Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

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

- and -

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC. (the "Applicants")

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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 INDALEX LIMITED INDALEX HOLDINGS (B.C.) LTD. 6326765 CANADA INC. and NOVAR INC.

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(Updated November 28, 2013)

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Century Services Inc. Appellant;
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2010 SCC 60

File No.: 33239.

Supreme Court of Canada

Heard: May 11, 2010;
Judgment: December 16, 2010.

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

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Bankruptcy and Insolvency -- Priorities -- Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada -- Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrange-

ment Act purporting to nullify deemed trusts in favour of Crown -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

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

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

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Summary:

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

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

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

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the

BIA because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the

CCAA to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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

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

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

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

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[page388]

History and Disposition:

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

(QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel:

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

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

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

1 DESCHAMPS J.:-- For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated

(S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

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

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[page392]

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

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

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process,

> each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

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

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

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

[page399]

3.2 *GST Deemed Trust Under the CCAA*

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp.*

(Arrangement relatif à), 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liqui-

dation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

> **222....**
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust

for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

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

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

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

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

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

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

> **18.4** ...
>
> ...
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

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

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

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

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

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

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

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

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that

amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to

remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

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

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

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

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as

"the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

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

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 , at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

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62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the

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

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

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

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

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

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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

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

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

ganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
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> (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
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> ...

> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
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> ...
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> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

114 ABELLA J. (dissenting):-- The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

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122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

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125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :
>
>> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...

> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

[page440]

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or
(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial

legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
>
> (*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum
>
> (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
> (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,
(ii) the refusal of a proposed compromise by the creditors or the court,
(iii) six months following the court sanction of a compromise or an arrangement,
(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,
(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

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

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same na-

ture as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

[page454]

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same na-

ture as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

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

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

[page455]

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred

to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

cp/e/qlhbb

1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

2

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

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Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

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Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

Cases referred to

Steinberg Inc. c. Michaud, [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld

Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442, [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15

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C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5.1 [as am.], 6 [as am.]

Companies Act 1985 (U.K.), 985, c. 6, s. 425

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

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Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

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[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

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[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

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The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

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ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

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designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

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designed to make the notes more secure;

(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;

(c) the Canadian banks provide below-cost financing for the margin funding facility; and

(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

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issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

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directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;
(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
(d) the releases are invalid under Quebec rules of public order; and because
(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

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(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

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[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

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be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

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[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

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ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

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the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

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(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

. . . . .

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

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Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

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[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

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would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

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years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

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made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

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released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

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principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

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certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

In my view, the appellant has not demonstrated that

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allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.
(Footnote omitted)

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[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

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[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

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Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

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operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

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[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

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(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

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even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

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The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

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[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

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[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

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[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;
(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
(c) the Plan cannot succeed without the releases;
(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;

(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

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acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

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among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

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Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec
(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

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(13) Usman Sheikh, for Coventree Capital Inc.

(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

(15) Neil C. Saxe, for Dominion Bond Rating Service

(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

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Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

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Case Name:
Nortel Networks Corp. (Re)

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

[2009] O.J. No. 2558

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

75 C.C.P.B. 233

2009 CarswellOnt 3583

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

2009 CanLII 31600

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 21, 2009.
Judgment: June 18, 2009.

(89 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Unsecured claims -- Motions by unionized and non-unionized former employees for orders requiring Nortel to restore payments to the employees dismissed -- Nortel was granted protection under the Company's Creditors Arrangement Act and was under financial pressure -- The employee claims were unsecured claims and therefore did not have any statutory priority --

Furthermore, the claims were based mostly on services that were provided pre-filing -- There was no reason to treat the unionized or non-unionized employees any differently than other unsecured creditors -- Nortel's resources were to be used to attempt restructuring -- Companies' Creditors Arrangement Act, s. 11.

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

Counsel:

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

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

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

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

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

Leanne Williams, for Flextronics Inc.

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

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

Gail Misra, for the CEP Union.

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

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

Alex MacFarlane, for the Official Unsecured Creditors Committee.

M. Starnino, for the Superintendent of Financial Services.

ENDORSEMENT

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

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

Union Motion

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

on behalf of all retirees of the Applicants who were formerly represented by the Union.

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

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

(a) retirement allowance payments ("RAP");
(b) voluntary retirement options ("VRO"); and
(c) termination and severance payments.

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

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

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

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

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c. 41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including

the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

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

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

Background

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

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

15 The Initial Order provides:

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

Position of Union

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

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

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

19 Section 11.3 of the CCAA provides:

> No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
> (b) requiring the further advance of money or credit.

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

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

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

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

24 The Union contends that Section 11.3 of the CCAA precludes the court from

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

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

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

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

Position of the Former Employees

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

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

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

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

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

Position of the Applicants

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

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

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

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

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

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

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

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of

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

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

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

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

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

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

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

> premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

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

Report of the Monitor

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

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

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

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

Discussion and Analysis

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

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

49 The Applicants acknowledged that they were insolvent in affidavit material filed on the Initial Hearing. This position was accepted and is referenced in my endorsement of

January 14, 2009. The Applicants are in the process of restructuring but no plan of compromise or arrangement has yet to be put forward.

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

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

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

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

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

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

55 Counsel to the Union contends that the Applicants must pay for the full measure of its bargain with the Union while the Collective Agreement remains in force and further that the court does not have the jurisdiction to authorize a party, in this case the Applicants, to unilaterally determine which provisions of the Collective Agreement they will abide by while the contract is in operation. Counsel further contends that Section 11.3 of the CCAA precludes the court from authorizing the Applicants to make selective determinations as to

which parts of the Collective Agreement they will abide by and that by failing to abide by the terms of the Collective Agreement, the Applicants acted as if the Collective Agreement between themselves and the Union has been amended to the extent that the Applicants are no longer bound by all of its terms and need merely address any loss through the plan of arrangement.

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

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

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

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

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

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

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

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

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

65 No cases were cited in support of this interpretation.

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

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

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

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

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

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

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

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

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

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> ...
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra*. Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

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

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

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

> ... The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> ...
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

77 At the commencement of an insolvency process, the situation is oftentimes fluid. An

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

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

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

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

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

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

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

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

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

support of their respective positions.

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

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

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

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

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

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlaxw/qlaxr/qlhcs/qlana

4

Case Name:

Futura Loyalty Group Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of The Futura Loyalty Group Inc., Applicant

[2012] O.J. No. 5362

2012 ONSC 6403

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

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

2012 CarswellOnt 14263

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

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: November 13, 2012.
Judgment: November 13, 2012.

(26 paras.)

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

Statutes, Regulations and Rules Cited:

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

Counsel:

S. Reid, for the Applicant.

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

J. Desjardins, for DirectCash Payments Inc.

D. Pearlman, for Aimia Canada Inc.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Overview of orders sought under the *CCAA*

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

II. Extending the Stay Period and increasing the DIP Facility

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

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

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

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

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

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

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

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

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

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

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

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

10 Section 11 of the *CCAA* authorizes a court to "make any order that it considers appropriate in the circumstances", "subject to the restrictions set out in this Act". As Morawetz J. observed in *Re Nortel Networks Corp.*, the "*CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives ..."[1] Although counsel could not point me to a case in which a court had permitted an applicant to satisfy a pre-filing credit or claim enjoyed by a custom-

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

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

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

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

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

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

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

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

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

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

IV. Dispensing with notice to Prepaying Merchant Customers

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

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

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

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

> Direct notification of the *CCAA* Proceedings to the Prepaying Merchant Customers could cause them to cancel their participation in the Aeroplan Coalition Program, which would have a detrimental effect on the ongoing operation and value of the Applicant's business.
>
> Since the Applicant is seeking an order allowing it to continue to honour prepayments made under the Aeroplan Coalition Program in the ordinary course,

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

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

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

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

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

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

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

V. Summary

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

D.M. BROWN J.

cp/e/qllqs/qlpmg/qlcas/qljac

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

2 2009 CanLII 32699 (ONSC).

3 2009 ABQB 78.

5

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.

[1972] 2 O.R. 280-284

ONTARIO
[COURT OF APPEAL]
MacKAY, McGILLIVRAY and BROOKE, JJ.A.
25th FEBRUARY 1972.

1972 CanLII 535 (ON CA)

Sale of land -- Deposit -- Purchaser registering assignment of agreement of purchase and sale to secure return of deposit -- Vendor now seeking to sell property to third party -- Whether Court empowered to order assignment expunged from vendor's title upon the vendor furnishing adequate security in lieu of the assignment -- Judicature Act, s. 19.

Courts -- Jurisdiction -- Plaintiff seeking mandatory order on an interloctory application expunging assignment of agreement of purchase and sale registered against title by defendants -- Assignment registered to secure return of deposit -- Plaintiff seeking to sell to third party and willing to furnish security in lieu of assignment -- Whether Court empowered to make such order -- Judicature Act, s. 19(1).

Section 19(1) of the Judicature Act, R.S.O. 1970, c. 228, empowers the Court to make a mandatory order, even though interlocutory, directed to a party to the action if it is just and convenient to do so. Accordingly, where a plaintiff has agreed to sell real property to a third party, and where an assignment of an earlier agreement of purchase and sale has been registered against the plaintiff's title in an attempt to secure the return of a deposit paid thereunder by the defendants, the Court has jurisdiction to order the expunging of the assignment upon the plaintiff furnishing adequate security in lieu of the interest in land, if any, created by the assignment.

[Re Michie Estate and City of Toronto et al., [1968] 1 O.R. 266, 66 D.L.R. (2d) 213; Board v. Board (1919), 48 D.L.R. 13, [1919] A.C. 956, [1919] 2 W.W.R. 940; Williams and Rees v. Local Union No. 1562 of United Mine Workers of America (1919), 45 D.L.R. 150, [1919] 1 W.W.R. 217, 14 Atla. L.R. 251 [revd on other grounds 59 S.C.R. 240, 49 D.L.R. 578, [1919] 3 W.W.R. 828], folld]

APPEAL from an order of Wright, J., dismissing an application for an order expunging an assignment of an agreement of purchase and sale from the title of the plaintiff.

B. Chernos, for plaintiff, appellant.

R.G. Lord, for defendants, respondents.

The judgment of the Court was delivered orally by

BROOKE, J.A.:-- This is an appeal from the order of the Honourable Mr. Justice Wright dated January 26, 1972, whereby he dismissed the plaintiff's application for an order expunging or vacating the assignment in writing of an agreement of purchase and sale from the title to the plaintiff's lands upon the plaintiff furnishing adequate security in lieu of the interest in land, if any, created by the assignment.

The action arises out of an agreement of purchase and sale dated December 3, 1968, between the plaintiff and the defendant Fundy Bay Builders Limited of the plaintiff's lands which transaction was to close on June 30, 1970, but did not close. By assignment in writing dated December 30, 1968, the defendant Fundy Bay Builders Ltd. assigned the agreement to the defendant Cape Jones Securities Limited and this assignment was registered on the title to the plaintiff's lands on January 10, 1969, in the Registry Office for the Registry Division of the East and West Riding of the County of York.

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On October 2, 1970, the plaintiff commenced this action and the defendants served their defence and counterdlaim on March 14, 1971. By an agreement in writing dated both February 25, 1971, and March 1, 1971, the plaintiff agreed to sell the lands in question for $415,000. The lands are subject to a first mortgage in the sum of $205,000 and this was so at the time of the proposed sale to the defendant Fundy Bay Builders Ltd. As a part of the purchase price in the pending transaxtion the plaintiff has agreed to take back a second mortgage of $130,000 (a sum which is $30,000 in excess of the amount claimed by the defendant in the pending action as a return of its deposit).

The material before Wright, J., made it clear that if the assignment in question is not removed from the title to the plaintiff's lands, the pending transaction will abort. The plaintiff proposes then that the second mortgage in the sum of $130,000 which bears interest at the rate of 81/2% per annum and matures on June 30, 1975, be held in trust pending the determination of the action in place of, and as security for, the lien which the defendants contend they are entitled to in the sum of $100,000 to secure the return of the deposit moneys which they have paid. It is significant that the lien, if it exists, was subsequent to the first mortgage above referred to.

Briefly, the action can be described as an action in which the plaintiff claims for an order to expunge the assignment of the agreement of purchase and sale from its title and for a judgment declaring that the defendants have no interest in the land. The plaintiff claims that the defendants were in default under the agreement and not entitled to the return of the deposit moneys and that the plaintiff terminated the contract. The defendants defend alleging the agreement of purchase and sale was unemforceable as it was void for uncertainty and, alternatively, that the plaintiff had failed to fulfil certain of its covenants in the agreement and, finally, that the defendants were ready, willing and able to carry out the transaction but that the plaintiff elected to terminate it and the defendants are therefore entitled to be repaid the deposit moneys together with interest.

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The defendants assert a lien against the property to secure the return of the deposit moneys. By way of counterclaim the defendants claim for the lien and the return of the deposit moneys and interest and damages.

It appears Wright, J., believed that the seurity which was proposed was adequate but found that he had no jurisdiction to require the defendants to look to such security for satisfaction of their claim in lieu of the assignment. His brief reasons for judgment are as follows:

Although I agree with Mr. Teplitsky that what he offers is reasonably better than what the defendants now have, I consider that I have no power to force it on an unwilling defendant as trustee.

The plaintiff sought and obtained leave from the Honourable Mr. Justice Lerner to appear to this Court, who, in his reasons expressly agreed with the view of Wright, J., with respect to the adequacy of the security proposed and after considering some of the authorities, concluded that there was good reason to doubt that there was an absence of jurisdiction to make the order sought.

In our view, Wright, J., was in error. As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters. In Re Michie Estate and City of Toronto et al., [1968] 1 O.R. 266 at pp. 268-9, 66 D.L.R. (2d) 213 at pp. 215-6, Stark, J., after considering the relevant provisions of the Judicature Act and the authorities, said:

It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantive law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of Peacock v. Bell

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and Kendall (1667), 1 Wms. Saund. 73 at p. 74, 85 E.R. 84:

" ... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."

In Board v. Board (1919), 48 D.L.R. 13 at pp. 17-8, [1919] A.C. 956, [1919] 2 W.W.R. 940, Viscount Haldane for the Privy Council in dealing with the question of the nature of jurisdiction of a superior Court said: If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities, such as the well-known judgment of Lord Mansfield in Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021, and the judgment of Lord Hardwicke in Earl of Derby v. Duke of Athol (1749), 1 Ves.Sen.201, 27 E.R. 982. They are collected in the admirable opinion of Stuart, J., in the Supreme Court in the present case, from whose reasoning, as well as from the arguments employed by the other learned Judges there, their Lordships have derived much assistance. They only desire to add that independently of the rule just referred to, there is another principle of construction which would in thier opinion have been by itself sufficient to dispose of the question whether the words of the Act of 1907 excluded matrimonial jurisdiction. That Act set up a superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes, J., in Mayor of London v. Cox (1867) 1 E. & I. App. 239, at p. 259, nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so.

In addition, and of importance, is that the justice of the situation requires a cause such as this will not fail for want of a remedy. In Williams and Rees v. Local Union No. 1562 of

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United Mine Workers of America (1919), 45 D.L.R. 150 at p. 178, [1919] 1 W.W.R. 217, 14 Atla. L.R. 251 [reversed on other grounds 59 S.C.R. 240, 49 D.L.R. 578, [1919] 3 W.W.R. 828], Beck J., said, and I agree with his view:

> I believe my brother judges accept the opinion I expressed some time ago as follows:--
>
> "That every superior court is the master of its own practice is a proposition laid down by Tindal, C.J., in Scales v. Cheese (1844), 12 M. & W. 685, 152 E.R. 1374, and adopting this, I think that, without any statutory rules of practice, the court can, should a case arise, even though the law be fixed as to the substantial rights of the parties, award such remedies, though they be new, as may appear to be necessary to work out justice between the parties."

Where the plaintiff is desirous of selling its land and provides adequate security to meet its possible obligations to the defendants, surely it has a right to have its title cleared and proceed, and this Court has the power to make any order necessary in the circumstances. In my opinion, then, the Court had jurisdiction at law to deal with this matter in addition to its powers by reason of its equitable jurisdiction.

In my view, s. 19(1) of the Judicature Act, R.S.O. 1970, c. 228, gives to the Court jurisdiction to make a mandatory order, even though interlocutory, directed to a party to the action if it is just and convenient to do so and in this way to require the defendants here to do such acts as may be necessary as to effectively remove the assignment in question from the title to the lands. Here the defendants seek to invoke the Court's equitable jurisdiction by asserting a claim for lien against the lands to secure the return of the moneys which they have paid.

While I have some doubts that the defendants are able to assert such a claim in these circumstances, conceding for the moment that they are entitled to do so and will succeed, if they seek equity -- they must do equity. The security offered by the plaintiff is more than adequate and the defendants ought

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to be required to accept that security in lieu of the lien which they claim. The result to them is the same but the continuation of the registration of the assignment is a cause of loss to the plaintiff which ought to be avoided, if possible. On the face of it, it therefore appears just and convenient that the order sought should be made.

In all of the circumstances, then, we think that Mr. Justice Wright was in error -- that he had jurisdiction to make the order sought before him and an order should go that upon the providing of the security proposes, which is a second mortgage on the property which matures June 30, 1975, in the sum of $130,000 bearing interest at the rate of 81/2% payable to the defendants and assigned to a trustee, to be agreed upon, to abide the outcome of this action, the defendants should remove from the title to the lands the assignment of the agreement of purchase and sale here in question.

The plaintiff is entitled to its costs of the motion before Wright, J., the application for leave to appeal and its costs in this Court.

Appeal allowed.

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Re Regina and Consolidated Fastfrate Transport Inc.

[Indexed as: R. v. Consolidated Fastfrate Transport Inc.]

22 O.R. (3d) 172
[1995] O.J. No. 61

Ontario Court (General Division),
McCombs J.
January 9, 1995

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Injunctions -- Jurisdiction -- Court having jurisdiction in appropriate circumstances to grant injunctive relief to Crown to ensure that funds available to pay fine in event of conviction.

Injunctions -- Criminal law -- Crown seeking injunction prohibiting company charged with offence under Competition Act from disposing of proceeds of sale of its assets until criminal trial completed -- Injunction granted -- Competition Act, R.S.C. 1985, c. C-34.

Criminal law -- Competition Act -- Crown seeking injunction to ensure sufficient funds to pay fine if corporate accused convicted -- Injunction granted -- Competition Act, R.S.C. 1985, c. C-34.

The respondent was charged with an offence under the Competition Act. If the respondent were convicted, the Crown intended to seek a fine of $8 million. The respondent recently sold its assets to a newly incorporated company for $6.8 million. The Crown applied for an injunction prohibiting the respondent from disposing of the proceeds of sale of its assets until after the criminal trial was completed, submitting that the order was required in the public interest to ensure that there would be funds available to pay the fine.

Held, the application should be allowed.

The court had jurisdiction, in appropriate circumstances, to grant injunctive relief to the Crown to ensure that, in the event of a conviction, funds would be available to redress the crime. There was no sound policy basis for recognizing, in exceptional circumstances, the availability of an injunctive remedy to private litigants in the civil context, and not in the criminal context when the state was one of the litigants.

As the respondent was committed for trial after a preliminary inquiry, the requirement of a strong prima facie case had been met.

The nature of the transaction involving the sale of the respondent's assets to a newly incorporated company gave rise to grave concerns that the funds would be unavailable in the event that the respondent was convicted and fined.

There was a serious risk of irreparable harm to the public interest if the injunction was not granted. In the absence of any evidence that the respondent's parent company would experience substantial hardship if the injunction was granted, it had to be concluded that the applicant would suffer the greater harm in the event that an injunction was not granted. The company was restrained from winding up or disposing of the proceeds of the sale until the end of the prosecution against it.

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, 32 Man. R. (2d) 241, 56 N.R. 241, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145; Kourtessis v. M.N.R., [1993] 2 S.C.R. 53, 14 C.R.R. (2d) 193, 81 C.C.C. (3d) 286, 20 C.R. (4th) 104, 102 D.L.R. (4th) 456, 78 B.C.L.R. (2d) 257, 153 N.R. 1, [1993] 4 W.W.R. 225, 93 D.T.C. 5137 sub nom. Canada v. Baron; Ontario (Attorney General) v. Stranges (1984), 46 O.R. (2d) 452, 12 C.C.C. (3d) 455, 9 D.L.R. (4th) 629 (Div. Ct.), consd

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Other cases referred to

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62, 30 C.P.C. 205 (C.A.); Liberty National Bank & Trust Co. v. Atkin (1981), 31 O.R. (2d) 715, 121 D.L.R. (3d) 160 (S.C.); Lister & Co. v. Stubbs (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797, 59 L.J.Ch. 570, 63 L.T. 75, 38 W.R. 548, 6 T.L.R. 317 (C.A.); Mareva Compania Naviera, SA v. International Bulkcarriers, SA (1975), [1980] 1 All E.R. 213, 119 Sol. Jo. 660, [1975] 2 Lloyd's Rep. 509 (C.A.); Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093, 119 Sol. Jo. 441, [1975] 2 Lloyd's Rep. 137 (C.A.); North London Railway Co. v. Great Northern Railway Co. (1883), 11 Q.B.D. 30, 52 L.J.Q.B. 380, 48 L.T. 695, 31 W.R. 490 (C.A.); Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229, 117 D.L.R. (4th) 449 (Gen. Div.); Ontario (Attorney General) v. Grabarchuk (1976), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.); RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, 60 Q.A.C. 241, 164 N.R. 1, 54 C.P.R. (3d) 114, 20 C.R.R. (2d) D-7; Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd. (1977), 17 O.R. (2d) 717 (H.C.J.); Toronto (City) v. McIntosh (1977), 16 O.R. (2d) 257 (H.C.J.); United States of America v. Shephard, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424, 34 C.R.N.S. 207, 9 N.R. 215, 70 D.L.R. (3d) 136

Statutes referred to

Absconding Debtors Act, R.S.O. 1990, c. A.2, s. 2
Competition Act, R.S.C. 1985, c. C-34, s. 45(1)(c)
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 11, 43, 101
Income Tax Act, S.C. 1970-71-72, c. 63
Public Commercial Vehicles Act, R.S.O. 1970, c. 375

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 45.01(1)

Authorities referred to

Carthy, Millar and Cowan, Ontario Annual Practice, 1994-95

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(Aurora: Canada Law Book, 1994)
Halsbury's Laws of England, 4th ed. reissue, vol. 24, p. 426
McAllister, D.M., Mareva Injunctions, 2nd ed. (Toronto: Carswell, 1983), p. 15
Sharpe, R.J., Injunctions and Specific Performance, 2nd ed., pp. 1-46 to 1-47

APPLICATION for an injunction prohibiting the respondent from disposing of the proceeds of the sale of its assets until a criminal trial is completed.

