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,* R.S.C. 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.

Applicants

BOOK OF AUTHORITIES OF THE RETIREES

(Returnable July 24, 2013)

VOL. I OF II

July 10, 2013

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TABLE OF CONTENTS

Table of Contents

19. *AGB Halifax Enterprises Inc. v. Wood Street Developments Inc.* (1999), 125 O.A.C. 275 (Ont. C.A.)

20. *McKay v. Fee* (1860) 20 U.C.W.B. 268 (U.C.Q.B.) at paras. 1-4.

21. *Elguindy v. Wakeworth Institution* (2011) 2011 ONSC 4670

22. *The Law of Costs,* 2nd ed. (Aurora, Ontario: Canada Law Books, looseleaf).

23. *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77 at para. 37

24. *Heather's House of Fashion Inc., Re* (No. 2) (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.)

TAB 1

** Preliminary Version **

Case Name:

Sun Indalex Finance, LLC v. United Steelworkers

Sun Indalex Finance, LLC, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant;

v.

United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents.

And between

United Steelworkers, Appellant;

v.

Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents, and

Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of

Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners.

[2013] S.C.J. No. 6

[2013] A.C.S. no 6

2013 SCC 6

301 O.A.C. 1

96 C.B.R. (5th) 171

354 D.L.R. (4th) 581

2013EXP-356

2013EXPT-246

J.E. 2013-185

D.T.E. 2013T-97

EYB 2013-217414

439 N.R. 235

2013 CarswellOnt 733

223 A.C.W.S. (3d) 1049

20 P.P.S.A.C. (3d) 1

File No.: 34308.

Supreme Court of Canada

Heard: June 5, 2012;
Judgment: February 1, 2013.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein, Cromwell and Moldaver JJ.

(280 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Priority -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Pensions and benefits law -- Private pension plans -- Bankruptcy, effect of -- Appeals from judgment setting aside decision concluding that deemed trust did not apply to wind-up deficiencies allowed -- Statutory deemed trust extended to contributions employer had to make to ensure that pension fund was sufficient to cover liabilities upon wind-up -- However, deemed trust was superseded by security granted to creditor that loaned money to employer during insolvency proceedings -- Although employer, as plan administrator, might have put itself in position of conflict of interest by failing to give plan's members proper notice of motion requesting financing of its operations during restructuring process, there was no realistic possibility that, had members received notice and had CCAA court found they were secured creditors, it would have ordered priorities differently -- Consequently, it was not appropriate to order equitable remedy such as constructive trust ordered by Court of Appeal.

Appeals from a judgment of the Ontario Court of Appeal setting aside a decision concluding that a deemed trust did not apply to wind-up deficiencies. Indalex became insolvent in 2009. At that time, Indalex was the administrator of two registered pension plans. Indalex obtained protection under the Companies' Creditors Arrangement Act ("CCAA"). Both plans faced funding deficiencies when Indalex filed for the CCAA stay. Indalex's financial distress threatened the interests of all the plan members. Indalex was authorized to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors. Indalex subsequently received a bid for approximately US$30 million, and the buyer did not assume responsibility for the pension plans' wind-up deficiencies. The plan members contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings. The plan members

brought motions for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors. The court concluded that the deemed trust did not apply to the wind-up deficiencies because the associated payments were not "due" or "accruing due" as of the date of the wind up. The Ontario Court of Appeal allowed the plan members' appeals. It found that the deemed trust created by section 57(4) of the Pension Benefits Act applied to all amounts due with respect to plan wind-up deficiencies. The Court of Appeal also concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations.

HELD: Appeals allowed. A contribution had "accrued" when the liabilities were completely constituted, even if the payment itself would not fall due until a later date. The fact that the precise amount of the contribution was not determined as of the time of the wind-up did not make it a contingent contribution that could not have accrued for accounting purposes. The relevant provisions, the legislative history and the purpose were all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. Therefore, Court of Appeal correctly held that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency with respect to salaried plan. It was difficult to accept the Court of Appeal's sweeping intimation that the debtor in possession ("DIP") lenders would have accepted that their claim ranked below claims resulting from the deemed trust. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust. Although the employer, as plan administrator, might have put itself in a position of conflict of interest by failing to give the plan members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the CCAA court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it was not appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

Statutes, Regulations and Rules Cited:

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, S.C. 2007, c. 36,

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

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 122(1)(a)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2, s. 11

Pension Benefits Act, R.S.O. 1980, c. 373, s. 21(2), s. 23, s. 32

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 1(1), s. 8(1)(a), s. 9, s. 10(1)12, s. 12, s. 19, s. 20, s. 22, s. 25, s. 26, s. 42, s. 56, s. 57, s. 57(3), s. 57(4), s. 58, s. 59, s. 68, s. 69, s. 70, s. 73, s. 74, s. 75, s. 75(1)(a), s. 75(1)(b)

