-up Act or either of them;
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The Power to Stay in the Context of CCAA Proceedings

By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105 at p. 113 (B.C.C.A.).

Gibbs J.A. continued with this comment:

> To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to the or company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period. (emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff. On all of these issues the onus of satisfying the Court is on the party seeking the stay: see also, Weight Watchers International Inc. v. Weight Watchers of Ont. Ltd. (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Int. Inc.) 42 D.L.R. (3d) 320n., 10 C.P.R. (2d) 96n (Fed. C.A.), where Mr. Justice Heald recited the foregoing principles from Empire Universal Films Ltd. et. al. v. Rank et al., [1947] O.R. 775 at p. 779.

Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra, is a particularly helpful authority, although the question in issue there was somewhat different than those in issue on these motions. The case was one of several hundred arising out of the Mississauga derailment in November 1979, all of which actions were being case managed by Montgomery J. These actions were all part of what Montgomery J. called "a controlled stream" of litigation involving a large number of claims and innumerable parties. Similarly, while the Olympia & York proceedings under the CCAA do not involve a large number of separate actions, they do involve numerous Applicants, an even larger number of very substantial claimants, and a diverse collection of intricate and broad sweeping issues. In that sense the CCAA proceedings are a controlled stream of litigation. Maintaining the integrity of the flow is an important consideration.

DISPOSITION

I have concluded that the proper way to approach this situation is to continue the stay imposed under the CCAA prohibiting the action against the Olympia & York defendants, and in addition, to impose a stay, utilizing the Court's general jurisdiction in that regard, preventing the continuation of the action against National Bank as well. The stays will remain in effect for as long as the s. 11 stay remains operative, unless otherwise provided by order of this Court.

In making these orders, I see no prejudice to the Campeau Plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with -- at least for the purposes of that proceeding in the CCAA proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very effectively unless and until Olympia & York -- whose alleged misdeeds are the real focal point of the attack on both sets of defendants -- is able to participate.

In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

1. Counsel for the Plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the CCAA proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the CCAA proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
2. In this sense, the Campeau claim -- like other secured, undersecured, unsecured, and contingent claims -- must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings -- i.e. the action and the CCAA proceeding -- the scales tip in favour of dealing with the Campeau claim in the context of the latter: see HM Attorney General v. Arthur Andersen & Co. (United Kingdom) and other, [1989] E.C.C. 224 (Eng. C.A.), cited in Arab Monetary Fund v. Hashim, supra.

   I am aware, when saying this that in the Initial Plan of Compromise and Arrangement filed by the Applicants with the Court on August 21, 1992, the Applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan". This treatment does not change the issues, in my view, as it is up to the Applicants to decide how they wish to deal with that group of "creditors" in presenting their Plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the CCAA proceedings.

3. Pre-judgment interest will compensate the Plaintiffs for any delay caused by the imposition of the stays, should the action subsequently proceed and the Plaintiffs ultimately be successful.
4. While there may not be great prejudice to National Bank if the action were to continue against it alone and the causes of action asserted against the two groups of defendants are different, the complex factual situation is common to both claims and the damages are the same. The potential of two different inquiries at two different times into those same facts and damages is not something that should be encouraged. Such multiplicity of inquiries should in fact be discouraged, particularly where -- as is the case here -- the delay occasioned by the stay is relatively short (at least in terms of the speed with which an action like this Campeau action is likely to progress.

CONCLUSION

Accordingly, an Order will go as indicated, dismissing the Notion of the Campeau Plaintiffs and allowing the Motion of National Bank. Each stay will remain in effect until the expiration of the stay period under the CCAA unless extended or otherwise dealt with by the court prior to that time. Costs to the Defendants in any event of the cause in the Campeau action. I will fix the amounts if counsel wish me to do so.

BLAIR J.

Tab 12

Case Name:

Canadian Airlines Corp. (Re)

**IN THE MATTER OF Canadian Airlines Corporation and Canadian Airlines International Ltd.
Between
The Bank of Nova Scotia Trust Company of New York, As Trustee for the Holders of Senior Secured Notes and Montreal Trust Company of Canada, As Collateral Agent for the Holders of Senior Secured Notes, Plaintiffs, and
Canadian Airlines Corporation, Canadian Airlines International Ltd., Canadian Regional Airlines Ltd., Canadian Regional Airlines (1998) Ltd. and Canadian Airlines Fuel Corporation Inc., defendants**

[2000] A.J. No. 1692

19 C.B.R. (4th) 1

Docket: 0001-05071, 0001-05044

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral Judgment: May 4, 2000.

(41 paras.)

Application by holders of senior secured notes in corporation for order lifting stay of proceedings against them in Companies' Creditors Arrangement Act proceeding to allow for appointment of receiver and manager over assets and property charged in their favour and for order appointing court officer with exclusive right to negotiate sale of assets or shares of corporation's subsidiary.

Counsel:

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q. C., and H.M. Kay, Q. C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C, and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

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1 **PAPERNY J.** (orally):-- Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

2 Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAC") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

3 The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

4 Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

5 On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

6 The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

7 On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

8 The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

9 The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

> -interest has continued to accrue at approximately $2 million U.S. per month;
>
> -the security has decreased in value by approximately $6 million Canadian;
>
> -the Collateral Agent and the Trustee have incurred substantial costs;
>
> -no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;
>
> -no outstanding accrued interest has been paid; and-they are the only secured creditor not getting paid.

10 The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

11 The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

12 The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, Meridian Development Inc. v. Toronto Dominion Bank (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 (B.C.C.A.).

13 This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

14 The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11(4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

15 In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

16 Also see Blair J.'s decision in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

17 As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in Re Alberta-Pacific Terminals Ltd (1991), 8 C.B.R. (3d) 99

(B.C.S.C.). She stated:

> The status quo is not always easy to find... Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

18 Further commentary on the status quo is contained in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

19 Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court of Appeal in Re Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A. [In Chambers]):

(1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.

(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.

(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of the particular case.

20 At pages 342 and 343 of this text, Canadian Commercial Reorganization:

> Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

21 I now turn to the particular circumstances of the applications before me.

22 I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest,

they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Oat. CA.) at 115, as just one of several cases supporting this proposition. Re Philip's Manufacturing Ltd. (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

23 The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

24 Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

25 Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

26 In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

27 Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CAIL of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Re-gional Airlines (1998) Ltd. ("CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

28 The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would he in excess of $1.1 billion.

29 This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8 (c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a re-ceiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CALL], and subsequent sale, of the assets comprising the Senior Notes Security.

30 On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

31 The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

32 Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

33 An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

34 The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

35 With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> ...any and all proceedings ... against or in respect of ... any of the Petitioners' property ... whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise...

36 As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding ... in respect of ... the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

37 If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

38 As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: Meridian Development Mc. v. Toronto Dominion Bank, supra, and Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (NS.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: Re Woodward's Ltd. (1993), 17 C.B.R. (3d) 236 (B.C.S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the

> insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

39 The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and en-danger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

40 The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

41 I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

PAPERNY J.

cp/s/qw/qlmmm

GLUSKIN SHEFF + ASSOCIATES INC. (Moving Party)	and	CANWEST MEDIA INC. et al (Responding Parties)	Court File No. CV-09-8396-00CL Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

BRIEF OF AUTHORITIES OF THE MOVING PARTY

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