Michael R. Dambrot, Q.C., and Dale Yurka, for applicant.

Steven Sharpe and Robyn Bell, for respondent.

MCCOMBS J.: --

Overview

The applicant seeks an injunction prohibiting the respondent from disposing of $6.8 million, the proceeds of the sale of its assets, until after its criminal trial is completed. The applicant submits that the order is required in the public interest, because otherwise there would likely be no funds available to pay the substantial fine that would probably be imposed in the event of a conviction.

In this motion, I must decide first whether I have jurisdiction to grant the relief sought, and second, whether I ought to grant that relief.

The Facts

Consolidated Fastfrate Transport Inc. (C.F.T.I.) is charged with conspiracy under s. 45(1)(c) of the Competition Act, R.S.C. 1985, c. C-34. C.F.T.I. is accused, along with four other transport companies, of conspiring to unduly lessen competition in the supply of pool car freight forwarding

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services during a more than 11-year period ending in 1987. The trial, which is about to begin, will not be completed for several months. The allegations involve large sums of money, and the applicant has indicated that if C.F.T.I. is convicted, a fine of $8 million will be sought.

C.F.T.I. is a wholly-owned indirect subsidiary of Federal Industries Ltd. (Federal). In 1993, Federal had revenues of $1.4 billion and assets of $840 million. C.F.T.I. has recently sold its assets to a newly incorporated company, Consolidated Fastfrate Inc. (C.F.I.), which was started by a group which includes the former top management of C.F.T.I. By the sale agreement, C.F.I. has acquired all of C.F.T.I.'s assets and liabilities in exchange for payment to C.F.T.I. of $6.8 million.

The consequence of this transaction is that C.F.T.I. is now stripped of its assets, and owns only the $6.8 million in sale proceeds. By way of an undertaking given to the applicant by C.F.T.I. and Federal, the proceeds of the sale are being held pending completion of this application.

It has not been suggested that C.F.T.I.'s assets have been sold for improper motives. Instead, the applicant has focused on the effect of the transaction, rather than the intent of the parties.

The applicant submits that if the injunction is not granted, C.F.T.I. would be at liberty to dispose of the proceeds of the sale of its assets, and that if C.F.T.I. is convicted, Federal would be under no legal obligation to pay any fine that might be imposed on C.F.T.I. Federal's president and chief executive officer has expressed a qualified intention on behalf of Federal to pay any fine that might be imposed if there is a successful prosecution. In testimony in another forum, he said:

> If there was a bona fide judgment against a company within the Federal group, depending on its materiality, because I am bound by my own fiduciary responsibility . . . I would, without hesitation, recommend to my board that this amount be paid, subject only to the fiduciary responsibilities of the

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officers and directors.

The applicant submits that the qualifications in the undertaking of Federal's president leave so many uncertainties that they provide little comfort to the public interest. The applicant submits that the only way to ensure that the funds are secure is to grant the order sought, pending completion of the criminal proceedings.

Jurisdiction to Grant the Remedy Sought

The extent of the jurisdiction of a judge of this court to grant an interlocutory remedy in a criminal case remains unclear. Section 11 of the Courts of Justice Act, R.S.O. 1990, c. C.43, confers upon this court "all the powers historically exercised by courts of common law and equity in England and Ontario". That common law power includes the power to grant the appropriate remedy where one does not exist (see Ontario Annual Practice, 1994-95, Carthy, Millar and Cowan (Aurora: Canada Law Book, 1994), annotation to s. 11 of the Courts of Justice Act), and in turn gives rise to the power to grant interlocutory relief where appropriate. In Halsbury's Laws of England, 4th ed. Reissue, volume 24, at p. 426, the power is described as:

> . . . original and independent jurisdiction to prevent what . . . [the court] considered an injury, whether arising from a violation of an unquestionable right or from a breach of contract or confidence.

In addition to the common law powers which have been statutorily preserved in s. 11, the Courts of Justice Act also contains s. 101, which expressly confers the power to grant interlocutory relief where to do so appears "just and convenient". The effect of s. 101 was not to take any of the jurisdiction away, but to enable the court to overcome technical obstacles to the granting of injunctions where appropriate: see North London Railway Co. v. Great Northern Railway Co. (1883), 11 Q.B.D. 30 at p. 39, 52 L.J.Q.B. 380 (C.A.), per Cotton L.J.

Robert J. Sharpe, in Injunctions and Specific Performance,

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2nd ed., at pp. 1-46 to 1-47, interprets the rule in North London Railway, supra, as suggesting that:

> [S]o long as the plaintiff asserts a recognized legal or equitable right, there is jurisdiction to grant an injunction even if one has not been granted in the past in similar cases. It also suggests that the remedy can be applied in novel ways. Indeed, there are many instances where an injunction may be awarded to restrain or prevent a wrong which would not give rise to an action in damages. The courts have quite properly refused to restrict to exclusive predefined categories their power to grant injunctions.

Ordinarily, injunctions are made only in civil proceedings, and are governed by s. 101 of the Courts of Justice Act, which clearly confers jurisdiction in the civil context. In the case before me, however, no civil action has been brought. The question before me is therefore whether the absence of a civil action precludes the granting of injunctive relief.

There is precedent for injunctive relief in the criminal context. In Ontario (Attorney General) v. Stranges (1984), 46 O.R. (2d) 452, 12 C.C.C. (3d) 455 (H.C.J.), Mr. Stranges, who was facing charges of theft from charities, had attempted to cash annuities held on his behalf by two insurance companies. The Attorney General of Ontario brought an injunction application in the context of a civil motion against Mr. Stranges and the insurance companies. Although the application was framed as a civil action, it has important similarities to this case. In both cases, the Crown sought to ensure, in the public interest, that funds would be available either to compensate the victims of crime, as in Stranges, or to pay a fine, as in the case before me. In Stranges, supra, Galligan J. recognized the Attorney General of Ontario's right to seek injunctive relief in the public interest, and continued an earlier injunction in order to ensure that restitution could be made to the victims of theft.

In the case of Kourtessis v. M.N.R., [1993] 2 S.C.R. 53, 81 C.C.C. (3d) 286, the Supreme Court of Canada demonstrated that when the interests of justice require it, a civil remedy can be

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superimposed on criminal proceedings in order to fill a gap in the criminal procedure. In that case, the court created a civil right of appeal for the appellants (who had launched a collateral attack on the constitutionality of a provision of the Income Tax Act, S.C. 1970-71-72, c. 63), despite the fact that no statutory right of appeal existed.

The applicant submits that whether or not the jurisdiction comes from the common law powers preserved by s. 11, or the express powers conferred by s. 101 of the Courts of Justice Act, a remedy is required in this case in the interests of justice. The applicant submits that I have jurisdiction to grant either a "public interest" injunction, or an injunction similar to a Mareva injunction.

(a) The Mareva injunction

Prior to 1975, it was a fundamental principle of the law of interlocutory injunctions that no injunction would be granted prior to trial to restrain defendants from disposing of or dealing with their assets, because of the entrenched rule that there shall be no execution before judgment: see Mareva Injunctions, 2nd ed. (Toronto: Carswell, 1983), Debra M. McAllister, at p. 15; and see Lister & Co. v. Stubbs (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (C.A.).

The exceptions to the rule that there could be no execution prior to judgment were injunctions obtained in situations where fraud was alleged and where the rules of practice or a statute provided a prejudgment remedy: see Mareva Injunctions, McAllister, supra, at p. 15; Toronto (City) v. McIntosh (1977), 16 O.R. (2d) 257 (H.C.J.); Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd. (1977), 17 O.R. (2d) 717 (H.C.J.); Rules of Civil Procedure, rule 45.01(1); and the Absconding Debtors Act, R.S.O. 1990, c. A.2, s. 2.

The Mareva injunction exceptions to the general rule against restraining assets prior to trial developed in England, first in 1975 in the case of Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093 (C.A.), and later in Mareva Compania Naviera, SA v. International

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Bulkcarriers SA (1975), [1980] 1 All E.R. 213, 119 Sol. Jo. 660 (C.A.). In Mareva, at p. 215, Lord Denning stated:

> If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

The new rule was imported to Ontario for the first time in 1981 in Liberty National Bank & Trust Co. v. Atkin (1981), 31 O.R. (2d) 715, 121 D.L.R. (3d) 160 (S.C.). The rule was recognized by the Court of Appeal for Ontario the following year in Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, and three years later, by the Supreme Court of Canada in Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161. Canadian courts maintained the old rule of general application that there is no execution prior to judgment, and no judgment prior to trial, but recognized that there are specific exceptions, including the Mareva injunction.

In Aetna, the Supreme Court of Canada clearly intended to restrict the application of the Mareva remedy. In dissolving an injunction granted by a lower court, the court held that although Mareva injunctions are available in Canada, they must be applied sparingly, and only in the clearest of cases, where there is a genuine risk that assets will disappear.

In Aetna, the appellant had been enjoined from moving assets from the province of Manitoba to its head office in Montreal. The court, in dissolving the injunction, observed that the appellant had acted in the ordinary course of its business, and that there were realistic avenues of recovery open to the respondent. Speaking for the court, Estey J. stated, at p. 37 S.C.R., p. 186 D.L.R.:

> There is . . . a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The

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harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country.

(b) The Public Interest Injunction

The applicant concedes that the Mareva injunction is available essentially for the protection of the financial interests of private litigants, but submits that the remedy should nevertheless be available to protect the public interest, which prosecutions such as the one in this case represent.

The right of the Attorney General to bring an application for an injunction in the public interest is well-established, and there is ample precedent for granting such an order when it is in the public interest. For example, injunctive relief was granted in the public interest in Stranges, supra. Moreover, in Ontario (Attorney General) v. Grabarchuk (1976), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.), an interim injunction was granted to prohibit the defendant from continuing to flout the Public Commercial Vehicles Act, R.S.O. 1970, c. 375, pending disposition of the charges. A more recent example of the granting of injunctive relief on public interest grounds is the decision of Adams J. of this court in Ontario (Attorney General) v. Dieleman (1994), File No. 93-CQ-36131 [now reported 20 O.R. (3d) 229, 117 D.L.R. (4th) 449], in which an injunction was granted restricting anti-abortion protest activity.

Conclusion re Jurisdictional Issue

I am persuaded that there is ample precedent to permit the conclusion that a judge of this court has jurisdiction, in appropriate circumstances, to grant injunctive relief to the Crown in order to ensure that, in the event of a conviction, funds will be available to redress the crime.

There are also sound policy reasons for the existence of such jurisdiction. No authority need be cited for the proposition

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that the application and enforcement of the criminal law is of significant public interest. Moreover, there can be no doubt that the Competition Act under which the respondent is presently indicted, represents criminal legislation which is central to Canadian economic policy, involving matters of significant public interest.

I conclude that there is no sound policy basis for recognizing, in exceptional circumstances, the availability of an injunctive remedy to private litigants in the civil context, and not in the criminal context when the state is one of the litigants.

I therefore conclude on grounds of both precedent and policy that a judge of this court has the authority to grant the relief sought in this case.

Should an Injunction be Granted in this Case?

In considering whether to grant injunctive relief, I have considered a number of decisions, including Chitel v. Rothbart, supra, Ontario (Attorney General) v. Grabarchuk, supra, Ontario (Attorney General) v. Dieleman, and the recent decision of the Supreme Court of Canada in RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

Having regard to the authorities as well as to the exigencies of this case, including the fact that the trial of the respondent is about to begin, I have concluded that the following questions are appropriate to be asked in determining whether the relief sought should be granted:

1. Has the applicant established that there is a strong prima facie case on the merits?

2. Is the respondent disposing of its assets in a manner out of the ordinary course of business, so as to make tracing of assets remote or impossible?

3. Would there be irreparable harm suffered if the injunction

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is not granted?

4. In balancing the relative inconvenience of the applicant and the respondent, whose interests should prevail?

Question 1: Has the applicant established that there is a strong prima facie case on the merits?

In considering this issue, I take into account the fact that the respondent has been committed for trial following a preliminary inquiry, and that no appeal has been taken from that ruling. I must conclude that the judge presiding over the preliminary hearing acted judicially and applied the appropriate test as set out in United States of America v. Shephard, [1976] 2 S.C.R. 1067, 30 C.C.C (2d) 424. Accordingly I conclude that there is evidence concerning all of the essential ingredients of the offence, such that a reasonable jury, properly instructed, could convict the respondent. In the circumstances of this case, the requirement of a strong prima facie case has been met.

Question 2: Is the respondent disposing of its assets in a manner out of the ordinary course of business, so as to make tracing of assets remote or impossible?

There is no evidence before me to suggest that Federal or C.F.T.I. will intentionally set out to ensure that the funds are untraceable in the event of a conviction and substantial fine. However, because of the nature of the transaction involving the sale of the assets of C.F.T.I. to the newly incorporated company, and in light of all the surrounding circumstances, I am left with grave concerns that the funds would be unavailable in the event that C.F.T.I. is ultimately convicted and fined.

Question 3: Would there be irreparable harm suffered if the injunction is not granted?

In light of my conclusions regarding Q. 3, I conclude that there is a serious risk of irreparable harm to the public interest if the injunction is not granted.

1995 CanLII 7150 (ON SC)

Question 4: In balancing the relative inconvenience of the applicant and the respondent, whose interests should prevail?

In light of the significant public interest represented by the prosecution and the very large fine being sought, and in light of the fact that the parent company, Federal, had assets in 1993 of $840 million and revenues of $1.4 billion that same year, and in the absence of any new evidence that Federal will experience substantial hardship if an injunction is granted, I conclude that the applicant would suffer the greater harm in the event that an injunction is not granted.

Conclusion

In the result, I conclude that the applicant has satisfied the onus upon it, and accordingly, an order will go restraining the respondent from winding up or disposing of the proceeds of the sale of its assets until the completion of the prosecution against it. The applicant should, however, be required to give an undertaking in damages.

The precise terms of the order will be determined after counsel have had an opportunity to confer. If necessary, I will hear submissions from counsel concerning the terms of the order.

Application allowed.

1995 CanLII 7150 (ON SC)

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** Preliminary Version **

Case Name:

Buschau v. Rogers Communications Inc.

Rogers Communications Incorporated, appellant;
v.
Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky, Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E.

White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and National Trust Company, respondents.
And
National Trust Company, appellant;
v.
Sandra Buschau, Sharon M. Parent, Albert Poy, David Allen, Eileen Anderson, Christine Ash, Frederick Scott Atkinson, Jaspal Badyal, Mary Balfry, Carolyn Louise Barry, Raj Bhamber, Evelyn Bishop, Deborah Louise Bissonnette, George Boshko, Colleen Burke, Brian Carroll, Lynn Cassidy, Florence K. Colbeck, Peter Colistro, Ernest A. Cottle, Ken Dann, Donna de Freitas, Terry Dewell, Katrin Dolemeyer, Elizabeth Engel, Karen Engleson, George Fierheller, Joan Fisher, Gwen Ford, Don R. Fraser, Mabel Garwood, Cheryl Gervais, Rose Gibb, Roger Gilodo, Murray Gjernes, Daphne Goode, Karen L. Gould, Peter James Hadikin, Marian Heibloem-Reeves, Thomas Hobley, John Iannantuoni, Vincent A. Iannantuoni, Ron Inglis, Mehroon Janmohamed, Michael J. Jervis, Marlyn Kellner, Karen Kilba, Douglas James Kilgour, Yoshinori Koga, Martin Kosuljandic, Ursula M. Kreiger, Wing Lee, Robert Leslie, Thomas A. Lewthwaite, Holly Li, David Liddell, Rita Lim, Betty C. Lloyd, Rob Lowrie, Che-Chung Ma, Jennifer MacDonald, Robert John MacLeod, Sherry M. Madden, Tom Makortoff, Fatima Manji, Edward B. Mason, Glenn A. McFarlane, Onagh Metcalfe, Dorothy Mitchell, Shirley C.T. Mui, William Neal, Katherine Sheila Nimmo, Gloria Paiement, Lynda Pasacreta, Barbara Peake, Vera Piccini, Inez Pinkerton, Dave Podworny, Doug Pontifex, Victoria Prochaska, Frank Radelja, Gale Rauk, Ruth Roberts, Ann Louise Rodgers, Clifford James Roe, Pamela Mamon Roe, Delores Rose, Sabrina Roza-Pereira, Sandra Rybchinsky,Kenneth T. Salmond, Marie Schneider, Alexander C. Scott, Inderjeet Sharma, Hugh Donald Shiel, Michael Shirley, George Allen Short, Glenda Simoncioni, Norm Smallwood, Gilles A. St. Dennis, Geri Stephen, Grace Isobel Stone, Mari Tsang, Carmen Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young and Rogers Communications Incorporated, respondents.

[2006] S.C.J. No. 28

[2006] A.C.S. no 28

2006 SCC 28

2006 CSC 28

[2006] 1 S.C.R. 973

[2006] 1 R.C.S. 973

269 D.L.R. (4th) 1

349 N.R. 324

[2006] 8 W.W.R. 583

J.E. 2006-1309

226 B.C.A.C. 25

54 B.C.L.R. (4th) 1

52 C.C.P.B. 161

26 E.T.R. (3d) 1

2006 CarswellBC 1530

148 A.C.W.S. (3d) 483

EYB 2006-106843

File No.: 30462.

Supreme Court of Canada

Heard: November 15, 2005;
Judgment: June 22, 2006.

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

(104 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Subsequent History:

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

Catchwords:

Pensions -- Pension plan -- Trust -- Termination -- Pension plan indicating that trust surplus to be distributed amongst remaining pension plan members in event of termination -- Pension plan and trust agreement not providing for termination of trust by pension plan members -- Whether members can rely on rule in Saunders v. Vautier to terminate trust -- Whether recourse available to members under federal pension benefits standards legislation -- Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 29(2), (11).

Summary:

The individual respondents are members of a pension plan ("Plan"). The Plan and the trust were established in 1974 as a defined benefit plan funded solely by the employer for the benefit of employees of a company that RCI acquired in 1980. It provided that, in the event of termination, the surplus remaining in the trust was to be distributed amongst the remaining members, but neither the trust agreement nor the Plan provided, at any time, for termination of the trust by employees. The Plan developed a large actuarial surplus. In 1981, RCI amended the Plan so that any surplus funds remaining on termination would revert to RCI and, in 1984, it closed the Plan to new employees. RCI began taking contribution holidays the following year and was refunded $968,285 from the surplus. In 1992, it merged the Plan retroactively with other RCI pension plans. The Plan members initiated a first action against RCI and the Court of Appeal concluded (1) that the merger was valid but did not affect the existence of the Plan trust as a separate trust; and (2) that the members were at liberty to institute proceedings to terminate the trust based on the rule in *Saunders v. Vautier*, to the extent that it was applicable. According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. The court also concluded that the members retained the right to distribution of the surplus upon termination. Relying on the common law rule, the members initiated a second action and succeeded in obtaining order terminating the Plan. The Court of Appeal set aside a part of the chambers judge's decision, finding that a court did not have the power under the *Trust and Settlement Variation Act* to consent on behalf of contingent *sui juris* beneficiaries. The court found that, provided that all the required consents were obtained, the members will be at liberty to invoke the common law rule. It also found that RCI could not amend the Plan to permit the addition of new members. Since questions could arise concerning the "mechanics" of the termination, the trustee would have to satisfy itself that all the conditions and all statutory requirements had been met.

Held: The appeal should be allowed.