Pension Benefits Act, 1965, S.O. 1965, c. 96, s. 22(2)

Pension Benefits Act, 1987, S.O. 1987, c. 35, s. 58, s. 59, s. 75(1), s. 76(1)

Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113, s. 23(a)

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Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2, s. 21, s. 22, s. 32

Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, s. 52(5)

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(7)

R.R.O. 1990, Reg. 909, s. 4(4)3, s. 5(1)(b), s. 5(1)(e), s. 14, s. 29, s. 31

Securing Pension Benefits Now and for the Future Act, 2010, S.O. 2010, c. 24, s. 21(2)

Subsequent History:

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

Court Catchwords:

Pensions -- Bankruptcy and Insolvency -- Priorities -- Company who was both employer and administrator of pension plans seeking protection from creditors under Companies' Creditors Arrangement Act ("CCAA") -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Company entering into debtor in possession ("DIP") financing allowing it to continue to operate -- CCAA court granting priority to DIP lenders -- Proceeds of sale of business insufficient to pay back DIP lenders -- Whether pension wind-up deficiencies subject to deemed trust -- If so, whether deemed trust superseded by CCAA priority by virtue of doctrine of federal paramountcy -- Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), 57(4), 75(1)(a), 75(1)(b) -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pensions -- Trusts -- Company who was both employer and administrator of pension plans seeking protection from creditors under CCAA -- Pension funds not having sufficient assets to fulfill pension promises made to plan members -- Whether pension wind-up deficiencies subject to deemed trust -- Whether company as plan administrator breached fiduciary duties -- Whether pension plan

members are entitled to constructive trust.

Civil Procedure -- Costs -- Appeals -- Standard of review -- Whether Court of Appeal erred in costs endorsement concerning one party.

Court Summary:

Indalex Limited ("Indalex"), the sponsor and administrator of two employee pension plans, one for salaried employees and the other for executive employees, became insolvent. Indalex sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The salaried plan was being wound up when the *CCAA* proceedings began. The executive plan had been closed but not wound up. Both plans had wind-up deficiencies.

In a series of court-sanctioned steps, the company was authorized to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The *CCAA* court granted the DIP lenders, a syndicate of pre-filing senior secured creditors, priority over the claims of all other creditors. Repayment of these amounts was guaranteed by Indalex U.S.

Ultimately, with the approval of the *CCAA* court, Indalex sold its business but the purchaser did not assume pension liabilities. The proceeds of the sale were not sufficient to pay back the DIP lenders and so Indalex U.S., as guarantor, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority. The *CCAA* court authorized a payment in accordance with the priority but ordered an amount be held in reserve, leaving the plan members' arguments on their rights to the proceeds of the sale open for determination later.

The plan members challenged the priority granted in the *CCAA* proceedings. They claimed that they had priority in the amount of the wind-up deficiency by virtue of a statutory deemed trust under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and a constructive trust arising from Indalex's alleged breaches of fiduciary duty as administrator of the pension funds. The judge at first instance dismissed the plan members' motions concluding that the deemed trust did not apply to wind up deficiencies. He held that, with respect to the wind-up deficiency, the plan members were unsecured creditors. The Court of Appeal reversed this ruling and held that the pension plan wind-up deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing priority and over other secured creditors. In addition, the Court of Appeal rejected a claim brought by the United Steelworkers, which represented some members of the salaried plan, seeking payment of its costs from the latter's pension fund.

Held (LeBel and Abella JJ. dissenting): The Sun Indalex Finance, George L. Miller and FTI Consulting appeals should be allowed.

Held: The United Steelworkers appeal should be dismissed.

(1) *Statutory Deemed Trust*

Per **Deschamps** and Moldaver JJ.: It is common ground that the contributions provided for in s. 75(1)(a) of the *PBA* are covered by the deemed trust contemplated by s. 57(4) of the *PBA*. The only question is whether this statutory deemed trust also applies to the wind-up deficiency payments required by s. 75(1)(b). The response to this question as it relates to the salaried employees is affirmative in view of the provision's wording, context and purpose. The situation is different with respect to the executive plan as s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up.

The wind-up deemed trust provision (s. 57(4) *PBA*) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due". Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind-up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind-up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations".

The time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind-up. The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind-up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind-up. Therefore, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection.