Per LeBel, **Deschamps**, Fish and Abella JJ.: The members of the Plan cannot invoke the rule in *Saunders v. Vautier* to terminate the trust. That rule is not easily incorporated into the context of employment pension plans. Such plans are heavily regulated. The *Pension*

Benefits Standards Act, 1985 ("P.B.S.A.") deals extensively with the termination of plans and the distribution of assets, and it is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that the P.B.S.A. provides a means to reach the distribution stage, it should prevail over the common law. Moreover, a pension trust is not a stand-alone instrument. In this case, the trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the P.B.S.A. provides mechanisms that protect members from inappropriate conduct by plan administrators. [para. 2] [paras. 27-33]

The P.B.S.A. is not a complete code, but when it provides recourse to pension plan members, they should use it. Here, the members of the Plan want the trust fund to be collapsed and distributed directly to them, but the available recourse is subject to the provisions of the P.B.S.A. The Superintendent of Financial Institutions, who is responsible for the application of the P.B.S.A., is in a position to deal with issues relating to termination or winding up. He can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. He is also in the best position to monitor the orderly termination of the Plan in accordance with the P.B.S.A., which is a condition precedent to distribution. Because all contributions ceased in 1984, the Superintendent could consider the Plan terminated under s. 29(2), which is not limited to solvency issues, and could decide whether the facts warrant winding up the part of the RCI pension plan that relates to the Plan pursuant to s. 29(11) of the P.B.S.A., which would have the effect of terminating the trust. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a pension plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power. Whether RCI can amend the Plan to open it to new members is a question best left to the Superintendent. [para. 2] [para. 29] [paras. 44-57]

Per McLachlin C.J. and **Bastarache** and Charron JJ.: The rule in *Saunders v. Vautier* does not apply in the circumstances of this case, and any application regarding the termination of the Plan and the trust must be dealt with in accordance with the terms of the Plan and the provisions of the P.B.S.A. [para. 100]

The P.B.S.A. is a comprehensive statutory scheme which contains detailed provisions for the termination of pension plans and the distribution of plan assets. It recognizes that employers are generally, as in the case at bar, entitled to terminate a pension plan, but it also empowers the Superintendent of Financial Institutions to terminate such plans in specified situations, including those referred to in s. 29. The Superintendent's supervisory focus is primarily on matters affecting the solvency or the financial condition of a pension plan. There is no provision in the P.B.S.A. for plan beneficiaries to terminate a pension plan or for any party to terminate a trust under which pension fund contributions are held as security for the payment of plan benefits prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but he does not have a general discretion to terminate pension plans

and may comply with such a request only where the stipulated pre-conditions are met. In the instant case, none of the statutory grounds for termination of the Plan are present. The words "suspension or cessation of employer contributions" in respect of the Superintendent's power to terminate a pension plan under s. 29(2)(*a*) must be construed as referring to an employer's failure to make required contributions; they do not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan. [paras. 79-88]

Because the Plan members have only a contingent interest in the trust surplus, the rule in *Saunders v. Vautier* cannot be invoked to terminate the trust. It requires that beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust corpus. The members do not have absolute entitlement to the surplus until the Plan and trust are terminated. Furthermore, the common law rule also requires the consent of all parties who have an interest in the trust property. Since both the P.B.S.A. and the Plan include survivor rights, those rights cannot be overridden by the consent of present Plan members and other beneficiaries, or by the courts. Nor can s. I(b) of the *Trust and SettleAnament Variation Act* assist in this respect. The court does not have the power to consent on behalf of current spouses and common law partners who are of full legal capacity, nor can consent be given on behalf of unascertainable future spouses and common law partners, since the termination of the Plan would presumably not be in their best interests. [para. 90] [paras. 98-99]

Trust law cannot in the present case prevail over the contract and the governing legislation. Applying the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the parties, since the terms of the Plan do not give rise to a reasonable expectation that the trust could be terminated by the members over RCI's objections so that the members might obtain the surplus. Such a result would permit members of a pension plan to vary its terms without the employer's consent. Applying the common law rule would disregard the employer's unique role in respect of the Plan and the trust, circumvent the terms of the contract at the root of the trust, and make the legislative framework irrelevant. In particular, applying it would disregard s. 29(9) and permit the termination of the Plan and the trust without the involvement of the employer as plan administrator, and without the Superintendent's approval. Finally, introducing the rule in *Saunders v. Vautier* into the private pension system would disrupt the fair and delicate balance between the interests of the employer and employees, and would be contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans. [paras. 92-94] [para. 97]

A court has no authority to assign the responsibilities of the administrator and the Superintendent to the trustee contrary to the legislative scheme, under which a process for terminating a pension plan has been established. [para. 95]

RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and any amendments to it must be examined in light of to the applicable provisions of the Plan and the P.B.S.A. In the special context of pension plans, employers who administer such plans on behalf of their employees must always act in accordance with the spirit, purpose and terms of the plans, and in such a way as to

ensure the protection of employees' pension benefits, not to reduce, threaten or eliminate them. [paras. 102-103]

Cases Cited

By Deschamps J.

Not applied:*Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **referred to:***Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380.

By Bastarache J.

Not applied: *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; **referred to:***Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597.

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Pension Benefits Act, R.S.O. 1990, c. P.8, s. 69(1)(a).

Pension Benefits Standards Act, S.C. 1966-67, c. 92, s. 12.

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Pension Benefits Standards Act, 1985, S.C. 1986, c. 40.

Pension Benefits Standards Regulations, 1985, SOR/87-19, ss. 6-10, 16, 24.

Trustee Act, R.S.B.C. 1996, c. 464, s. 86.

Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463, s. 1.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Low and Thackray JJ.A.) (2004), 24 B.C.L.R. (4th) 85, 236 D.L.R. (4th) 18, [2004] 5 W.W.R. 10, 6 E.T.R. (3d) 236, 193 B.C.A.C. 258, 316 W.A.C. 258, 39 C.C.P.B. 247, [2004] B.C.J. No. 297 (QL), 2004 BCCA 80, and (2004), 27 B.C.L.R. (4th) 17, 239 D.L.R. (4th) 610, [2004] 7 W.W.R. 218, 9 E.T.R. (3d) 221, 197 B.C.A.C. 279, 323 W.A.C. 279, [2004] B.C.J. No. 991 (QL), 2004 BCCA 282, with supplementary reasons (2004), 35 B.C.L.R. (4th) 248, 241 D.L.R. (4th) 766, [2005] 2 W.W.R. 67, 197 B.C.A.C. 279, at p. 287, 323 W.A.C. 279, at p. 287, [2004] B.C.J. No. 1321 (QL), 2004 BCCA 369, reversing a decision of Loo J. (2002), 100 B.C.L.R. (3d) 327, 44 E.T.R. (2d) 177, 30 C.C.P.B. 167, [2002] B.C.J. No. 865 (QL), 2002 BCSC 624, and (2003), 13 B.C.L.R. (4th) 385, [2003] 7 W.W.R. 341, 35 C.C.P.B. 199, [2003] B.C.J. No. 1025 (QL), 2003 BCSC 683, granting an application for termination of a pension plan. Appeal allowed.

Counsel:

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[Editor's note: A corrigendum was published by the Court June 23, 2006. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

1 DESCHAMPS J.:-- The 112 respondents are pension plan members who have been litigating for over 10 years to gain access to their pension trust fund. This case is about whether and how the fund can be distributed to them.

2 By 2002, the plan for which the trust was created, the Premier pension plan ("Plan"), had a surplus evaluated at $11 million. The Supreme Court and the Court of Appeal for British Columbia accepted the members' arguments and found that the trust used to fund the Plan ("Trust" or "Premier Trust") could be collapsed under the common law rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.). According to that rule, the terms of a trust can be varied or the trust can be terminated if all beneficiaries of the trust, being of full legal capacity, consent. For the reasons that follow, I am of the view that the common law rule does not apply to the Trust in the case at bar. The context and the purpose of pension plans do not generally lend themselves well to the common law rule. Moreover, a pension trust is not a stand-alone instrument. The Trust is explicitly made part of the Plan. It cannot be terminated without taking into account the Plan for which it was created and the specific legislation governing the Plan. Any recourse available to the members here is subject to the provisions of a federal statute, the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."). In my view, the Superintendent of Financial Institutions ("Superintendent"), who is responsible for the application of the P.B.S.A., is in a position to resolve the impasse that the members would face if the interpretation suggested by my colleague Bastarache J. were adopted.

3 In order to explain the particular context in which the termination of the Trust is sought, a few facts will have to be elicited to situate the dispute between the members and their former employer. Then, to explain why the common law rule does not apply, it will be useful to briefly review pension plans in general and the Plan itself. Finally, I will comment on the relevant provisions of the P.B.S.A. that would allow the members to make a proper request to the Superintendent.

I. Facts

4 The Plan was established in 1974 for the employees of Premier Communication Ltd. It

provides for defined benefits and is funded by the employer only. It states that the company expects to continue the Plan indefinitely, but that in the event of termination, the surplus remaining in the trust fund is to be distributed amongst the remaining members:

> <u>GENERAL RULE SEVEN</u> -- <u>AMENDMENT OR TERMINATION OF PLAN</u>
>
> ...
>
> 2. While the Company expects to continue the Plan indefinitely, it must and does reserve the right to terminate the Plan, if, at any time in the future, conditions should arise that indicate the necessity of such action.
>
> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

5 In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used for improvements to improve benefits for members. On April 12, 1984, the actuary actually recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:

> It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).

6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:

> You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the

surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc).

We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.

7 The members initiated the litigation against Rogers in 1995. They requested the return of the trust funds paid to Rogers in 1985 and a declaration that the funds belonged to them. The trial judge dismissed the claim on most of the issues ((1998), 54 B.C.L.R. (3d) 125). The members appealed. The Court of Appeal found that trust law imports its own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent and in view of Rogers' concession that the merger was not complete as regards the Plan, members of the Plan retained rights that were distinct from those of members of the other plans that had been merged with it in the RCI Plan. The Court of Appeal concluded that the merger of the Plan with the RCI Plan was valid but did not affect the existence of the Trust as a separate trust. The members were also at liberty to institute proceedings to terminate the Trust based on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent that either may be applicable. The Court of Appeal held that the employer's withdrawal of substantial funds from the surplus in 1985, which was admitted to have been in breach of trust, had been properly repaid to the trustee. Thus, the Plan's members retained the right to distribution of the surplus upon termination (*Buschau v. Rogers Cablesystems Inc.* (2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau* #1"), at paras. 63 to 68). This Court denied leave to appeal that decision, [2001] 2 S.C.R. vii.

8 In 2001, the members applied to the Supreme Court of British Columbia for an order terminating the Plan. Loo J. ordered termination on the basis that the rule in *Saunders v. Vautier* was applicable and that s. 1(*b*) of the *Trust and Settlement Variation Act* provided the court with the jurisdiction to consent on behalf of those missing beneficiaries who were *sui juris* (*Buschau v. Rogers Communications Inc.* (2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624). Rogers appealed.

9 The Court of Appeal found that the members were at liberty to invoke the rule in *Saunders v. Vautier* provided that the consents of all members and beneficiaries had been obtained. It set aside a part of the chambers judge's decision based on the *Trust and Settlement Variation Act*, finding that a court did not have the power to consent on behalf of contingent *sui juris* beneficiaries. However, it provided the members with an opportunity to show that all the required consents had been obtained (*Buschau v. Rogers Communications Inc.* (2004) 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau* #2 ")). After receiving additional evidence and representation, the Court of Appeal found that the rule in *Saunders v. Vautier* could operate to terminate the trust. It recognized that questions could arise concerning the "mechanics" of the termination, but it was of the opinion that the trustee would have to satisfy itself that "[all] the conditions have been met and that all statutory requirements -- including the payment of applicable taxes -- have been complied with" before distributing the trust assets ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("

Buschau #3"), at para. 17). Rogers and the trustee appealed to this Court.

10 Rogers submits that the rule in *Saunders v. Vautier* does not apply. National Trust does not take issue with the Court of Appeal's order inasmuch as it determines the rights of Rogers or of the members. However, the trustee claims that the order places it in an untenable position by devolving upon it the authority and legal responsibility to give effect to and administer the termination of the Premier Trust, although this authority is not provided for by the terms of the Trust or by statute. The members maintain that the rule in *Saunders v. Vautier* applies but argue, in the alternative, that Rogers should terminate the Plan pursuant to its fiduciary duty under the P.B.S.A. At the end of the hearing before this Court, the parties were asked to provide their views on the application of the P.B.S.A. to the termination of a plan by the Superintendent. Rogers takes the position that the Superintendent does not have the right to terminate the Plan because his role is limited to solvency issues. The members submit that the Superintendent has a discretionary power and that, as a result, they do not have a clear recourse. In their view, the rule in *Saunders v. Vautier* is not ousted by the P.B.S.A.

11 It is clear from the history of the litigation that some of the issues are now *res judicata*. One of them is that the merger of the Plan with the RCI Plan did not affect the Trust. As the Court of Appeal noted at the time, this peculiar situation may present some conceptual difficulties (*Buschau* #1, at para. 66). Nonetheless, these facts must be interpreted with the help of the general principles of pension law. For this reason, it will be useful to review some background information concerning pension plans in general and the Plan in particular.

II. Pension Plans in General

12 Pension plans have a complex history and constitute a response to a multitude of needs. As R. L. Deaton puts it:

> ...[employee] benefits [initially] served multiple purposes, including attracting a labour supply and reducing turnover, serving as an investment in human capital by improving morale, increasing productivity and efficiency by rationalizing the human element in the work process, promoting loyalty to the firm, preventing or forestalling unionization, preventing government intervention with respect to compulsory social insurance, maximizing the tax position of certain benefits by increasing non-taxable compensation to employees, minimizing the cost per unit of benefit through group arrangements, thereby compensating for imperfect individual knowledge of insurance markets, and creating a favourable corporate public relations image.
>
> (*The Political Economy of Pensions: Power, Politics and Social Change in Canada, Britain and the United States* (1989), at pp. 119-20)

He adds that in recent years many sophisticated employers have adopted a compensation

approach based on the "total value of labour remuneration, wages and fringes having become interchangeable costs" (p. 122). Thus, what some may still view as a gratuitous reward for employees remains a powerful long-term human resources management tool as well as an undeniable benefit for aging employees. Employees rightly see their pension benefits as part of their overall compensation. How important pension benefits are to employees, and how sensitive employees are about such benefits, is even clearer in the present context of corporate mergers and acquisitions.

13 Pension benefits also serve broader social goals, which were recognized by the Court of Appeal (*Buschau* #2, at para. 47), citing approvingly E. E. Gillese (now a justice of the Ontario Court of Appeal), "Pension Plans and the Law of Trusts" (1996), 75 *Can. Bar Rev.* 221, at pp. 232-34. Together with government programs and individual savings, pension plans provide an aging population with invaluable financial support. In recognition of the social value of such an investment, pension contributions receive special tax treatment. The social component of private pension plans plays a crucial role in an era in which public pension programs have not yet been reformed to ensure adequate funding (see Deaton, at pp. 136-37, for an outline of the increase in contributions that would be required to conform to international standards). Courts do not make social policy, but the social role of pension plans might prove relevant when it comes time to decide whether the rule in *Saunders v. Vautier* can be employed to terminate a pension trust.

14 In Canada, defined benefit plans are usually funded in one of two ways: the funds are either held by an insurance company or held in trust (D. Rienzo, "Trust Law and Access to Pension Surplus" (2005), 25 *E.T.P.J.* 14; G. Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *Meredith Memorial Lectures 1988, New Developments in Employment Law* (1989), 59, at p. 64). In an insured plan, the insurance company receives an agreed payment and, bearing the risk of a shortfall, undertakes to pay the pension benefits to the members. When a plan is funded through a trust, the employer contracts with a trust company. The trust company holds and invests the pension contributions, subject to instructions under the trust agreement. The contributions are generally adjusted following an evaluation by an actuary who determines the level of funding needed to meet the solvency requirement under the applicable legislation. Here, the Plan is and always has been funded through a trust, so the discussion can be limited to trust-related issues.

15 A defined benefit plan can fall into deficit or accumulate a surplus. Pension underfunding is a cause for concern. Almost 70 percent of major corporate pension plans were in deficit positions in the late 1970s. In the early 1980s, however, the situation reversed. Surpluses were generated by high levels of investment earnings coupled with lower wage increases and widespread layoffs, while employer contributions were left in the funds as employees forfeited their future pension rights: Deaton, at pp. 133-34, and Nachshen, at pp. 66-67. The situation reverted to one of deficits in the late 1990s. The magnitude of the underfunding problem has only recently started to emerge in legal commentaries ("Pension Underfunding Still Widespread, Yet...", *Business and Legal Reports*, October 1, 2003 (online)). However, a surplus or deficit position reflects only a snapshot of a fund at a specific point in time. Since a pension plan is usually viewed as an

ongoing instrument, time and sound actuarial advice are supposed to allow for secure funding while preventing the unnecessary accumulation of surpluses. Although the existence of deficits or surpluses is not an anomaly since actuaries cannot perfectly predict the future, in an ideal world, each plan would always be funded to the exact amount required to discharge its obligations.

16 Surpluses have not always been dealt with explicitly in pension plans or pension trusts. In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, the Court, dealing with issues relating to the distribution of a surplus, held that "when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust" (p. 639). The Court also stated that "[w]hen a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles" (p. 643 (emphasis added)). It is thus necessary to determine which trust law principles *are applicable* before considering how they apply.

17 Before termination of a plan, a surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. A pension surplus can be used to justify a contribution holiday if this is permitted by the plan, but the surplus can also disappear if investment earnings are lower than anticipated. Since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. As the Court said in *Schmidt*, "[t]he right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan" (p. 654). Entitlement is determined by consulting the Plan, the Trust agreement (*Schmidt*, at para. 48) and the relevant legislation (*Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 39).

18 Pension plans are heavily regulated. At this juncture, it is worth looking at the legislative scheme applicable to the issue.

III. The *Pension Benefits Standards Act, 1985*

19 The complex statutory and regulatory framework to which pension plans are subject cannot be overlooked. Recognizing the economic and social importance of pension plans, Parliament and the vast majority of provincial and territorial legislatures have adopted legislation regulating them. The first federal pension benefits standards legislation came into force on March 23, 1967 (S.C. 1966-67, c. 92). The current statute, the P.B.S.A., was initially enacted in 1986 (S.C. 1986, c. 40). Under it, an important role of control and supervision is assigned to the Superintendent (see A. N. Kaplan, *Pension Law* (2006) for analysis on the analogous role of the Superintendent under the Ontario legislation). The Superintendent administers the P.B.S.A., collects information and conducts studies concerning pension plans and their operation (s. 5). Strict investment and solvency standards are imposed on plan administrators (s. 9(1) and *Pension Benefits and Standards Regulations, 1985*, SOR/87-19, rr. 6 to 10), who must also file documents and information required by the P.B.S.A. (ss. 7.4 and 12). A plan administrator also acts as a trustee for the employer, the members of the plan, and any persons entitled to pension

benefits. The Superintendent can issue a direction of compliance if he is of the view that an administrator or an employer is pursuing a course of conduct that is contrary to sound financial practices, or that a pension plan is not being administered in accordance with the P.B.S.A. (s. 11(1) and (2)). If the Superintendent's direction is not complied with, the pension plan's registration may be revoked (s. 11.1). The Superintendent also plays a key role at the termination and distribution stage (ss. 9.2 and 29, and rr. 16 and 24). For example, his consent must be obtained before a surplus can be distributed (r. 16(2)(*d*)). Guidelines and instruction guides are published by the Superintendent to assist in the administration and termination of plans and trusts. Specific attention is paid to the rights of beneficiaries upon a request for distribution of a surplus. The *Guidelines to Administrators for Plan Terminations* make it clear that a delay in winding up will not be accepted simply because the administrator prefers to manage the funds.

20 In essence, the Superintendent plays a crucial role in the protection of beneficiaries. Although most of his interventions relate to supervision of the solvency requirements, he also acts as a gatekeeper for the distribution of a pension fund. The Superintendent has unique duties and responsibilities *vis-à-vis* beneficiaries that may make it possible to avoid resorting to a common law rule that was designed for an environment totally different from that of pension law.

IV. The Rule in *Saunders v. Vautier*

21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in *Underhill and Hayton: Law of Trusts and Trustees* (14th ed. 1987), at p. 628:

> If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or trustees.

According to D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters Law of Trusts in Canada* (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it.

22 The members argue that this rule allows them to terminate the Trust fund even though the employer, upon agreeing to the Trust, stated that only he could terminate it. The terms of the Plan and its Trust fund are the key to the analysis. I will now turn to them.

V. The Plan and its Trust Fund

23 The Plan, as stated in 1974, provided for the assets to be held in accordance with

the terms of a Trust agreement. A committee known as the Retirement Committee was appointed by the company to administer the Plan. All employees hired after January 1, 1974 were required to become members of the Plan, while the other employees were eligible to join it under certain conditions (General Rule Two). The benefits were not to exceed the maximum permitted under the prevailing legislation and were payable upon retirement (the normal retirement age was 65 years). Although entitled to make additional contributions, employees were not required to contribute to the regular funding of the Plan (Special Rule Four (1)). The employer's contribution was calculated by the actuary appointed under the Plan (General Rule Four (2)). Benefits were to be paid to the member for the remainder of his or her life and then to the member's beneficiary for any remaining portion of a "guaranteed period". A lump sum could be paid, but only to a member, if the benefit was less than $10 per month, and even so this was at the Retirement Committee's discretion. The committee could decide all matters in respect to the operation, administration and interpretation of the provisions of the Plan (General Rule Six (12)). The company had the right to amend the Plan provided that the amendment did not affect rights acquired or benefits earned as at the date of the amendment. Upon termination, benefits were to be paid as provided for in the Plan, and the balance of assets remaining in the trust fund, after all liabilities had been satisfied, were to be distributed by the Committee among the remaining members on the basis of s. 12 of the former *Pension Benefits Standards Act* (General Rule Seven).

24 The Trust agreement was entered into for the specific purpose of creating a Trust fund for the Plan. The fund was to be held and administered for the benefit of employees and of beneficiaries under the Plan. The trustee was to follow directions given by the company. The company also had the right to terminate the Trust agreement (art. V(2)).

25 Rogers purported to amend the Plan to give itself the right to the surplus in 1992, but the Court of Appeal found (*Buschau* #1, at para. 59) that the amendments had not affected the members' rights; its judgment in that case is now binding on the parties.

26 Thus, neither the Trust agreement nor the Plan provides for termination of the Trust by employees. The members consequently rely on the rule in *Saunders v. Vautier*. Does it apply? Like my colleague Bastarache J., I conclude that it does not. My reasons are slightly different, however.

VI. Non-Application of the Rule in *Saunders v. Vautier*

27 There are many reasons why the rule is not easily incorporated into the context of employment pension plans.

28 First, pension plans are heavily regulated. The P.B.S.A. regulates the termination of a plan and the distribution of the fund and the trust assets. I accept the following comment of the Court of Appeal (*Buschau* #2, at para. 47):

> It must be acknowledged that the application of the rule in *Saunders v. Vautier* to pension trusts does involve different and more complicated factors, financial and legal, than an ordinary legacy or gift in trust. As

> already noted, pension trusts are part of the complex of rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

However, the Court of Appeal's order (*Buschau* #3) defies the application of the P.B.S.A. because it allows for the operation of the rule in *Saunders v. Vautier* without regard to the obligations to report to the Superintendent and to provide for the payment of pension benefits before distribution of the trust fund. The P.B.S.A. deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule. To the extent that it provides a means to reach the distribution stage, the P.B.S.A. prevails over the traditional rule in *Saunders v. Vautier*.

29 Second, a family or testamentary trust is generally a stand-alone instrument. It does not usually depend on any other instrument for its operation. No indirect effect results from the application of the rule in *Saunders v. Vautier* in such cases. In contrast, a pension trust serves only as a vehicle for holding and managing the funds required by the pension plan. In the instant case, the Trust agreement is expressly "made a part of the Plan" (art. I(1)) and the Plan is attached to that agreement (preamble to the Trust agreement). The Trust agreement is therefore dependent on the Plan for which it was created. The Premier Trust cannot be collapsed without regard to the Plan itself. The two instruments are therefore indissociable. This particular situation was not dealt with in *Schmidt*, which focussed on the distribution of trust assets, not the termination of a trust agreement that had been expressly made part of a Plan. In the case at bar, despite the link between the Plan and the Trust agreement, the judgment of the Court of Appeal purports to authorize the members to resort to the rule in *Saunders v. Vautier*, but does not provide for termination of the Plan . And yet, termination of the Plan in accordance with the prevailing P.B.S.A. is a condition precedent to distribution. This awkward juridical status illustrates why the common law rule is not an easy fit in the pension law context.

30 Third, employers establish plans because it is in their interest to do so. Under normal circumstances, they have the right not to have their management decisions disturbed. In contrast, the common law trust allows no room for the settlor's interest. Although the particular circumstances of this case may lead to the conclusion that the employer no longer has a legitimate interest in the continuation of the Plan, a blanket statement that the employer has no interest conflicts with the usual expectations of parties to a pension plan.

31 Fourth, gift or legacy trusts are gratuitous, and accelerating the date of the beneficiaries' entitlement has no broad social consequences. Pension trusts funds, however, are no longer generally viewed as being gratuitous: either employees contribute directly or their entitlement is regarded as remuneration deferred until the date of their retirement. The capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die.

32 Thus, this case amply demonstrates the difficulties associated with applying the rule

in *Saunders v. Vautier* to a pension trust. The Court of Appeal issued an order stating that the members were at liberty to invoke the rule in *Saunders v. Vautier*. All the reporting and approval mechanisms that must precede termination by virtue of the P.B.S.A. were disregarded. They were treated as issues relating merely to "mechanics" (*Buschau* #3, at para. 17). According to the Court of Appeal, the Premier Trust may be collapsed without regard to its purpose of providing a means to defer income. No order was made to provide for annuities as required by the P.B.S.A. Moreover, while the Court of Appeal held that the Premier Trust may be terminated pursuant to the rule in *Saunders v. Vautier*, no corresponding provision was made for terminating the trustee's obligations to the members under the merged RCI Plan.

33 I therefore conclude that the impediments to applying the rule in *Saunders v. Vautier* are numerous. The rule is not easily applicable to pension trusts and not even the length of time elapsed since the beginning of the proceedings can allow the members to bend the rule to fit it to their case. I do not exclude the possibility that the common law rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general the fit is wrong. The conclusion that the common law rule does not generally apply to traditional pension funds is reinforced by the fact that the P.B.S.A. provides mechanisms that protect members from inappropriate conduct by plan administrators. Since my colleague Bastarache J. does not share my opinion on this point, I feel that I should elaborate on it.

VII. Members' Recourse

34 I have already noted that neither the Plan nor the Trust agreement grants members a direct right to terminate the Plan. There is a reason for this. Historically, employers created plans for their own purposes, without much input from employees. Of course, plans benefited employees, but they were essentially human resources management tools. Where possible, employers stated terms that allowed them to control the operation of the plans, thereby protecting their interests. Employer control is tempered, in a unionized context, by undertakings resulting from collective agreements and, outside of the collective bargaining context, by individual contracts of employment. However, wording reserving the employers' right to terminate is still common. A plan is also seen as being, if not a permanent instrument, at least a long-term one. However, the participation of any individual member is ephemeral: members come and go, while plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing plan, a single group of employees should not be able to deprive future employees of the benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. However, they are not left without recourse should the employer infringe the P.B.S.A. or their plan. They can alert the Superintendent and trigger action if and when required.

35 The P.B.S.A. is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the P.B.S.A. When asked to submit representations on the remedies afforded by the P.B.S.A., the members took the position that the remedy afforded by the statute could not cover all their claims. They also stated that the Superintendent could have intervened on his own.

36 This answer is not satisfactory. The members wanted the Trust fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*. As mentioned above, however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum. Moreover, the members' position is not compatible with the P.B.S.A. and it puts them at risk of attracting undesirable tax consequences (*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56(1), 146(8), 147.1(11) and (13); *Income Tax Regulations*, C.R.C. 1978, c. 945, ss. 8501(1) and 8502). Also, the Superintendent can hardly be expected to be familiar with details of the management of a particular pension plan. The members could have asked him to step in.

37 A clear illustration of the Superintendent's potential role can be found in the facts that gave rise to the members' original action. In 1985, the trustee, at Rogers' request, transferred close to $1 million to Rogers out of the Plan's Trust fund. Rogers eventually acknowledged that the transfer was improper and reimbursed the amount in the course of that initial proceeding. However, the members could have asked the Superintendent to exercise his powers under the P.B.S.A.

38 Under s. 8(3) of the P.B.S.A., plan members can object to an administrator's conduct if it is in breach of its fiduciary duty to them. Also, under s. 8(10), an employer who is an administrator is forbidden to put itself in a material conflict of interest. The Superintendent could have directed Rogers to return the money to the Trust (s. 29(11) and s. 11(1) of the P.B.S.A.).

39 Here, the members claim to be entitled to distribution of the surplus. For them to be entitled to distribution, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the Superintendent could order a distribution if he were faced with circumstances falling within the parameters of the P.B.S.A.

40 Is that the case? I mentioned earlier that clauses allowing employers to control terminations are common. However, the traditional pension plan analysis does not apply in the instant case. Rogers conceded that the 1992 amendments entitling it to any surplus on termination were "invalid as against the [members]" (*Buschau* #1, at para. 38). The Court of Appeal found (*Buschau* #1, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau* #1 is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau* #1 limit Rogers' rights to use it.

41 One circumstance that could justify delaying the termination of the Plan (as incompletely merged with the RCI Plan) and the incidental distribution of the Premier Trust fund would be if Rogers had a right to amend the Plan to open it to new members. However, the possibility of reopening the Plan is problematic and has been commented on by the courts below.

42 In the second action, the chambers judge interpreted the Court of Appeal's

conclusion in *Buschau* #1concerning the distinct right of the Plan members to the surplus as preventing Rogers from using its power to amend the Plan to reopen it to new members. Dealing with Rogers' argument that the rule in *Saunders v. Vautier* could not apply because it had the right to amend, the chambers judge found, in her 2002 reasons, that Rogers could not use its amending power to do what it could not do through a merger (at para. 29):

> The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to re-opening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

43 The Court of Appeal left this finding undisturbed (*Buschau* #2, at para. 61):

> The particular circumstances of this case make it impossible in my view that RCI could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time RCI gave any thought to re-opening ... was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other RCI employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by RCI some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust - the purported "merger" of the Plan with other plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the employer would be required to account to the existing Members as if the Plan had not been re-opened.

44 If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau* #1, the matter is best left to the Superintendent.

45 The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members.

46 If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the P.B.S.A.

47 The Superintendent could consider the Plan terminated because all contributions ceased in 1984. He could find that this cessation is, in the circumstances, a *termination* as that word is defined in the P.B.S.A.:

> **2.** (1) In this Act,
>
> ...
>
> "termination", in relation to a pension plan, means the cessation of crediting of benefits to plan members generally; and includes the situations described in subsections 29(1) and (2);

According to the guidelines issued by the Office of the Superintendent, winding up must not be delayed without the Superintendent's consent, and the administrator wanting to manage the fund is not an acceptable reason for delay. Moreover, the trust Fund, according to its terms, must be administered for the benefit of the employees and the beneficiaries, not the employer.

48 It is up to the Superintendent to decide whether the circumstances surrounding the cessation of the contribution make the definition of "termination" mentioned above applicable and whether the delay in winding up is justified (s. 11.1).

49 If the cessation is a termination and if the delay is not justified, the Superintendent can direct that the plan be wound up in part in accordance with s. 29(11), which reads as follows:

> **29**...
>
> (11) Where the whole of a pension plan has been terminated and the Superintendent is of the opinion that no action or insufficient action has been taken to wind up the plan, the Superintendent may direct the administrator to distribute the assets of the plan in accordance with the regulations made under paragraph 39(*j*), and may direct that any expenses incurred in connection with that distribution be paid out of the pension fund of the plan, and the administrator shall forthwith comply with any such direction.

50 It is also possible that the Superintendent could exercise his power of termination. Section 29(2) provides as follows:

> **29**...

(2) The Superintendent may declare the whole or part of a pension plan terminated where

(*a*) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;

51 Obviously, not every cessation of contributions will result in a direction by the Superintendent. Such a direction is not, however, restricted to cases in which the trust fund no longer meets the solvency requirements. The Superintendent's power in relation to solvency issues is governed by s. 29(2)(*c*), which reads as follows:

> the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1) [proper funding].

Since s. 29(2)(*c*) deals with solvency requirements, s. 29(2)(*a*) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.

52 Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(*a*) power.

53 Most of the facts that the members presented to the courts in their quest to have the rule in *Saunders v. Vautier* applied could have been submitted to the Superintendent. I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward-looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. The provisions of the P.B.S.A. and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.

54 Rogers argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(*a*), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(*c*), a provision that deals solely with solvency issues.

55 The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P-8 (s. 69(1)(a)), similar to s. 29(2)(*a*) of the P.B.S.A., that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Court of Appeal for Ontario affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, ftn. 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 [*Pension Benefits Act*] 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.

56 I agree with the Court of Appeal for Ontario, and it is my view that the Superintendent's power under s. 29(2)(*a*) of the P.B.S.A. becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purpose of the provisions of the P.B.S.A.

57 In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties.

58 Although the appeal is allowed, Rogers' arguments have not prevailed. As a result, the members should not be required to pay Rogers' costs. In addition, Rogers should bear the trustee's costs. The Court of Appeal's order as to costs should however be left undisturbed.

59 For these reasons, I would allow the appeal, order Rogers to pay National Trust's costs in this Court and set aside the order of the Court of Appeal with the exception of the order as to costs, which I would affirm.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

BASTARACHE J.:--

1. <u>Introduction</u>

60 This appeal concerns a decision of the British Columbia Court of Appeal holding that the respondents Sandra Buschau et al. ("respondents") are entitled to terminate an ongoing employee pension trust by invoking the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), a 19th century doctrine that arose in connection with the postponement of gifts in private trusts. The rule was considered by this Court in *Halifax School for the Blind v. Chipman*, [1937] S.C.R 196, where, at p. 215, in concurring reasons (for himself and Rinfret J.), Crocket J. addressed the origins and rationale of the rule in these terms:

> It is true that in *Saunders v. Vautier*, *Gosling v. Gosling*; *Wharton v. Masterman*, and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime. ...
>
> Various reasons have been ascribed for its [the rule's] establishment. Lindley, L.J., in *Harbin v. Masterman*, which went to the House of Lords on appeal under the name of *Wharton v. Masterman*, above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:
>
>> Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. ...
>
>> Herschell, L.C. said:
>
>> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.
>
>> Lord Davey said:
>
>> The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against

> the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. [Footnotes omitted.]

61 The Court of Appeal relied on the judgment of this Court in *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, as holding that the rule in *Saunders v. Vautier* was applicable to pension trusts, based on the finding in *Schmidt* that pension trusts are "classic" trusts which are subject to "all applicable trust law principles" ((2004), 24 B.C.L.R. (4th) 85, 2004 BCCA 80 ("*Buschau #2*"), at para. 52). The appellant employer, Rogers Communications Inc. ("RCI"), now appeals that decision of the Court of Appeal, arguing that the respondents cannot invoke the rule in *Saunders v. Vautier* to terminate the pension trust. The respondents' purpose in seeking to terminate the pension trust was to crystallize and obtain the actuarial surplus, to which they would not otherwise be entitled unless the pension plan was terminated in some other way, such as by the employer pursuant to the terms of the plan. A previous decision of the Court of Appeal had determined that despite the amendments to the trust made by RCI, the respondents retained the right to any actual surplus upon termination (see *Buschau v. Rogers Cablesystems Inc.* (2001), 83 B.C.L.R. (3d) 261, 2001 BCCA 16 ("*Buschau #1*"). It should also be noted that the pension plan itself provided that any surplus remaining upon termination after payment of the defined benefits would be distributed among the plan members.

62 The decision of the Court of Appeal also raises questions regarding the nature and content of an employer's obligation of good faith in a pension plan setting. In particular, it asks to what extent an employer is entitled to act in its own interests in the administration of a pension plan, consistent with its obligation to act in good faith. In *Buschau #2*, the Court of Appeal held that RCI's good faith obligation would preclude an amendment to re-open the Rogers Communications Inc. pension plan ("RCI Plan"), which was closed to new members in 1984.

63 National Trust Co., trustee of the pension trust under consideration in the main case (the "Trust"), also appeals the Court of Appeal's decision. It asks this Court to overturn the order made in the supplementary reasons of the Court of Appeal issued on May 18, 2004, wherein that court ordered National Trust to "turn ... over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners" ((2004), 27 B.C.L.R. (4th) 17, 2004 BCCA 282 ("*Buschau #3*"), at para. 16). National Trust argues that the effect of the decision of the Court of Appeal is to devolve upon it the authority and legal responsibility to give effect to and administer the termination of the Trust, an authority it says it does not possess under the terms of the RCI Plan or any applicable statute. National Trust argues that it is in no position to reconcile the decision of the court with the various legislative standards and requirements applicable to the termination of the Plan and Trust. It asks this Court to reverse the decision to impose on it duties and responsibilities it is not authorized to undertake pursuant to the Trust agreement, such duties and responsibilities belonging to the employer RCI or the Superintendent of Financial Institutions ("Superintendent"), pursuant to the applicable legislation and/or the terms of the Plan.

2. Background

64 RCI and respondents both provided a description of the events leading to the present appeal to establish the factual background for dealing with this case. I reproduce here the essence of their descriptions. It must be noted however that there is some disagreement concerning, in particular, the actual number of members in the Plan and the role played by the trustee National Trust, also an appellant.

65 The corporate predecessor of RCI established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

66 Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

67 Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

68 The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: *Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125. On January 11, 2001, the Court of Appeal upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see *Buschau #1*). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal,

I would note at the outset that the court's finding in *Buschau #1* that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, *inter alia*, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the plan "so they can obtain the necessary consents to terminate the Plan" ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624, at paras. 12 and 33).

71 On January 7, 2003 the respondents came to court with consents executed by the 144 members of the plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act.*

72 In reasons issued on May 1, 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683), Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

73 Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, 2004. She held, at paras. 11 and 22 of *Buschau #2*, that:

(a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;
(b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;
(c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;
(d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances of this case, be taken in good faith by this employer *vis-à-vis* the existing beneficiaries".

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in *Buschau #3*, the court held that the appeal should be allowed but made, *inter alia*, the following orders:

> THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;
>
> THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;
>
> THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;
>
> ...
>
> THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members. (RCI's factum, at para. 24).

77 The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (*Buschau #3*).

78 At the hearing of this appeal on November 15, 2005, this Court requested that the parties provide further written submissions regarding the interface between the rule in *Saunders v. Vautier* and the P.B.S.A. This decision followed a discussion between various members of the Court and counsel concerning possible conflicts between the rule in

Saunders v. Vautier and the P.B.S.A. I might also add that the same concerns had been raised by National Trust in its factum.

3. Analysis

79 The P.B.S.A. is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers upon their withdrawal from the active workforce. The P.B.S.A., together with the *Pension Benefits Standards Regulations, 1985*, SOR/87-19, facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.

80 Within this comprehensive scheme, s. 29 and the regulations enacted in relation thereto contain detailed provisions for the termination of pension plans and the distribution of plan assets.

81 Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, as expressed in most plan documents, including the Plan at issue here. This right is recognized in s. 29(5) of the P.B.S.A., which refers to the intention of a plan administrator (who in most cases will be the employer) to terminate a pension plan. But the Superintendent is also given power to terminate pension plans in other certain specified situations. He has the power to revoke a pension plan's registration for failure to comply with directions (s. 11.1). Directions of compliance can be issued where the Superintendent is of the opinion that an administrator or employer is acting in a manner "contrary to safe and sound financial or business practices" (s. 11(1)), or that a pension plan, or the administration of a pension plan, is not compliant with the P.B.S.A. or regulations (s. 11(2)). If registration is revoked, a plan is deemed to have been terminated (s. 29(1)).

82 In addition to deemed termination in consequence of the revocation of a plan's registration, s. 29(2) stipulates three other situations in which the Superintendent has power to directly order the termination of a plan. The Superintendent may exercise this power when there has been: a) cessation or suspension of employer contributions; b) discontinuance of the employer's business operations; or c) the employer's failure to fund the plan in accordance with prescribed standards of solvency. In each case, the power is directed to circumstances in which the security of the promised pension benefits is threatened.

83 This is consistent with the statute governing the Office of the Superintendent which states that the objects of the Office, in respect of pension plans, are: a) to supervise pension plans in order to determine if they meet minimum funding requirements or are complying with the other requirements of the legislation; b) if not, to advise the administrator and take, or advise the administrator to take, necessary corrective measures; and c) to promote the adoption by administrators of policies and procedures designed to control and manage risk (see the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I). It is apparent from the statutory objects of the Office that the supervisory focus of the Superintendent is primarily on matters affecting the

solvency or financial condition of pension plans. It is worth noting here that National Trust invokes the P.B.S.A. in its appeal, arguing at para. 70 of its factum that "[t]he judgment of the British Columbia Court of Appeal turns this statutory scheme on its head and places the Trustee in the role that by statute has been assigned to the administrator and to the Superintendent".

84 There is no provision in the P.B.S.A. for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the P.B.S.A. for any party (employer, administrator, trustee, Superintendent, plan members or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the plan. Beneficiaries may request that the Superintendent exercise his discretionary power under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.

85 "[T]ermination" in relation to a pension plan is defined in the P.B.S.A. as the cessation of the crediting of benefits to plan members generally (s. 2(1)). Termination of a pension plan is distinguished from "winding-up" which refers to the distribution of the assets of a terminated pension plan. The P.B.S.A. provides that the pension fund assets are only to be distributed after the Superintendent approves a report filed by the plan administrator on the termination of a plan. The report must set out the nature of the benefits to be provided under the plan and describe the methods of allocating and distributing those benefits (s. 29(9) and (10)).

86 A major issue in this appeal is whether termination of the Plan must logically precede the termination of the Trust. According to RCI, the judgment of the British Columbia Court of Appeal reverses the legislative scheme by permitting the beneficiaries of the Premier Plan to terminate the Trust and distribute the Trust assets, which were being held as security for the pension benefits accruing under the Plan, outside the legislative scheme and prior to the termination of the pension Plan itself. It argues at para. 18 of its supplemental factum that:

> In enacting the *PBSA, 1985*, Parliament intended to devise a comprehensive scheme for dealing with issues of pension plan regulation, including the circumstances of their termination and the winding up and distribution of assets held in pension funds. If it had contemplated granting additional rights to plan members to act on their own initiative to terminate pension trusts and distribute plan assets, it would have done so.

87 It would appear that none of the statutory grounds for termination of a pension plan are present in this case. The Premier Plan is fully funded and there is no threat to the solvency of the plan or the security of the pension benefits. There is no issue that the RCI Plan is being administered in a manner contrary to safe and sound financial or business practices, nor of non-compliance with the requirements of the legislation.

88 RCI has suspended contributions to the Plan. However, these contribution holidays are authorized by the terms of the Plan and have been approved by the courts. The reference to "suspension or cessation of employer contributions" in s. 29(2)(*a*) of the P.B.S.A. must be construed as referring to situations where an employer does not make required contributions. It does not extend to contribution holidays where the employer is relieved from making contributions by reason of a surplus in the plan.

3.1 *The Applicability of the Rule in Saunders v. Vautier*

89 RCI recognizes that there may be circumstances in which it is appropriate to apply common law trust principles to resolve issues regarding pension plans which have not been directly addressed in the legislation. I agree. This was the approach taken in *Schmidt* with respect to the question of ownership of surplus on termination of a pension plan. In that case, it was acknowledged that there was a gap in the legislation and the provisions of the statute did not provide guidance on this issue. However, RCI argues that, in the present case, s. 29 contains detailed provisions regarding the circumstances and manner in which pension plans may be terminated. RCI concludes that the legislation has "occupied the field" on this issue and there is no room for the operation of a common law rule.

90 Pension trusts are not the same as traditional trusts, as stated by the Court of Appeal at paras. 1-2 in *Buschau #1*. In employment pension trusts, there is a legal relationship between the parties apart from the trust and continuing obligations on the part of the administrator. In the present case, in view of its very terms (see General Rule 7.2), there is no entitlement to an actuarial surplus while the Plan is ongoing. As stated by the Court of Appeal, the Trust Agreement and the Plan form an "integrated whole" (*Buschau #2*, at para. 13). Moreover, this is a defined benefit plan, i.e., a plan that is entirely funded by the employer, where members have an equitable interest in the trust assets, a right *in personam* against the trustee to require proper administration of the trust assets, and a contingent interest to the trust assets existing on plan termination if they are alive and members at the date of termination. The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract clearly contemplated a continuing Plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan; in the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus, which does not vest until the Plan is terminated. This is reinforced by the statement in *Schmidt*, at p. 655: "When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries" (emphasis added) (see also p. 654). As a result, the

rule in *Saunders v. Vautier* cannot be invoked here, since the rule requires that the beneficiaries seeking early termination possess the sum total of vested, not contingent, interests in the trust *corpus*: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 1178. The question then is whether termination of this Plan can occur outside the boundaries of the P.B.S.A. The Court of Appeal reasoned that *Schmidt* had implicitly accepted that the rule in *Saunders v. Vautier* could apply independently of the P.B.S.A. and of any contract. The real question is whether trust law can in effect prevail over the contract and governing legislation in the present case (*Buschau #2*).

91 It is important to take note of the terms of the Plan and Trust documents. As I have previously stated, these are not distinct. The terms of the Plan are very specific and somewhat atypical of plans adopted in later years. In particular, art. V of the Trust Agreement reserves to the employer

> ... the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the Plan (including [the Trust] Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the [Trust] to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan ... .

General Rule Five permitted, but did not oblige, the employer to allocate additional pensions or pension entitlements to Plan members, retired or otherwise, if the Plan had an actuarial surplus. General Rule Six permitted members to designate a beneficiary, and to alter or revoke that designation within the bounds of the law. General Rule Seven gave the employer the right to amend, modify or change the Plan, provided that the changes did not affect certain of the members' rights or benefits. It also gave the employer the right to terminate the Plan if necessary. It went on to say:

> In the event of the termination of the Plan, the benefits being paid to Retired Members will be continued as provided for under the terms and provisions of the Plan. The balance of the assets remaining in the Trust Fund, after all liabilities to Retired Members have been satisfied, will be distributed by the Committee among the remaining Members on the basis required under the provisions of Section 12 of the Pension Benefits Standards Act.

92 The Plan clearly states then that it is the employer who may amend and terminate the Plan and that it is the employer's expectation that the Plan and Trust will continue indefinitely. In such circumstances, there could be no reasonable expectation on the part of RCI or the members that the Trust could be terminated by the members, over RCI's objections, in order that the members might obtain the surplus. The application of the rule in *Saunders v. Vautier* would contradict the reasonable contractual expectations of the

parties because beneficiaries who can collapse a trust under *Saunders v. Vautier* can, with the consent of the trustees, collectively agree to vary its terms. The rule would permit members of a pension plan to unilaterally vary its terms without the employer's consent.

93 It is also very important to consider the legislative context in which modern pension plans operate. It would appear that, in her 2003 decision, Loo J. disregarded the provisions of the P.B.S.A. regarding termination, but applied the *Trust and Settlement Variation Act* where it was necessary to circumvent the difficulty in obtaining all consents necessary under the rule in *Saunders v. Vautier.* In *Buschau #3*, the Court of Appeal noted that the rule in *Saunders v. Vautier* could result in the termination of the Plan if all of the preconditions of the rule were met, without regard for the legislative scheme and in particular s. 29(9) which provides that on termination of a plan, the administrator must file a report with the Superintendent

> ... setting out the nature of the pension benefits and other benefits to be provided under the plan and a description of the methods of allocating and distributing those benefits and deciding the priorities in respect of the payment of full or partial benefits to the members.

94 This means that the rule in *Saunders v. Vautier* would permit the termination of the pension Plan and Trust without the involvement of the employer as Plan administrator and without the approval of the Superintendent. The only logical explanation for this conclusion is that the Court of Appeal had accepted that the Trust was independent of the Plan and could be dealt with solely by reference to the Trust itself, notwithstanding, in particular, that the P.B.S.A. (and the terms of the Plan, at art. 9.3) provided special protections for spouses and common law partners. The terms of the Plan could be totally disregarded. At para. 54 of its reasons in *Buschau #2*, the Court of Appeal seems to accept that the Trust and the Plan constitute an "integrated whole", but nevertheless concludes that this whole is subject to trust law principles and to the resulting "disappearance" of the employer's rights and powers on the sole initiative of the Plan members. This is very different from the decision to apply the rule only where there is no conflict with the legislative scheme as in *Schmidt*. In my view, the unique role of the employer in respect of the pension Plan and pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented; as well, the legislative framework cannot be made irrelevant by applying the rule in *Saunders v. Vautier.*

95 In the context of the appeal brought by National Trust, particular regard must be given to s. 8(3) of the P.B.S.A., which states:

> 8. ...
>
> (3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

It is clear that a court has no authority to assign to National Trust the responsibilities of the administrator and of the Superintendent contrary to the legislative scheme which has determined a process to terminate a pension plan. But here I believe the Court of Appeal was defining a role for National Trust in light of the distinction it had made between the termination of the Plan and the termination of the Trust, only the former being subject to the terms of the Plan and provisions of the P.B.S.A.

96 The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54, at para. 38, modern pension statutes are public policy legislation that recognize the "vital importance of long-term income security". The "locking-in" provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security. This is not consistent with the operation of the rule in *Saunders v. Vautier*, as applied by the Court of Appeal in this case, which is based on an entirely different policy objective.

97 The introduction of the *Saunders v. Vautier* principle without qualification or restriction into the private pension system would constitute a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan. An employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer's business interests. In these circumstances, the "fair and delicate balance between the employer and employee interests" (*Monsanto Canada*, at para. 24) will be disrupted in a manner which is contrary to the legislative objective of encouraging the establishment and maintenance of private pension plans.

98 The rule in *Saunders v. Vautier* requires the consent of all parties who have an interest, or who own rights of enjoyment, in the trust property. The Court of Appeal held that the rule could be applied with the consent of all members (by which they surely meant to include former members) of the Premier Plan and those persons who are now designated beneficiaries (*Buschau #2*). But s. 22 of the P.B.S.A. requires that, absent a written waiver in prescribed form, any pension benefit paid after January 1, 1987 to a member or former member who has a spouse or common law partner on the date that the first payment is made shall be a joint and survivor pension benefit, entitling the surviving spouse to a benefit of at least 60 percent of the joint benefit. This requirement is reflected in the terms of the Premier Plan (art. 9.3). The inclusion of survivor benefits was a policy choice of the Legislature that must be honoured. These statutory rights cannot be overridden by the consent of present Plan members and other beneficiaries or by the courts. Nor can s. l(b) of the *Trust and Settlement Variation Act* assist. The current spouses and common law partners who have a present contingent interest are *sui juris*. As such, they could give their consent to termination of the Plan, and the court does not have the power to consent on their behalf unless they are legally incapacitated.

99 As for the interests of future possible spouses and common law partners, whose consent would also be required for termination pursuant to *Saunders v. Vautier*, those interests are more problematic in that their direct consent cannot be obtained, and asking a court to consent on their behalf would raise serious questions. RCI notes at para. 37 of its supplementary factum that, "the court may only consent on behalf of a beneficiary if the proposed trust variation is in the interests of that party. It is difficult to conceive of a circumstance in which termination of a pension trust would be in the interests of future spouses or common law partners". Consenting to the termination of the Plan on behalf of future unascertainable spouses and common law partners would presumably not be in their best interests. If Plan members who are not currently married or in a common law relationship were allowed to terminate the Plan and obtain the surplus, but were then to enter into a marriage or common law relationship in the future, their future spouses or common law partners would not enjoy their statutory right to the joint and survivor benefit to which they would have been entitled had the Plan been ongoing and not terminated. Thus, even if this was sufficient, valid consents to termination of the Plan in order to satisfy the pre-conditions of the *Saunders v. Vautier* rule have not been and cannot be obtained from all possible beneficiaries here; more importantly, while the current spouses and common law partners of Plan members are able to consent to termination, future spouses and common law partners who are currently unascertainable cannot give such consent, and a court would likely be reluctant to give its consent on their behalf.

100 For these reasons, I would conclude that the rule in *Saunders v. Vautier* does not apply in the circumstances of this case and that any application regarding the termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the P.B.S.A. The respondents' suggestion that the absence of a procedure in the P.B.S.A. permitting a unilateral termination of the Plan by the members justifies the action under the rule of *Saunders v. Vautier* cannot be accepted. The rule simply does not apply. Members' rights are determined by the Plan itself and the P.B.S.A.; as indicated above, neither the terms of the Plan itself nor the provisions of the P.B.S.A. grant the members a right to terminate the Plan. The unilateral right of members to terminate the Plan simply does not exist in this case.

3.2 *The Issue of Good Faith*

101 The Court of Appeal decided, at para. 61 of its reasons in *Buschau #2*, that the obligation of good faith of the employer precluded RCI from adopting any amendments to the Plan and Trust opening it to new members following its closure in 1984; it related this to what it termed the "stratagem" adopted by RCI years earlier to benefit from the actuarial surplus by merging different pension plans. The Court of Appeal then continued with a discussion of the employer's "interest" in the Plan and Trust.

102 It is quite obvious that the whole discussion concerning good faith had to do with fair conduct as administrator of the Plan. RCI insists that there is nothing uncommon about closed pension plans or the decision to rationalize funding and the provision of benefits after mergers. In its view, the proposed creation of an integrated pension scheme was a rational business decision that should not raise any issue regarding good faith when done within the parameters of the Plans's terms. RCI says there is no stratagem, only the

exercise of a power to amend in the context - and this is fundamental - of a defined benefit plan. RCI says that "the analysis of good faith in respect of the exercise of a discretionary power in a contractual context begins with a careful consideration of the parties' reasonable contractual expectations" (factum, at para. 75). It is a prohibition against acting in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" unless the employer has "reasonable and proper cause" (para. 80, quoting *Imperial Group Pension Trust v. Imperial Tobacco Ltd.*, [1991] 2 All E.R. 597 (Ch. D.), at p. 606). The respondents reject the contractual perspective and say that nothing done by the employer should affect or dilute their entitlements under the Plan; equitable principles should apply. I do not consider it necessary to arbitrate this debate. Section 8(10) of the P.B.S.A. provides sufficient guidance. The special context of pension plans requires employers who administer pension plans on behalf of their employees to always act in accordance with the spirit, purpose and terms of the pension plan; employers must always act in such a way as to ensure the protection of employees' pension benefits, not in a way that would reduce, threaten or eliminate them (see *Imperial Group*).

103 It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier.* I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier*. But of course the parties could not ignore the Court of Appeal's decision in *Buschau #1*. As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning is however driven by the idea that the Plan members were promised more than their pensions under the Plan, i.e., the right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation. I am of the view that RCI's powers of amendment were not forfeited or estopped because of the closure of the Plan. Any termination of the Plan and amendments to it must be examined on the basis of its terms and conditions, in consideration of the applicable provisions of the P.B.S.A. What would constitute an abuse of the employer's power or would otherwise offend community standards of reasonableness in the contemplated use of the Premier Plan assets for the benefit of present and future employees of RCI must be determined on that basis alone. In essence then, what is permitted and what is abusive will have to be determined in future proceedings according to the standard set in s. 8(10)(*b*) of the P.B.S.A. which states that "where the employer is the administrator pursuant to paragraph 7(1)(*c*), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer ... (*b*) shall act in the best interests of the members of the pension plan".

4. Disposition

104 The appeal is allowed and the order of the Court of Appeal is set aside with costs in

all courts to RCI and in this Court to National Trust.

Solicitors:

Solicitors for the appellant/respondent Rogers Communications Inc.: Nathanson, Schachter & Thompson, Vancouver.

Solicitors for the appellant/respondent National Trust Co.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondents Sandra Buschau et al: Laxton & Company, Vancouver.

* * * * *

Corrigendum, released June 23, 2006

Please note the following changes in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, released June 22, 2006. At the end of para. 76 of the English version, a citation should be added. The end of the paragraph should read: "... for the Premier Plan members (RCI's factum, at para. 24).

cp/e/qw/qlplh/qlhbb

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Lomas v. Rio Algom Limited et al.

[Indexed as: Lomas v. Rio Algom Ltd.]

99 O.R. (3d) 161

2010 ONCA 175 (CanLII)

Court of Appeal for Ontario,
Gillese, Blair and MacFarland JJ.A.
March 10, 2010

Pensions -- Winding up -- Court not having jurisdiction to make order compelling employer to commence proceedings to wind up pension plan pursuant to s. 68(1) of Pension Benefits Act -- Pension Benefits Act, R.S.O. 1990, c. P.8, s. 68(1).

The applicant, a former employee of the respondent and contributing member of the respondent's employee pension plan, brought an application for an order winding up the pension plan or directing the respondent to make an application under s. 68 of the Pension Benefits Act for the partial winding up of the pension plan. The respondent brought a motion to strike the paragraphs of the notice of application in which those remedies were requested as disclosing no reasonable cause of action. Before the motion was heard, the Supreme Court of Canada released its decision in Buschau v. Rogers Communications Inc. Based on Buschau, the motion judge found that the court did not have jurisdiction to order the wind up of the pension plan directly. The claim for a court-ordered wind up was struck. However, he found that Buschau did not preclude the court from ordering an employer to commence wind up proceedings pursuant to s. 68(1) of the PBA. The balance of the motion was dismissed. The majority of the Divisional Court affirmed the motion judge's ruling. The respondent appealed.

Held, the appeal should be allowed.

The Divisional Court erred in finding that Buschau did not address the issue of the court's jurisdiction to compel an employer which has been found to be in breach of its obligations to commence wind up proceedings under the PBA. In Buschau, the Supreme Court makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to (1) the societal purposes for which pension plans exist; (2) the scheme of the legislation that governs pension plans; and (3) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan. Ordering an employer to commence wind up proceedings under s. 68 of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, it is plain and obvious that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members. Moreover, such an order would run contrary to the legislative provisions governing the wind up of private pension plans in Ontario. If the Superior Court of Justice were to order the respondent to commence wind up proceedings, it would violate the PBA and the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 and amount to an unauthorized usurpation of the authority delegated to the superintendent of financial services and the Financial Services Tribunal.

Cases referred to

Bushau v. Rogers Cablesystems Inc., [2001] B.C.J. No. 50, 2001 BCCA 16, 195 D.L.R. (4th) 257, [2001] 2 W.W.R. 56, 148 B.C.A.C. 263, 83 B.C.L.R. (3d) 261, 10 B.L.R. (3d) 13, 26 C.C.P.B. 47, 36 E.T.R. (2d) 10, 102 A.C.W.S. (3d) 223 [Leave to appeal to S.C.C. refused [2001] 2 S.C.R. vii, [2001] S.C.C.A. No. 107]; Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28, 2006 SCC 28, 269 D.L.R. (4th) 1, 349 N.R. 324, [2006] 8 W.W.R. 583, J.E. 2006-1309, 226 B.C.A.C. 25, 54 B.C.L.R. (4th) 1, 52 C.C.P.B.

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161, 26 E.T.R. (3d) 1, 148 A.C.W.S. (3d) 483, EYB 2006-106843, apld [page162]
Gaydon (Re), [2001] NSWSC 473 (Aus.); Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690, [1995] O.J. No. 3035, 34 Admin. L.R. (2d) 51, 58 A.C.W.S. (3d) 398 (Gen. Div.); Saunders v. Vautier (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.); Westfield Queensland No. 1 Pty Ltd. v. Lend Lease Real Estate Investments Ltd., [2008] NSWSC 516 (Aus.), consd

Other cases referred to

Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, 152 D.L.R. (4th) 411, 219 N.R. 323, J.E. 97-2034, 66 Alta. L.R. (3d) 241, 206 A.R. 321, 35 B.L.R. (2d) 153, 47 C.C.L.I. (2d) 153, 19 E.T.R. (2d) 93, 74 A.C.W.S. (3d) 898; Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961, 158 D.L.R. (4th) 497, 114 O.A.C. 170, 37 C.C.E.L. (2d) 69, 78 A.C.W.S. (3d) 170 (C.A.) [Leave to appeal to S.C.C. refused [1998] 2 S.C.R. vii, [1998] S.C.C.A. No. 206]; Hermann Loog v. Bean (1884), 26 Ch. D. 306 (C.A.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 23 A.C.W.S. (3d) 101; Lomas v. Rio Algom Ltd., [2006] O.J. No. 5122, 57 C.C.P.B. 315, 154 A.C.W.S. (3d) 213 (S.C.J.) [Leave to appeal granted [2007] O.J. No. 5287 (Div. Ct.)]; Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, 2009 SCC 39, 309 D.L.R. (4th) 513, EYB 2009-162383, J.E. 2009-1510, 391 N.R. 234, 49 E.T.R. (3d) 159, 76 C.C.P.B. 1, 76 C.C.E.L. (3d) 55, 92 Admin. L.R. (4th) 203, 253 O.A.C. 256; PDC 3 Limited Partnership v. Bregman + Hamann Architects (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422, 140 O.A.C. 302, 12 B.L.R. (3d) 215, 8 C.L.R. (3d) 167, 103 A.C.W.S. (3d) 231 (C.A.)

Statutes referred to

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, ss. 2, 3, 5 [as am.], (2) [as am.], 20

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Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 3, 18, 68, (1), (2), 69(1) [as am.], 70, (1), (2), 71, 72 [as am.], 73, 74, 75 [as am.], 75.1, 76, 89(1), (2) [as am.], (3), (3.1), (3.2), (4) [as am.], (5), (6) [as am.], (7), (8) [as am.], (9) [as am.], (10) [rep. R.S.O. 1997, c. 28, s. 208(8)], (11) [as am.], 90 [rep. R.S.O. 1997, c. 28, s. 209], 91(1)
Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) [as am.]
Variation of Trusts Act, R.S.O. 1990, c. V.1 [as am.]
Rules and regulations referred to
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01(1)(b), 25.11
Uniform Civil Procedure Rules 2005 (N.S.W.)
Authorities referred to
Sharpe, Robert J., Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 2009)

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APPEAL from the decision of the Divisional Court (Lane and Kiteley JJ. for the majority, Murray J. dissenting) (2008), 89 O.R. (3d) 130, [2008] O.J. No. 282 (Div. Ct.) dismissing an appeal from the order of the motion judge dismissing a motion to strike [page163] a claim for an order compelling the employer to commence proceedings to wind up the pension plan.

Neil Finkelstein and Anne Glover, for appellant.

C. Clifford Lax, Q.C., and Andrew J. Winton, for respondent.

The judgment of the court was delivered by

[1] GILLESE J.A.: -- Can the court compel an employer to commence proceedings to wind up a pension plan? This appeal answers that question.

Background

[2] In 1966, Rio Algom Limited ("Rio Algom") established a pension plan for its salaried employees (the "Pension Plan"). Funds contributed to the Pension Plan were to be held in trust.

Accordingly, Rio Algom entered into a trust agreement with Montreal Trust Company as trustee (the "1966 Trust Agreement"). The pension plan text (the "1966 Plan Agreement") was attached to the 1966 Trust Agreement.

[3] Both the 1966 Trust Agreement and the 1966 Plan Agreement provide that no part of the trust fund is to be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan.

[4] Effective August 1, 1997, the Pension Plan was changed from a defined benefit ("DB") plan to a plan with both a DB and a defined contribution ("DC") portion. Members as of that date were given a one-time opportunity to switch from the DB to the DC portion of the plan. Members admitted after that date were eligible only for the DC portion of the Pension Plan.

[5] Alexander E. Lomas (the "applicant") has retired from employment with Rio Algom. While employed, he was a salaried employee and contributing member of the Pension Plan. He brought an application in which he seeks $2 million in damages, as well as other relief, including that which forms the subject of this appeal. He seeks to represent the members of the DB portion of the Pension Plan and others who may benefit from this proceeding as a result of their prior membership in the DB portion of the Pension Plan.

[6] The applicant alleges that Rio Algom has unilaterally and surreptitiously amended the Pension Plan to the detriment of plan members. He also claims that at various times before 1999, contrary to the original terms of the Pension Plan and in breach of trust, contract and fiduciary duty, Rio Algom and its officers and directors wrongfully diverted millions of dollars from the [page164] Pension Plan. Specifically, he alleges that Rio Algom: failed to contribute funds due and payable under the Pension Plan; failed to administer or cause the trustee to administer the Pension Plan for the benefit of the beneficiaries; managed and administered the funds contrary to the 1966 Trust Agreement and the 1966 Plan Agreement; and failed to make annual payments to fund the current service costs of the Pension Plan.

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[7] Rio Algom brought a motion to strike paras. 1(h), 1(i)(i) and (ii), and 2(y) of the Amended Notice of Application (the "Amended Application") as disclosing no reasonable cause of action. For ease of reference, those paragraphs of the Amended Application are set out below. Paragraph 1(i)(ii) is struck to reflect that part of the motion judge's order from which no appeal has been taken. For convenience, I will refer to the balance of the paragraphs in question as the "impugned paragraphs".

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1. The Applicant makes an application for:

. . . . .

(h) an Order determining:

(i) the present value of the assets of the Trust Fund;

(ii) the amount actuarially required to provide the pension and other benefits required to be paid to the persons named in paragraph 1(a) hereof in accordance with the terms of the Pension Plan,

and directing that the Respondents make an application under section 68 of the Pension Benefits Act for the partial winding-up of the Pension Plan and the distribution of the assets to the persons entitled thereto in conformity with the other determinations and declarations sought herein;

(i) in the alternative to the relief sought in paragraph 1(h), above:

(i) an Order for the purchase by the Trustee of annuities, policies of insurance or other instruments actuarially sufficient to ensure the payment of all pension and other entitlements due under the Pension Plan;

(ii) an Order for the winding up of the Pension Plan and distribution of its remaining or residual assets to those entitled thereto in accordance with the Pension Plan;

2. The grounds for the application are:

. . . . .

(y) The value of assets of the defined benefits portion of the Pension Plan is substantially in excess of the amount actuarially required to provide pension benefits to those entitled thereunder. The class of persons who are beneficiaries of the defined benefits portion of the Pension Plan is closed and the members of the class are determinable. No good purpose will be served by delaying the distribution of [page165] the surplus assets of the Pension Plan to those entitled to share in the distribution of the residual assets of the Trust Fund, after making provision for the payment of the pension and other benefits due to the persons entitled thereto. The surplus of the Trust Fund should be the subject of a partial wind-up under the Pension Benefits Act, so that the value may be distributed to the persons entitled thereto.

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[8] After the motion was scheduled but before it was heard, the Supreme Court of Canada released its decision in Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973, [2006] S.C.J. No. 28. Based on Buschau, the applicant conceded that he could no longer seek the relief set out in subpara. 1(i)(ii) of the Amended Notice, which asked the court to directly order the wind up of the Pension Plan. However, he maintained that Buschau did not preclude the court from ordering the employer to commence wind up proceedings pursuant to s. 68(1) of the Pension Benefits Act, R.S.O. 1990, c. P.8 (the "PBA").

[9] The motion judge accepted the applicant's submission. By order dated December 22, 2006 [[2006] O.J. No. 5122, 57 C.C.P.B. 315 (S.C.J.)] (the "Initial Order"), he struck the claim for a court-ordered wind up of the Pension Plan (para. 1(i)(ii)) but dismissed the balance of the motion, thus leaving the impugned paragraphs operative.

[10] In summary, the motion judge reasoned as follows. The application calls on the court to determine and declare the rights of Pension Plan members. If the court finds that wrongs have been committed, it has the power to fashion an appropriate remedy. Whether it has the jurisdiction to order Rio Algom to

apply for a wind up is a novel question. However, the applicant is not asking the court to assume the supervisory role of the Superintendent of Financial Services (the "Superintendent") or the Financial Services Tribunal (the "Tribunal"). Rather, the request is for an order compelling Rio Algom to do something that the PBA permits it to do -- apply for a wind up under s. 68. If that occurred, "the Superintendent would then oversee the subsequent and remaining steps in the winding-up process". Assuming that a finding is made that the rights of the Pension Plan members have been breached, the court is the best forum to determine the remedy.

[11] Rio Algom sought leave to appeal to the Divisional Court.

[12] By order dated May 8, 2007, Carnwath J. granted leave on the basis that the decision of the motion judge appeared to be in conflict with Buschau [[2007] O.J. No. 5287 (Div. Ct.)]. He stated that in Buschau, the Supreme Court of Canada found that the courts have no jurisdiction to order the wind up of a pension plan. The effect of the Initial Order, however, was to permit the impugned paragraphs to remain in the pleading and [page166] those paragraphs ask the court to order Rio Algom to wind up the Pension Plan by way of application to the Superintendent. Thus, he said, the effect of the Initial Order was to permit the court to do indirectly what it could not do directly. Resolving this matter is of public importance because the Initial Order implies that there could be concurrent schemes for a pension plan wind up -- the statutory scheme and a court-ordered scheme.

[13] The Divisional Court heard Rio Algom's appeal on October 18, 2007. A majority of the Divisional Court (Lane and Kiteley JJ.) were of the view that the motion had been properly decided and the impugned paragraphs should be permitted to remain in the Amended Application. Justice Murray dissented. By order dated January 24, 2008 (the "Order"), Rio Algom's appeal to the Divisional Court was dismissed.

[14] Rio Algom appeals to this court.

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[15] I would allow the appeal, largely for the reasons given by Murray J. in dissent.

The Divisional Court Decision

The majority decision

[16] The majority decision in the Divisional Court (the "majority decision" or the "majority") affirmed the Initial Order. Like the motion judge, the majority did not view Buschau as having addressed whether the court can compel an employer who has been found to be in breach of its obligations to commence wind up proceedings under the PBA. In the majority's view, Buschau focused on the rule in Saunders v. Vautier (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.) and not on the general question of the role of equity and trust law in relation to the pension benefits legislative scheme.

[17] The majority viewed the relief sought in the impugned paragraphs as compelling a wrongdoer to remedy its wrongdoing by taking a step expressly contemplated by the PBA, namely, an employer exercising its right to apply for a partial wind up. Remedies for breach of trust are fact dependent. Thus, the majority reasoned, a determination of the appropriate remedy requires a fuller record than that which is available on a motion such as this. If restitution -- an equitable remedy -- can be achieved only by a mandatory order requiring the wrongdoer to act as permitted by statute, there is no policy reason to prevent that. The victims of the wrongdoing may also have access to a remedy by means of a request to the Superintendent but that does not affect their rights in trust law. [page167]

[18] The majority concluded by stating that the motion judge correctly held that it was not plain and obvious that the applicant could not succeed on the pleading as written.

The dissent

[19] Justice Murray would have struck the impugned paragraphs on the basis that they were prohibited by Buschau. In his view, Buschau stands for the proposition that pension plan members

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have no right to compel the wind up of a defined benefit pension plan and they cannot circumvent the wind up provisions of the pension legislation by seeking a court order compelling the employer to wind up the pension plan. Therefore, he stated, it is not open to the court to order an employer to wind up a pension plan at the request of plan members.

[20] Murray J. also concluded that the impugned paragraphs could not remain because they contemplate relief that is inconsistent with the scheme of the PBA. There is no provision in the PBA that permits plan members to make an application for plan termination or wind up. As the Supreme Court noted in Buschau, if pension plan members have concerns about possible violations of the trust and plan, they are to alert the Superintendent. And, as was also pointed out in Buschau, because employees in an organization come and go, they have only a "passive and limited right with regard to employer decisions concerning the future of their plan and trust fund". Granting an order on behalf of plan members to compel the employer to apply for a plan wind up is inconsistent with those "passive and limited rights".

[21] Further, Murray J. reasoned, under the PBA only the employer and the Superintendent have the right to terminate a pension plan. The allegations raised in the Amended Application are all matters that the Superintendent is entitled to take into account in determining whether to take steps to wind up the pension plan. The court has no jurisdiction to perform the duties imposed on the Superintendent by the legislature. It ought not to act in a manner that negates the expertise of a statutorily appointed regulator. For the court to order -- at the request of plan members -- Rio Algom to terminate the DB Pension Plan would be an unauthorized usurpation of the authority delegated by the PBA to the Superintendent.

[22] Finally, Murray J. found that such an order would also interfere with the appeal process under the legislation. Under the PBA, a proposal to wind up made by the Superintendent can [page168] be appealed to the Tribunal [See Note 1 below] and then to the Divisional Court. [See Note 2 below] If the court requires an employer to apply for a wind up, the statutory

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appeal process is not available and the employer will have been deprived of its appeal rights.

[23] For all of these reasons, Murray J. concluded that it was plain and obvious that the court did not have the authority to order the relief requested in the impugned paragraphs.

The Issue

[24] This appeal raises a single issue: does the court have the jurisdiction to make an order compelling an employer to commence proceedings to wind up a pension plan pursuant to s. 68(1) of the PBA?

The Legal Principles Governing a Motion to Strike

[25] The motion to strike a pleading was brought under rules 21.01(1)(b) and 25.11 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. There is no dispute about the applicable legal principles. A claim should be struck if it is plain and obvious that it cannot succeed. [See Note 3 below] Neither the length and complexity of the issues nor the novelty of the cause of action should prevent the plaintiff from proceeding to trial. [See Note 4 below] Important issues of law are normally decided on a full factual record, which allows the trial judge to make findings that form the basis for the legal analysis and conclusions. [See Note 5 below]

An Overview of Why this Appeal Must be Allowed

[26] The majority decision of the Divisional Court is explicitly founded on the premise that Buschau does not address the issue in this appeal, namely, whether the court can compel an employer who has been found to be in breach of its obligations to commence wind up proceedings under the PBA. The majority [page169] views Buschau as having focused on the rule in Saunders v. Vautier and not on the more general question of the role equity and trust law in respect of the pension benefits legislation.

[27] With respect, I disagree.

[28] The rule in Saunders v. Vautier enables trust beneficiaries, in certain circumstances, to end the trust and

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force the distribution of the trust property. It is correct that in Buschau the Supreme Court of Canada held that members of a pension plan cannot use the rule to terminate a pension trust. However, I agree with Murray J. that Buschau is not confined to that narrow proposition.

[29] In Buschau, the Supreme Court makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to:
(i) the societal purposes for which pension plans exist;
(ii) the scheme of the legislation that governs pension plans; and
(iii) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan.

[30] Ordering an employer to commence wind up proceedings under s. 68 of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, [See Note 6 below] Buschau makes it "plain and obvious" that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members.

[31] I also agree with Murray J. that such an order runs contrary to the legislative provisions governing the wind up of private pension plans in Ontario. If the Superior Court of Justice were to order Rio Algom to commence wind up proceedings, it would violate the scheme of the PBA and the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 (the "FSCOA"), and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal.

[32] The following examination of Buschau and the relevant legislation will explain the foregoing conclusions and why this appeal must be allowed. [page170]

Buschau Examined

The facts

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[33] In 1974, Premier Communications Ltd. established a defined benefit pension plan for the benefit of its employees (the "Plan"). The Plan provided that in the event of termination, surplus was to be distributed among the remaining members. The Plan funds were held in a trust (the "Trust").

[34] The Plan was governed by the Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.) (the "PBSA"). There are no material differences between its relevant provisions and the corresponding ones in the PBA in respect of the matters in issue in this appeal.

[35] Rogers Communication Inc. ("RCI") [See Note 7 below] acquired Premier Communications Ltd. in 1980. In 1981, RCI amended the Plan to provide that on its termination, surplus would revert to it. In 1984, RCI closed the Plan to new employees. In 1992, RCI retroactively merged other of its pension plans with the Plan. By 2002, the Plan had an actuarial surplus of $11 million.

[36] Much litigation ensued over the Plan. The court determined, among other things, that although the merger of the pension plans was valid, it did not affect the existence of the Trust as a separate trust. It also held that the members of the Plan retained the right to any surplus funds that remained on Plan termination. [See Note 8 below]

[37] The Plan members wanted the surplus so they applied to the court for an order terminating the Plan. They relied on the rule in Saunders v. Vautier, which provides that if all of those persons who are beneficially entitled to the trust property are of full legal capacity and agree, they may modify or extinguish the trust without reference to the wishes of the settler or trustee. [See Note 9 below] The Plan members argued that the rule in Saunders v. Vautier allowed them to terminate the Trust even though the Plan documentation provided that only the employer had that right. They argued, alternatively, that RCI should be required to wind up the Plan under the PBSA. They maintained that because the Superintendent's power to terminate the Plan was discretionary, they had no clear recourse under the PBSA. [page171]

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[38] The British Columbia first instance and appeal courts held that the rule in Saunders v. Vautier applied and could be used to enable the Plan members to collapse the Trust. The Supreme Court of Canada reversed that decision.

The majority decision in Buschau

[39] Justice Deschamps wrote for the majority. She gave a number of reasons for holding that the rule in Saunders v. Vautier does not apply to pension trusts, which I would group and summarize as follows.

[40] First, the rule in Saunders v. Vautier is incompatible with the context and purpose of pension plans. Pension plans serve broad societal goals. Together with government programs and individual savings, they provide an aging population with invaluable financial support. Recognizing the economic and social importance of pension plans, Parliament and a majority of the provincial and territorial legislatures have adopted legislation regulating them. Permitting the rule in Saunders v. Vautier to operate would defy the application of the PBSA, which deals extensively with the wind up of pension plans and the distribution of assets. It is clear that Parliament intended the PBSA provisions to displace the rule in Saunders v. Vautier. The PBSA provides a means to reach the distribution stage -- it prevails over the rule. [See Note 10 below]

[41] Gift or legacy trusts are gratuitous -- accelerating the date of the beneficiaries' entitlement has no broad social consequences. However, the capital of the pension trust fund cannot be distributed without defeating the social purpose of preserving the financial security of employees in their retirement by allowing them to receive periodic payments until they die. Furthermore, before a pension plan is wound up, surplus is only an actuarial concept. While the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. [See Note 11 below]

[42] A pension plan, if not a permanent instrument, is at least a long-term one. The participation of any individual

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member is ephemeral -- members come and go while pension plans are expected to survive the flow of employees and corporate reorganizations. In an ongoing pension plan, a single group of employees should not be able to deprive future employees of the [page172] benefit of a pension plan. Thus, members often have only a passive and limited right with regard to employer decisions concerning the future of their plan and trust fund. They are not left without recourse should the employer infringe the PBSA because they can alert the Superintendent to their concerns. [See Note 12 below]

[43] Second, unlike other trusts, pension trusts are not stand-alone instruments. They serve only as the vehicle for holding and managing the funds of the pension plan. In the present case, the Trust agreement is made part of the Plan and is dependent on the Plan for which it was created. The two instruments are therefore indissociable. Pension trusts cannot be terminated without taking into account the provisions in the pension plan documentation and the legislation that governs the pension plan. While there are no indirect effects which arise on the application of the rule in Saunders v. Vautier to other types of trusts, that is not the case with pension trusts. Application of the rule would end a pension trust but it would not deal with termination of the pension plan. However, termination of the pension plan in accordance with the PBSA is a condition precedent to distribution of the assets held in the pension trust. [See Note 13 below]

[44] Further, while classic trust law allows no room for the settlor's intention, treating employers as having no interest in the pension trust conflicts with the usual expectations of the parties to the pension plan. Neither the Plan nor the Trust agreement gives the members a right to terminate the Plan. [See Note 14 below]

[45] Third, the rights of pension plan members are subject to the provisions of the PBSA. While the PBSA is not a complete code, when recourse to it is available, plan members should use it. [See Note 15 below]

[46] The PBSA deals explicitly with pension plan wind up. It

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gives the Superintendent a key role in the termination and distribution stages of a pension plan wind up. For the members to get the surplus, the Plan must first be terminated. Since the Plan does not provide for them to terminate it, the members can ask the Superintendent to consider ordering a partial Plan wind up. The Superintendent is in the best position to determine whether there is any legitimate purpose to be served by [page173] permitting a pension plan to continue or whether it should be wound up. [See Note 16 below]

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The minority decision in Buschau

[47] Justice Bastarache wrote the minority decision in Buschau. He concluded that the Plan members could not use the rule in Saunders v. Vautier to collapse the Plan or Trust for reasons similar to those given by the majority. Those reasons can be summarized as follows.

[48] The PBSA is a comprehensive statutory scheme structured to further the public policy objective of enhanced financial security for workers on their withdrawal from the active workforce. Within this comprehensive scheme, there are detailed provisions for the termination of pension plans and the distribution of plan assets. [See Note 17 below]

[49] Given the voluntary nature of the private pension plan system, employers are generally entitled to terminate a pension plan, a matter expressed in most plan documents, including the Plan. This right is recognized in the PBSA. The Superintendent is also given the power to terminate pension plans in certain specified situations. There is no provision in the PBSA for plan beneficiaries to terminate a pension plan. [See Note 18 below]

[50] It is an error to infer that the rule in Saunders v. Vautier can create a manner of realizing on the actuarial surplus in the fund in violation of the terms of the Plan. In this Plan, absolute entitlement to the surplus would only occur once the surplus became real, that is, once the Plan and Trust had been terminated. This is because the members only have a contingent interest in the Trust surplus which does not vest until the Plan is terminated. [See Note 19 below]

[51] The Plan states that it is the employer who may amend and terminate the Plan and it is the employer's expectation that the Plan and Trust will continue indefinitely. In the circumstances, there could be no reasonable expectation on the part of the employer or Plan members that the Trust could be terminated by the members over the objections of the employer. The application of the rule in Saunders v. Vautier would contradict [page174] the reasonable contractual expectations of the parties as it would permit the members to unilaterally vary the terms of the Trust without the employer's consent. [See Note 20 below]

[52] The unique role of the employer in respect of the pension plan and trust cannot be ignored. The terms of the contract at the root of the trust cannot be circumvented. The legislative framework cannot be made irrelevant by applying the rule in Saunders v. Vautier. [See Note 21 below]

[53] The underlying social policy objective of private pension plan legislation is to promote the establishment and maintenance of private pension plans to provide income security for employees and their families in retirement. This is not consistent with the operation of the rule in Saunders v. Vautier. [See Note 22 below]

[54] Termination of the Plan and Trust must be dealt with in accordance with the terms of the Plan and the provisions of the PBSA. The rule in Saunders v. Vautier does not apply. Neither the terms of the Plan nor the provisions of the PBSA grant the members a right to terminate the Plan. [See Note 23 below]
Buschau Applied

[55] I have set out the reasons in Buschau at some length to demonstrate that it stands for the general proposition that, absent language in the pension plan documentation to the contrary, pension plan members have no right to compel the wind up of a defined benefit pension plan. The reasoning of the Supreme Court in Buschau, as summarized above, shows that the court was not focused on the narrow matter of the rule in Saunders v. Vautier. Rather, the Supreme Court provides much-needed guidance on the rights of plan members generally in

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relation to the termination of a pension fund and the wind up of a pension plan.

[56] The reasoning in Buschau makes it clear that the court does not have the authority to compel an employer to wind up a pension plan at the request of members of the pension plan because to do so would be contrary to

(i) the societal purposes for which pension plans exist; [page175]

(ii) the scheme of the legislation that governs pension plans; and

(iii) the language usually found in pension plan documentation giving the employer the right to terminate the trust and pension plan.

[57] The majority decision in the Divisional Court would permit the court to order Rio Algom to wind up the Plan pursuant to s. 68(1) of the PBA. However, ordering an employer to commence wind up proceedings under s. 68(1) of the PBA is tantamount to ordering the wind up of the pension plan. Because the court cannot do indirectly that which it cannot do directly, [See Note 24 below] Buschau makes it "plain and obvious" that the court does not have the authority to order an employer to commence wind up proceedings under s. 68 of the PBA at the request of plan members.

[58] The applicant submits that Buschau stands for the proposition that the rule in Saunders v. Vautier is not available to plan members because the rule operates outside the PBA. On the applicant's view, because the impugned paragraphs ask the court to order Rio Algom to wind up the Pension Plan by means of s. 68(1) of the PBA, the reasoning in Buschau does not apply. I do not accept this submission.

[59] I accept that Buschau dictates that where a statutory scheme exists for the termination and wind up of pension plans, it must be followed. That statutory process, discussed in detail below, is not to be circumvented by the courts. However, that does not mean that the court has the right to require an employer to wind up the pension plan by means of compliance with the legislative scheme. The core reasoning in Buschau is

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that the members of a pension plan do not have the right to compel an employer to wind up the pension plan. The decision in Buschau is not confined to the method by which wind up is to take place.

The Scheme of the PBA Precludes the Court from Ordering an Employer to Commence Wind Up Proceedings

[60] Before examining the statutory scheme governing the wind up of pension plans in Ontario, it is useful to recall certain foundational principles underlying the pension legislation. [page176]

[61] Canada has chosen a "voluntary" system of private pension plan coverage. This means that unlike some other countries in the world, Canadian employers are not obliged to provide pension plans for their employees. Thus, employers have the right to decide both whether to establish pension plans for their employees and, subject to anything to the contrary in the pension plan documentation, to end any pension plan they might establish. However, while employers have the right to establish and to wind up pension plans, both actions are heavily regulated through legislation. There are many reasons for regulating pension plans but one of the most fundamental is the need for oversight by an independent regulator to ensure that pension plan promises are met and pension funds are not misused. It is with these principles in mind that I turn to a consideration of the statutory framework governing the wind up of pension plans. In this regard, I endorse Murray J.'s excellent analysis of the statutory wind up provisions.

[62] Pension plans provided for people employed in Ontario are subject to the provisions of the PBA. [See Note 25 below] Together, the PBA and the FSCOA govern the wind up of pension plans. The relevant provisions in both pieces of legislation can be found as Schedules "A" and "B" to these reasons.

[63] FSCOA creates the administrative structure for certain regulated sectors in Ontario, including pension plans. The three principal institutions established by FSCOA are the Financial Services Commission (the "Commission"), the Superintendent and the Tribunal. The role of the Superintendent

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is, among other things, to administer the PBA and supervise generally private pension plans. [See Note 26 below]

[64] The PBA provides only two methods by which a pension plan can be wound up.

[65] First, the employer's right to wind up pension plans, in whole or in part, is affirmed in s. 68(1) of the PBA. However, this does not mean that the employer's right to wind up is unfettered. Wind up of a pension plan can be done only through compliance with the PBA. Section 68(2) makes it mandatory that the plan administrator give written notice of the proposal to wind up the pension plan to the Superintendent and pension plan members, among others. Section 70(1) stipulates that the administrator of a pension plan that is to be wound up must file a wind up [page177] report and s. 70(2) provides that no payments can be made out of the pension fund after notice of proposal to wind up, until the Superintendent has approved the wind up report.

[66] As the pension fund of a pension plan that is wound up continues until all the pension fund assets have been disbursed, [See Note 27 below] and as the preceding paragraph makes clear, distribution on wind up is dependent on Superintendent approval, the only way the employer can wind up is through compliance with the PBA. The Superintendent's role in a "s. 68 wind up" is to provide the necessary regulatory oversight to ensure that the wind up complies with the requirements of the PBA and regulations and the plan documentation. [See Note 28 below] The Superintendent cannot force the continuation of the pension plan.

[67] Second, s. 69(1) gives the Superintendent the discretion to order the wind up of a pension plan, in whole or in part, in certain specified situations such as the employer's failure to make required contributions to the pension fund, the employer's bankruptcy, or the cessation of employment of a significant number of members of the pension plan as a result of the discontinuance of all or part of the employer's business. More is said below about the elaborate process that must be followed in a Superintendent-initiated wind up.

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[68] At this juncture, it is significant to note that the PBA does not give plan members the right to compel the wind up of a pension plan. As the Supreme Court observed in Buschau, this does not leave plan members without recourse. If plan members believe that the employer has acted improperly in the administration of the plan, they may turn to the Superintendent. [See Note 29 below] All of the alleged wrongdoing set out in the Amended Notice of Application are matters that the Superintendent can take into account in determining what steps, if any, should be taken in respect of the Pension Plan. As Buschau directs, when recourse to the Superintendent is available to plan members, they should use it. [See Note 30 below]

[69] Based on Buschau, the applicant has conceded that the court cannot make an order directly compelling Rio Algom to wind up the Pension Plan. With respect, there is no difference between ordering Rio Algom to wind up the Pension Plan and [page178] the relief contemplated in the impugned paragraphs, namely, ordering Rio Algom to commence wind up proceedings pursuant to s. 68(1) of the PBA. As will be evident from the foregoing explanation of the wind up provisions that apply to employers, there is only one way an employer can wind up a pension plan in Ontario and that is pursuant to s. 68(1) of the PBA.

[70] Because the court cannot order Rio Algom to wind up the Pension Plan at the request of plan members, it cannot order Rio Algom to commence wind up proceedings pursuant to s. 68(1) at the request of plan members -- the two are synonymous. To suggest that there is a difference between the two orders reflects a fundamental misunderstanding of the employer initiated wind up of a pension plan.

[71] I return to a consideration of the statutory scheme governing the Superintendent's powers in relation to the wind up of pension plans. It offers a separate basis for concluding that the court does not have the authority to compel an employer to commence wind up proceedings under the PBA.

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[72] When it is the Superintendent (rather than the employer) who initiates the wind up of a pension plan, a very different process must be followed. The PBA and the FSCOA create a carefully calibrated, multi-layered process for deciding whether a wind up will be ordered when the wind up has not been initiated by the employer. Section 89(5) of the PBA requires the Superintendent to serve notice of the proposal to make an order to wind up (the "Notice of Proposal"), together with written reasons for why he or she proposes to make the wind up order, on the plan administrator and the employer. The Superintendent is also empowered to require the plan administrator to transmit a copy of the Notice of Proposal and reasons to other persons (s. 89(5)).

[73] The Notice of Proposal must state that the person on whom it is served is entitled to a hearing before the Tribunal (s. 89(6)). If a hearing is not required, the Superintendent may carry out the proposal (s. 89(7)). That is, the Superintendent may wind up the pension plan.

[74] However, the employer or any other person receiving the Notice of Proposal can challenge the proposed wind up order. This is done by requiring a hearing before the Tribunal (s. 89(6) and (8)).

[75] The Superintendent, the person requiring the hearing and any other persons specified by the Tribunal are the parties [page179] to the proceeding (s. 89(11)). [See Note 31 below] The Tribunal has exclusive jurisdiction to decide all questions of fact and law that arise in the proceeding (s. 20 of the FSCOA). At or after the hearing, the Tribunal has the power to direct the Superintendent to carry out or to refrain from carrying out the proposal to wind up, and to take such actions as the Tribunal considers the Superintendent ought to have taken in the circumstances (s. 89(9)).

[76] Whatever decision the Tribunal makes can be appealed to the Divisional Court (s. 91(1)).

[77] If the court could simply require the employer to commence wind up proceedings under s. 68(1) of the PBA as the

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Order would permit, the statutory process governing Superintendent-initiated wind ups would be eliminated. This appears to me to be an impermissible interference with the legislative scheme in two ways.

[78] First, the court would have to decide the matters of fact and law necessary in determining whether a wind up should be ordered. Those matters involve difficult questions of entitlement and calculations of liability for plan members' pensions, the adequacy of the plan assets to satisfy liabilities, prioritization of claims, methods of distribution, questions related to grow-in benefits and a host of other complex, technical issues. [See Note 32 below] But, the legislature has given the Superintendent the power in the first instance to determine whether to initiate wind up proceedings and it has given the Tribunal exclusive jurisdiction to decide that matter at or after the hearing. [See Note 33 below] If the court were to order Rio Algom to commence wind up proceedings, it would violate the legislative scheme and amount to an unauthorized usurpation of the authority delegated to the Superintendent and Tribunal.

[79] Second, the procedural safeguards and appeal rights of all affected parties that are established by the statutory process would be eliminated. There would be no preliminary determination by the Superintendent that a wind up was necessary and appropriate. There would be no hearing by the Tribunal and there would be no appeal to the Divisional Court. Instead, the [page180] Ontario Superior Court of Justice would make the first instance decision.

[80] In Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690, [1995] O.J. No. 3035 (Gen. Div.), at p. 698 O.R., Sharpe J. rejected the suggestion that there was overlapping jurisdiction between an expert regulatory body and the courts, saying:

> [W]here Parliament has created a statutory regime which includes both rights and a procedure for their resolution, there is at the very least a strong reluctance to permit jurisdiction to be divided between the specialized agency or

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tribunal and the courts or to permit overlapping or concurrent jurisdiction.

[81] Those comments apply with force in the pension field, where the courts have repeatedly recognized the need for specialized expertise. [See Note 34 below] As Robins J.A. said in Gencorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 39 O.R. (3d) 38, [1998] O.J. No. 961 (C.A.), at p. 43 O.R., leave to appeal to S.C.C. refused [1998] 2 S.C.R. vii, [1998] S.C.C.A. No. 206, when speaking about the PBA:

> The administration and regulation of this manifestly complex and specialized field of activity requires specific knowledge and expertise.

[82] Furthermore, the court would be disadvantaged should the statutory process be circumvented because it would be deprived of a cogent factual record on which to evaluate the strengths and weaknesses of the arguments for and against termination of the pension plan and distribution of the assets. If the statutory process is followed, when the Divisional Court hears an appeal from a decision of the Tribunal, it has the benefit of a full record. The Superintendent and the Tribunal will have fulfilled the different roles assigned to them by the legislation in determining whether to order a wind up, using their specialized expertise. If, however, the court could compel the employer to commence wind up proceedings without the benefit of the statutory process, the roles of the Superintendent and the Tribunal are eliminated and the court is denied the benefit of their specialised expertise. As Murray J. said, at para. 52 of his dissenting reasons:

> It is the departure from the statutory scheme, in the manner advanced by the [applicant], that would deprive a reviewing court of a cogent record on which to evaluate the strengths and weaknesses of the arguments for and against plan termination or that relate to the distribution of plan assets. [page181]

[83] The task of deciding when to order an "involuntary" wind up [See Note 35 below] has been specifically assigned by the

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legislature to the Superintendent and the Tribunal. Deference is due the decisions of both. [See Note 36 below] If the Order is permitted to stand, the courts would become an alternate forum for the determination of that matter. This would disrupt the legislative scheme, short-circuit the statutory process and deprive the courts and the litigants of the knowledge and expertise brought to the difficult issues that arise when contemplating the involuntary wind up of a pension plan. As Murray J. said, at para. 51:

> To deprive a reviewing court of the specialized expertise of the regulators on wind up and the subsequent distribution of assets reflects neither the intention of the legislature nor the interests of the employer, plan members or others with an interest in the pension plan.

Conclusion

[84] The impugned paragraphs contemplate the court making an order requiring Rio Algom to commence wind up proceedings pursuant to s. 68 of the PBA. A majority of the Divisional Court would permit the impugned paragraphs to remain because, in their view, it is not plain and obvious that such an order is unavailable as a mandatory injunction to protect the applicant plan member's rights or as one of the court's array of restitutionary remedies.

[85] A restorative mandatory injunction requires the defendant to repair a situation in a manner consistent with the plaintiff's rights. It is available only to protect an existing right. [See Note 37 below] Both the reasoning in Buschau and the legislative scheme governing the wind up of pension plans lead to the conclusion that the applicant, as a member of the Pension Plan, does not have the right to compel its wind up. As he has no such right, a mandatory injunction to that effect is not available.

[86] Nor does the court have the authority to order the employer to commence wind up proceedings as part of its powers to effect restitution. Together, the PBA and the FSCOA create a comprehensive statutory regime regarding the wind up of pension plans. Under that scheme, the court has no original

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jurisdiction to [page182] order the wind up of a pension plan. There is no difference between an order requiring an employer to wind up a pension plan and an order requiring an employer to commence wind up proceedings under the PBA. As there is no power in the court to order the former, there is no power in the court to order the latter.

[87] Therefore, it is "plain and obvious" that the court does not have the authority to order Rio Algom to commence wind up proceedings under the PBA.

[88] The foregoing is sufficient to dispose of this appeal. Nonetheless, a brief comment is warranted in respect of the suggestion in the reasons of the majority in the Divisional Court, that the court has the power to terminate a pension trust pursuant to trust law principles. I question that suggestion for two reasons.

[89] The first relates to the fact that a pension trust is "indissociable" [See Note 38 below] from the pension plan. As the court cannot order the wind up of the pension plan, and the plan and trust are indissociable, I query whether the court can order the termination of a pension trust. This query is compounded by the fact that it is not clear that a pension trust can be terminated without first winding up the pension plan. [See Note 39 below]

[90] Second, apart from the rule in Saunders v. Vautier, I am unaware of any trust law principle that allows the court to terminate a trust before the purposes of the trust have been fulfilled. [See Note 40 below] Indeed, the inherent power of the court to vary a trust is so limited that legislation was required to provide the court with adequate power in that regard. [See Note 41 below]

[91] The reasoning of the New South Wales Supreme Court in Gaydon (Re) [See Note 42 below] is illustrative of this point. In Gaydon, the plaintiff became the trustee of the Crane Trust as a result of a court order removing Ms. Crane as trustee. Following Ms. Crane's mingling of trust accounts and mismanagement of the trust assets, the plaintiff had been unable

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to reconstruct the accounts of the Crane Trust. The trust beneficiaries had attained the age [page183] of majority and were of sound mind. The plaintiff sought an order removing himself as trustee and dissolving the trust. The court rejected the notion that it could order the trust to be dissolved.

[92] At paras. 29-31 of Gaydon, Barett J. held that the prayer for relief

> . . . is framed upon some implicit assumption that the Court may, by order, dissolve a trust in the same way as it may, for example, dissolve a partnership . . . . Any such assumption is, of course, unwarranted. It is the duty of the Court to uphold and protect trusts, not to destroy them, although where the terms of the trust envisage, in certain circumstances, realisation of property, winding up of the trust's affairs and final payments to beneficiaries, the Court will, naturally enough, give effect to those "winding-up" provisions. . . .
>
> Thinking of the kind which sees an application of this kind made is fostered by the growing assimilation of certain kinds of trusts to companies. I refer, of course, to trusts governed by the provisions of the Corporations Law dealing with managed investment schemes. Part 5C.9 of the Corporations Law allows managed investment schemes to be wound up in various circumstances and creates certain powers which may be exercised by the Court in relation to such a winding up. But those provisions are irrelevant here. I mention them only to emphasise that, in the absence of applicable statutory powers, it is no business of the Court to act so as to put an end to a trust. . . .
>
> Termination of the Crane Trust, if it is to occur, is something which lies within the power of the beneficiaries, Mrs. Rodgers and Mrs. Flynn. Being sui juris and absolutely entitled, they can invoke the rule in Saunders v. Vautier [1841] Cr & Ph 240 to put an end to the trust so that it can be regarded as fully administered and the plaintiff can be regarded as discharged.

(Emphasis added; citation omitted)

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[93] This passage was relied upon in Westfield Queensland No. 1 Pty Ltd. v. Lend Lease Real Estate Investments Ltd. [See Note 43 below] In Westfield, the plaintiffs owned a shopping centre through a network of trust arrangements. They came to a stalemate regarding the management of the shopping centre and sought, among other things, the termination of several of the trusts pursuant to the Uniform Civil Procedure Rules 2005 (N.S.W.) and the inherent jurisdiction of the court.

[94] The court held that there was no general power to terminate the trust. The court's jurisdiction under the Rules was "not a jurisdiction to make any such order in relation to a trust as the court thinks fit; a fortiori it is not a jurisdiction to terminate a trust when the court sees fit". [See Note 44 below] Powers conferred on trustees for [page184] expediency in the management and administration of property do not authorize the court to determine the trust. [See Note 45 below] Relying on Gaydon, the court stated as a general proposition that it is the court's role to uphold and enforce trusts, not to terminate them. It concluded by stating that there is nothing in the inherent powers of the court that would assist the plaintiffs in their contention that they were entitled to the winding up of the trust. [See Note 46 below]

[95] Restitutionary remedies are designed to effect restitution to the estate, that is, to compensate the estate for loss suffered. [See Note 47 below] The imposition of a constructive trust over assets, the requirement to account, tracing and an order for compensation are examples of restitutionary remedies. [See Note 48 below] Beneficiaries of an express trust may also seek the removal of trustees.

[96] If, as the respondent submits, Rio Algom is incapable of fulfilling its fiduciary duties as a result of a repeated pattern of abusing its powers as administrator of the Pension Plan, the court could avail itself of the remedies mentioned in the preceding paragraph. For the reasons given, I question whether ordinary trust principles would permit the court to order the termination of the pension trust.

Disposition

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[97] I would allow the appeal, grant the motion and strike out subparas. 1(h), 1(i)(i) and 2(y) of the Amended Notice of Application, with costs to the appellant fixed at $35,000, all inclusive. I would make no order as to the costs of the proceedings below, as counsel have advised they will be able to resolve those matters between themselves.

Appeal allowed. [page185]

SCHEDULE A

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, ss. 2, 3, 5 and 20

Commission established

2(1) There is hereby established a commission to be known in English as the Financial Services Commission of Ontario and in French as Commission des services financiers de l'Ontario.

Members

(2) The Commission shall consist of the chair and the two vice-chairs of the Commission, the Superintendent and the Director.

Quorum

(3) A majority of the members of the Commission constitutes a quorum.

Purposes

3. The purposes of the Commission are,

(a) to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors;
(b) to make recommendations to the Minister on matters affecting the regulated sectors; and
(c) to provide the resources necessary for the proper functioning of the Tribunal.

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. . . . .

Superintendent

5(1) There shall be a Superintendent of Financial Services appointed under Part III of the Public Service of Ontario Act, 2006 who shall be the chief executive officer of the Commission.

Powers and duties

(2) The Superintendent shall,

(a) be responsible for the financial and administrative affairs of the Commission;

(b) exercise the powers and duties conferred on or assigned to the Superintendent;

(c) administer and enforce this Act and every other Act that confers powers on or assigns duties to the Superintendent; and

(d) supervise generally the regulated sectors.

Delegation of powers and duties

(3) The Superintendent may, subject to the conditions that the Superintendent considers appropriate, delegate in writing to any person employed in the Commission the exercise of any power or the performance of any duty that this Act or any other Act confers on or assigns to the Superintendent [page186] and all acts done and decisions made under the delegation are as valid and effective as if done or made by the Superintendent.

Same, hearings

(4) The Superintendent may appoint in writing any employee of the Commission, or any other person, to hold a hearing on behalf of the Superintendent and to exercise the powers and perform the duties of the Superintendent relating to the hearing.

Oaths

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(5) The Superintendent may administer an oath required under this Act and any other Act that confers powers on or assigns duties to the Superintendent.

. . . . .

Exclusive jurisdiction

20. The Tribunal has exclusive jurisdiction to,

(a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and

(b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

SCHEDULE B

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 18, 68-77, 89-91

Employees in Ontario

3. This Act applies to every pension plan that is provided for persons employed in Ontario.

. . . . .

Refusal or revocation of registration

18(1) The Superintendent may,

(a) refuse to register a pension plan that does not comply with this Act and the regulations;

(b) revoke the registration of a pension plan that does not comply with this Act and the regulations;

(c) revoke the registration of a pension plan that is not being administered in accordance with this Act and the regulations;

(d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations;

(e) revoke the registration of an amendment that does not comply with this Act and the regulations.

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Application of subs. (1)

(2) The authority of the Superintendent under subsection (1) is subject to the right to a hearing under section 89.

Effect of refusal or revocation

(3) A refusal of registration of a pension plan or a revocation of registration of a pension plan operates to terminate the pension plan as of the date specified by the Superintendent.

Idem

(4) A refusal of registration of an amendment to a pension plan or the revocation of an amendment to a pension plan operates to terminate the amendment as of the date specified by the Superintendent.

Wind up

(5) Where registration of a pension plan is refused or revoked, the administrator shall wind up the pension plan in accordance with this Act and the regulations.

. . . . .

Winding up

68(1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part.

Same, jointly sponsored pension plans

(1.1) The following rules apply, and subsection (1) does not apply, with respect to jointly sponsored pension plans:

1. If a jointly sponsored pension plan is also a multi-employer pension plan, the administrator may wind up the plan in whole or in part unless the documents that create and support the plan authorize another

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person or entity to do so. In that case, the authorized person or entity may wind up the plan in whole or in part.

2. If a jointly sponsored pension plan is not a multi-employer pension plan, the administrator or another person or entity may wind up the plan in whole or in part if the documents that create and support the plan authorize the administrator, person or entity to do so.

Notice

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;
(b) each member of the pension plan;
(c) each former member of the pension plan;
(d) each trade union that represents members of the pension plan;
(e) the advisory committee of the pension plan; and
(f) any other person entitled to a payment from the pension fund. [page188]

Notice of partial wind up

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up.

Information

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations.

Effective date

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or,

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in any other case, on the date notice is given to members.

Order by Superintendent

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change.

Winding up order by Superintendent

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;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the Bankruptcy and Insolvency Act (Canada);

(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 or as a result of the reorganization 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;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the

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pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs. [page189]

Date and notice

(2) In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice.

Wind up report

70(1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Payments out of pension fund after notice of proposal to wind up

(2) No payment shall be made out of the pension fund in respect of which notice of proposal to wind up has been given until the Superintendent has approved the wind up report.

Application of subs. (2)

(3) Subsection (2) does not apply to prevent continuation of payment of a pension or any other benefit the payment of which commenced before the giving of the notice of proposal to wind up the pension plan or to prevent any other payment that is prescribed or that is approved by the Superintendent.

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Approval

(4) An administrator shall not make payment out of the pension fund except in accordance with the wind up report approved by the Superintendent.

Refusal to approve

(5) The Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

Rights and benefits on partial wind up

(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

Appointment of administrator to wind up

71(1) If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator. [page190]

Costs of administration on winding up

(2) The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund.

Termination

(3) The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so.

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Notice of entitlement upon wind up and election

72(1) Within the prescribed period of time, the administrator of a pension plan that is to be wound up, in whole or in part, shall give to each person entitled to a pension, deferred pension or other benefit or to a refund in respect of the pension plan a statement setting out the person's entitlement under the plan, the options available to the person and such other information as may be prescribed.

Election

(2) If a person to whom notice is given under subsection (1) is required to make an election, the person shall make the election within the prescribed period of time or shall be deemed to have elected to receive immediate payment of a pension benefit, if eligible therefor, or, if not eligible to receive immediate payment of a pension benefit, to receive a pension commencing at the earliest date mentioned in clause 74(1)(b).

Payment

(3) Within the prescribed period of time, the administrator shall make payment in accordance with the election or deemed election.

Determination of entitlements

73(1) For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part,

(a) the employment of each member of the pension plan affected by the winding up shall be deemed to have been terminated on the effective date of the wind up;
(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and
(c) provision shall be made for the rights under

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section 74.

Transfer rights on wind up

(2) A person entitled to a pension benefit on the wind up of a pension plan, other than a person who is receiving a pension, is entitled to the rights under subsection 42 (1) (transfer) of a member who terminates employment and, for the purpose, subsection 42 (3) does not apply.

Combination of age and years of employment

74(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan [page191] equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

(a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;

(b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,

(i) the normal retirement date under the pension plan, or

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each

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month of age and for each month of continuous employment or membership at the effective date of the wind up.

Member for ten years

(3) Bridging benefits offered under the pension plan to which a member would be entitled if the pension plan were not wound up and if the membership of the member were continued shall be included in calculating the pension benefit under subsection (1) of a person who has at least ten years of continuous employment with the employer or has been a member of the pension plan for at least ten years.

Prorated bridging benefit

(4) For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the pension plan were not wound up.

Notice of termination of employment

(5) Membership in a pension plan that is wound up in whole or in part includes the period of notice of termination of employment required under Part XV of the Employment Standards Act, 2000.

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment. [page192]

Consent of employer

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(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

Consent of administrator, jointly sponsored pension plans

(7.1) For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

Application of section

(8) This section and sections 73 (determination of entitlements), 84, 85 and 86 (guaranteed benefits) apply in respect of the wind up, in whole or in part, of a pension plan where the effective date of the wind up is on or after the 1st day of April, 1987.

Refund

(9) A person affected by a wind up who elects to receive a benefit under subsection (1) is not entitled to payment of any refund of contributions or interest under subsection 63(3) or (4) (refunds).

Liability of employer on wind up

75(1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the

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regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39(3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans. [page193]

Liability on wind-up, jointly sponsored pension plans
Employers, etc.

75.1(1) Where a jointly sponsored pension plan is wound up in whole or in part, the employer or the person or entity required to make contributions under the plan on behalf of the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the employer or by the person or entity on behalf of the employer, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the employer or the person or entity on behalf of the employer.

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Members

(2) Where a jointly sponsored pension plan is wound up in whole or in part, the members shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the plan, are payable by the members, that are due or have accrued and that have not been paid into the pension fund; and

(b) any additional amounts that, under the documents that create and support the plan, are payable in the circumstances by the members.

Payments

(3) The payments required by subsections (1) and (2) shall be made in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Insufficient pension fund

77. Subject to the application of the Guarantee Fund, where the money in a pension fund is not sufficient to pay all the pension benefits and other benefits on the wind up of the pension plan in whole or in part, the pension benefits and other benefits shall be reduced in the prescribed manner.

. . . . .

Notices and hearings

Notice of proposal to refuse or revoke

89(1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or

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to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.

Notice of proposal to make or refuse to make order

(2) Where the Superintendent proposes to make or to refuse to make an order in relation to, [page194]

(a) subsection 42(9) (repayment of money transferred out of pension fund);

(b) subsection 43(5) (repayment of money paid to purchase pension, deferred pension or ancillary benefit);

(c) subsection 80(6) (return of assets transferred to pension fund of successor employer);

(d) subsection 81(6) (return of assets transferred to new pension fund);

(d.1) section 83 (the Guarantee Fund applies to a pension plan);

(e) section 87 (administration of pension plan in contravention of Act or regulation); or

(f) section 88 (preparation of a report),

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

Notice of proposal re membership

(3) Where the Superintendent proposes to make or to refuse to make an order requiring an administrator to accept an employee as a member of a class of employees for whom a pension plan is established or maintained, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator, and the Superintendent shall serve or require the administrator to serve a copy of the notice and the written reasons on the employee.

Notice re payment of surplus

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(3.1) Where an application is filed in accordance with subsection 78(2) for the payment of surplus to the employer and the Superintendent proposes to consent or refuse to consent under subsection 78(1), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and on any person who made written representations to the Superintendent in accordance with subsection 78(3).

Notice re return of excess amount

(3.2) Where an application is filed in accordance with subsection 78(4) and the Superintendent proposes to consent or refuse to consent under subsection 78(4), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and the Superintendent may require the applicant to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.

Notice of proposal to attach terms and conditions to approval or consent

(4) Where the Superintendent proposes to refuse to give an approval or consent or proposes to attach terms and conditions to an approval or consent under this Act or the regulations, other than a consent referred to in subsection (3.1) or (3.2), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant for the approval or consent. [page195]

Notice of proposed wind up order

(5) Where the Superintendent proposes to make an order requiring the wind up of a pension plan or declaring a pension plan wound up, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and the employer, and the Superintendent may require the administrator to transmit a copy of the

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notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the administrator.

Notice requiring hearing

(6) A notice under subsection (1), (2), (3), (3.1), (3.2), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

Power of Superintendent

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

Hearing

(8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing.

Power of Tribunal

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

(10) Repealed.

Parties

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(11) The Superintendent, the person who requires a hearing and such other persons as the Tribunal specifies are parties to the proceeding before the Tribunal under this section.

(12), (13) Repealed.

Release of documentary evidence

(14) Documents and things put in evidence at a hearing shall, upon the request of the person who produced them, be released to the person within a reasonable time after the matter in issue has been finally determined.

. . . . .

90. Repealed.

Appeal to court

91(1) A party to a proceeding before the Tribunal under section 89 may appeal to the Divisional Court from the decision or order of the Tribunal. [page196]

Certified copy of record

(2) Upon the request of a party desiring to appeal to the Divisional Court and upon payment of the fee established by the Minister, the Tribunal shall furnish the party with a certified copy of the record of the proceeding, including the documents received in evidence and the decision or order appealed from.

Notes

Note 1: Although the word "appealed" is used, where the Superintendent proposes to make a wind up order, the employer is entitled to a hearing before the Financial Services Tribunal: see s. 89(5)-(11) of the PBA. Such a hearing appears to be de novo: see footnote 31, below.

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Note 2: And, with leave, to this court.

Note 3: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at p. 975 S.C.R.

Note 4: Ibid., at pp. 975 and 977 S.C.R.

Note 5: PDC 3 Limited Partnership v. Bregman + Hamann Architects (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (C.A.), at para. 11.

Note 6: As Carnwath J. observed in granting leave to appeal the Initial Order to the Divisional Court.

Note 7: Formerly Rogers Cablesystems Inc.

Note 8: Buschau v. Rogers Cablesystems Inc., [2001] B.C.J. No. 50, 83 B.C.L.R. (3d) 261 (C.A.), at paras. 63-68, leave to appeal to S.C.C. refused [2001] 2 S.C.R. vii, [2001] S.C.C.A. No. 107.

Note 9: Buschau, at para. 21.

Note 10: At paras. 12, 13, 19 and 28.

Note 11: At paras. 17 and 31.

Note 12: At para. 34.

Note 13: At paras. 2 and 29.

Note 14: At paras. 30 and 34.

Note 15: At para. 35.

Note 16: At paras. 35, 39, 45 and 52.

Note 17: At paras. 79 and 80.

Note 18: At paras. 81 and 84.

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Note 19: At para. 90.

Note 20: At para. 92.

Note 21: At para. 94.

Note 22: At para. 96.

Note 23: At para. 100.

Note 24: As Carnwath J. observed in granting leave to appeal the Initial Order to the Divisional Court [[2007] O.J. No. 5287 (Div. Ct.)].

Note 25: PBA, s. 3.

Note 26: FSCOA, s. 5(2).

Note 27: PBA, s. 76.

Note 28: See ss. 68 and 70.

Note 29: Buschau, at paras. 34-35.

Note 30: At para. 35.

Note 31: While it need not be decided on this appeal, it appears to me that the hearing before the Tribunal is de novo, rather than an appeal. The Superintendent has not made an order that is being appealed. Rather, he has issued a Notice of Proposal which has triggered the right to a hearing by those affected if the proposal is implemented.

Note 32: See, for example, PBA, ss. 70 and 72-75.

Note 33: FSCOA, s. 20.

Note 34: Nolan v. Kerry (Canada) Inc., [2009] 2 S.C.R. 678, [2009] S.C.J. No. 39, at para. 29.

Note 35: That is, a wind up that has not been voluntarily

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initiated by the employer.

Note 36: Nolan v. Kerry Canada (Inc.), at paras. 22-30.

Note 37: Hermann Loog v. Bean (1884), 26 Ch. D. 306 (C.A.), at pp. 316-17; The Honourable Mr. Justice Robert J. Sharpe, Injunctions and Specific Performance, looseleaf (Aurora: Canada Law Book, 2009) at para. 1.10.

Note 38: Buschau, at para. 29.

Note 39: This was a major issue in Buschau: see para. 86 of the minority decision. However, it remains unanswered.

Note 40: For example, even where it is impossible to complete performance of a charitable trust, the trust is not ended. Instead, through a cy pres scheme, the purposes of the charitable trust are fulfilled as nearly as possible.

Note 41: Variation of Trusts Act, R.S.O. 1990, c. V.1.

Note 42: [2001] NSWSC 473 (Aus.).

Note 43: [2008] NSWSC 516 (Aus.).

Note 44: Ibid., at para. 44.

Note 45: Ibid., at paras. 49-68.

Note 46: Ibid., at para. 68.

Note 47: Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at p. 547 S.C.R., McLachlin J.; Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, at para. 30.

Note 48: Canson, at p. 588 S.C.R., La Forest J.

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Indexed as:

College Housing Co-operative Ltd. v. Baxter Student Housing Ltd.

Baxter Student Housing Ltd. and R.C. Baxter Ltd. (Defendants), Appellants; and College Housing Co-operative Limited and College Housing Holdings Incorporated (Plaintiffs), Respondents.

[1976] 2 S.C.R. 475

Supreme Court of Canada

1975: May 12 / 1975: June 26.

Present: Martland, Judson, Spence, Pigeon and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mechanics' liens -- Appointment of receiver to draw upon and borrow undrawn balance of proceeds under a mortgage -- Whether judge exceeded jurisdiction in ordering that mortgagee, in respect of any moneys advanced by mortgagee to receiver, should have priority over any other registered or unregistered charges or encumbrances -- The Mechanics' Liens Act, R.S.M. 1970, c. M80, s. 11(1) -- The Queen's Bench Act, A.S.M. 1970, c. C280, s. 59.

The respondent housing co-operative and the respondent holding company (both non-profit corporations, without funds) entered into a contractual relationship with the appellants whereby, inter alia, the first appellant was to construct a student housing project. Title to the project was in the name of the holding company; the housing cooperative was to be the head tenant; the second appellant was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/73 a moisture problem developed in the building, which recurred during the winter of 1973/74, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building sought advice of experts who recommended remedial measures, the estimated cost of which amounted to $135,000. The contractor refused to authorize that the work be done at its expense. Proceedings subsequently commenced between the parties but little progress was made.

The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation first mortgage in the principal amount of $1,988,831, all of which had been advanced except for a holdback of $228,897, and from a second mortgage in

the amount of $220,959, all of which had been advanced. On June 22, 1973, the contractor caused a mechanics' lien to be filed against the property in the amount of $310,440, claimed to be due to it under the contract.

In the summer of 1974, the owner of the property applied to a Queen's Bench judge in chambers for an order appointing a receiver of the balance of the proceeds of the C.M.H.C. mortgage. The order was granted and contained a provision that any moneys paid by the mortgagee "shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands." An appeal was dismissed by the Court of Appeal, and the appellants, with leave, then appealed to this Court. The question to be decided was whether the judge exceeded his jurisdiction in making the said order.

Held: The appeal should be allowed and the application for the order dismissed.

The appointment of the receiver was wrong in law because the provision ordering that any moneys paid by C.M.H.C. to the receiver would have priority over any other registered or unregistered charges or encumbrances ran contrary to s. 11(1) of The Mechanics' Liens Act, R.S.M. 1970, c. M80. Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. The inherent jurisdiction of the Court of Queen's Bench, under s. 59 of The Queen's Bench Act, R.S.M. 1970, c. C280, is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of this order was to alter the statutory priorities which a court simply cannot do.

Cases Cited

Boake v. Guild, [1932] O.R. 617, aff'd. [1934] S.C.R. 10, sub nom. Carrel v. Hart; Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al., [1958] S.C.R. 361; Montreal Trust Co. et al. v. Churchill Forest Industries (Manitoba) Ltd., [1971] 4 W.W.R. 542; Winnipeg Supply and Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd., [1972] 1 W.W.R. 651, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba [[1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.], dismissing an appeal from an order of Nitikman, J. appointing a receiver. Appeal allowed.

K.B. Foster and C.R. MacArthur, for the defendants, appellants.
K.G. Houston, for the plaintiffs, respondents.

Solicitors for the defendants, appellants: Aikins, MacAulay & Thorvaldson, Winnipeg.
Solicitors for the plaintiff, respondents: Arpin & Co., Winnipeg.

The judgment of the Court was delivered by

DICKSON J.:-- This is an appeal from a judgment of the Court of Appeal for Manitoba affirming an order of Nitikman, J. appointing a receiver to draw upon and borrow the undrawn bal-

ance of proceeds under a mortgage. The question to be decided is whether the judge exceeded his jurisdiction in ordering that the mortgagee, in respect of any moneys advanced by the mortgagee to the receiver, should have priority over other charges or encumbrances registered or unregistered affecting the lands.

The facts are unusual. In late 1971 College Housing Co-operative Limited (the Housing Co-operative) and College Housing Holdings Incorporated (the Holding Company) entered into contractual relationship whereby inter alia Baxter Student Housing Ltd. (Baxter Housing) was to construct on a "turnkey" basis a four-storey, 192-suite apartment building, known as "Dalhousie Drive Project", to provide housing for students at the University of Manitoba. Title to the project was in the name of the Holding Company; the Housing Co-operative, a students' co-operative, was to be the head tenant; R.C. Baxter Ltd. (R.C. Baxter) was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/1973 a moisture problem developed in the building, which recurred during the winter of 1973/1974, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building, the Housing Co-operative, sought advice of experts who recommended certain remedial measures, the estimated cost of which amounted to $135,000. Baxter Housing refused to authorize that the work be done at its expense. Two questions therefore became crucial (i) who would pay for the remedial work and (ii) where would the money come from. On point (i) I should say that in September 1973 the Housing co-operative and the Holding Company issued a statement of claim against Baxter Housing and R.C. Baxter seeking damages and other relief to which the defendants responded with a counterclaim for $310,440 for balance of construction cost and the defence, in brief, that the project had been completed in accordance with the plans and specifications in a good and workman-like manner. Those proceedings have not yet been litigated and little progress has been made. The facts material on point (ii) I take to be the following. The Housing Co-operative and the Holding Company are non-profit corporations, without funds. The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation (C.M.H.C.) first mortgage in the principal amount of $1,988,831, all of which has been advanced except for a holdback of $228,897, and from a second mortgage in the principal amount of $220,959, all of which has been advanced. On June 22, 1973, Baxter Housing caused a mechanics' lien to be filed against the property in the amount of $310,440 claimed to be due to it under the contract.

In the summer of 1974, almost a year ago, the plaintiff owner of the property moved before Nitikman, J. for an order appointing W.E. Shields or some other fit and proper person as receiver of the balance of the proceeds of the C.M.H.C. mortgage. The notice of motion referred to (i) the dispute between the parties as to the adequacy of the design and construction of the student housing project, (ii) the recommendations of the experts, (iii) the likelihood that if the repairs were not carried out forthwith there was every probability they would not be able to be done before freeze-up, with the result the project would suffer another winter with the moisture problem in the suites with an anticipated loss of goodwill and an increased vacancy rate, (iv) the filing by the defendants of the mechanics lien and (v) the refusal by C.M.H.C., by reason of the lien, to advance further moneys under the mortgage. Affidavits were filed in support of the motion and the affiants cross-examined, following which Nitikman, J. made the order called into question in these proceedings. That order contained the following provision, inserted no doubt in the hope that C.M.H.C., relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:

> 2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage and Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.

Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of The Mechanics' Liens Act of Manitoba, R.S.M. 1970, c. M80, reading:

> 11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.

Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See Boake v. Guild [[1932] O.R. 617, aff'd, [1934] S.C.R. sub nom. Carrel v. Hart.], and Rand, J. in Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al. [[1958] S.C.R. 361.], at p. 364. Section 59 of The Queen's Bench Act, R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of The Mechanics' Liens Act, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.

In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas, J.A. per curiam said:

> In any event, I am of the opinion that sec. 11(1), supra, cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (Montreal Trust Company et al. v. Churchill Forest Industries

> (Manitoba) Limited, [1971] 4 W.W.R. 542 at p. 546 et seq.) In my view, the order appealed from is not in conflict with The Mechanics' Liens Act, supra, and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief, Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

The case does not stand for the proposition that the Court has a discretion in the application of a statutory imperative, such as that residing in s. 11(1) of The Mechanics' Liens Act, in circumstances of the nature of those upon which Matas, J.A. lays emphasis in the following extracts from his judgment:

> In the case at bar the receiver has been given control of the only money available as a means of breaking the stalemate which has been created by filing of the lien. The objective in having a receiver appointed was not to prevent dissipation of the fund, but to utilize the fund as a sensible and practical way of getting the necessary work done.
>
> ...
>
> There is ample evidence to support a finding that if plaintiffs are prevented from using the only available funds, and are thus prevented from doing the work, there will be an adverse effect on the building and the financial viability of the project will be in jeopardy. It would be fruitless to require plaintiffs to await the result of mechanics' lien or other court action, which would take place some time in the future while the property deteriorated and the financial viability of the project was being seriously affected.

These would be compelling reasons for the appointment of a receiver in the absence of s. 11(1) but, given that subsection, it would seem to me they are considerations which the Court is not entitled to bring into account. Parenthetically, events have proven, as so often appears to be the case, that peripheral skirmishing is wasteful of time and money and justice is better served by getting ahead with trial of substantial issue in the proceedings. Reference was made by Matas J.A. to the case of Winnipeg Supply and Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd. [[1972] W.W.R. 651, 23 D.L.R. (3d) 160.]. In that case the Court of Appeal for Manitoba held that, on an appeal from a judgment at trial in a mechanics' liens action, where a subcontractor's steel shoring supports for a building were essential to hold the building in place and to avoid serious damage, the cost of continuing supply of the supports and of removal would rank in priority to lien claimants. The priority given to the expenditure for an urgent and necessary purpose for the benefit of others was recognized in that case.

It is commonplace to appoint a receiver at the instance of a creditor in order to preserve property pending litigation. We have here the novel situation of an owner of property applying for the appointment of a receiver. The res is not the property but a sum of money to which the owner wish-

es to have recourse for the purpose of effecting improvements to the property. Until the main litigation has been concluded, it will not be known whether the cost of such improvements will fall upon the owner or upon the contractor and in the meantime the effect of the order of Nitikman, J. would be to subordinate the lien of the contractor to any advances under the mortgage made by C.M.H.C. to the receiver. The appointment would permit the receiver to borrow and expend moneys which, in the absence of the moisture difficulties and the litigation ensuing by reason thereof, would be payable to the contractor. None of the authorities to which we have been referred touches upon the appointment of a receiver in such circumstances and with such powers.

Mr. Houston advanced an argument based upon s. 4(1) of The Mechanics' Liens Act which reads in part:

> 4.(1) Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, ... a lien for the price of that work, service, ... upon the ... building, ... and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, ... limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner; but no such lien exists under this Act for any claim for less than twenty dollars.

(The italics are mine.)

It was contended that the lien of the contractor cannot go beyond the fair value of the work done, and that although the Manitoba Courts have not made an ultimate finding they have implicitly found that no amount is justly due to the lien claimant. I do not think the record before us bears this out. Explicit in the order of Nitikman, J. was a finding of a moisture problem affecting the student housing project but there was no finding, express or implicit, in either of the lower Courts as to responsibility for the problem. An order directing payment to a receiver at this time of the holdback fund with C.M.H.C. would be tantamount to a finding in favour of the owner on the major issue not yet litigated. Mr. Houston contends that s. 4(1) limits the right to lien. In my opinion its only effect is to limit the amount which the lienholder can recover. Unless and until the main action has been tried, the amount, if any, justly due to the contractor will not be known. The interlocutory proceeding taken for the appointment of the receiver was not intended to have, and did not have, the effect of making any determination of this outstanding issue.

The appellant contractor submitted that the order of Nitikman, J. was by its nature hypothetical and unenforceable in that C.M.H.C. did not appear in the proceedings and was known not to release funds except on assurance of priority and furthermore was not bound or directed by the order to advance funds to the receiver appointed. The effect which I would give to the express statutory provision, namely, s. 11(1) of The Mechanics' Liens Act makes it unnecessary to consider this additional ground of attack upon the validity of the order.

I would allow the appeal, reverse the decision of the Court of Appeal for Manitoba affirming the order of Nitikman, J. and direct that the motion be dismissed with costs in this Court and in the Courts below.

Appeal allowed with costs.

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD. 6326765 CANADA INC. and NOVAR INC.

Court File No: 09-CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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