The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. The remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust. In this case, the Court of Appeal correctly held with respect to the salaried plan, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the statutory deemed trust issue.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Given that there can be no deemed trust for the executive plan because that plan had not been wound up at the relevant date, the main issue in

connection with the salaried plan boils down to the narrow statutory interpretative question of whether the wind-up deficiency provided for in s. 75(1)(b) is "accrued to the date of the wind-up" as required by s. 57(4) of the *PBA*.

When the term "accrued" is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due. In the present case, s. 57(4) uses the word "accrued" in contrast to the word "due". Given the ordinary meaning of the word "accrued", the wind-up deficiency cannot be said to have "accrued" to the date of wind-up. The extent of the wind-up deficiency depends on employee rights that arise only upon wind-up and with respect to which employees make elections only after wind-up. The wind-up deficiency therefore is neither ascertained nor ascertainable on the date fixed for wind-up.

The broader statutory context reinforces the view according to which the most plausible grammatical and ordinary sense of the words "accrued to the date of wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. Moreover, the legislative evolution and history of the provisions at issue show that the legislature never intended to include the wind-up deficiency in a statutory deemed trust. Rather, they reinforce the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind-up.

The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

In this case, the s. 57(4) deemed trust does not apply to the wind-up deficiency. This conclusion to exclude the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. The legislature has created trusts over contributions that were due or accrued to the date of the wind-up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency. While the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. The decision as to the level of protection that should be provided to pension beneficiaries under the *PBA* is one to be left to the Ontario legislature.

(2) *Priority Ranking*

Per **Deschamps** and Moldaver JJ.: A statutory deemed trust under provincial legislation such as the *PBA* continues to apply in federally-regulated *CCAA* proceedings, subject to the doctrine of federal paramountcy. In this case, granting priority to the DIP lenders subordinates the claims of other stakeholders, including the plan members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: Although there is disagreement with Deschamps J. in connection with the scope of the s. 57(4) deemed trust, it is agreed that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Deschamps J. on the priority ranking issue as determined by operation of the doctrine of federal paramountcy.

(3) *Constructive Trust As A Remedy for Breach of Fiduciary Duties*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: It cannot be the case that a conflict of interests arises simply because an employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the beneficiaries of the corporation's pension plan. This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles of employer and pension plan administrator being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. Rather, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation.

Seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex. Likewise, failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty to avoid conflicts of interest in this case. Indalex's decision to act as an employer-administrator cannot give the plan members any greater benefit than they would have if their plan was managed by a third party administrator.

It was at the point of seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator. However, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plans' beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

An employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest. Accordingly, Indalex breached its fiduciary duty by failing to take steps to ensure that the pension plans had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator, particularly when it sought the DIP financing approval, the sale approval and a motion to voluntarily enter into bankruptcy.

Regardless of this breach, a remedial constructive trust is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. There is no evidence to support the contention that Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings resulted in any such asset. Furthermore, to impose a constructive trust in response to a breach of fiduciary duty to ensure for the pension plans some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

Per **Deschamps** and Moldaver JJ.: A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the corporate employer must be prepared to resolve conflicts where they arise. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Specifically, in seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the plan members' priority. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the plan members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the plan members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the plan members.

As for the constructive trust remedy, it is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. There is agreement with Cromwell J. that this condition was not met in the case at bar and his reasoning on this issue is adopted. Moreover, it was unreasonable for the Court of Appeal to reorder the priorities in this case.

Per **LeBel** and Abella JJ. (dissenting): A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. It follows that before entering into an analysis of the fiduciary duties of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position and characteristics of the pension beneficiaries. In the present case, the beneficiaries were in a very vulnerable position relative to Indalex.

Nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise.

Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

In the present case, the employer not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust.

(4) *Costs in United Steelworkers Appeal*

Per McLachlin C.J. and Rothstein and **Cromwell** JJ.: There is no basis to interfere with the Court of Appeal's costs endorsement as it relates to United Steelworkers in this case. The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the United Steelworkers, representing only 7 of 169 members of the salaried plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. There is no error in principle in the Court of Appeal's refusal to order the United Steelworkers costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court.

Per **Deschamps** and Moldaver JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Per **LeBel** and Abella JJ.: There is agreement with the reasons of Cromwell J. on the issue of costs in the United Steelworkers appeal.

Cases Cited

By Deschamps J.

Referred to: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558.

By Cromwell J.

Referred to: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306; *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, aff'g 2008 ONCA 394, 67 C.C.P.B. 1; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4) 194; *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5) 47; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5) 169; *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6459 (CanLII); *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4) 314; *Donkin v. Bugoy*, [1985] 2 S.C.R. 85; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

By LeBel J. (dissenting)

Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4) 293; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.

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Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1) "administrator","wind up", 8(1)(a), 9, 10(1)12, 12, 19, 20, 22, 25, 26, 42, 56, 57, 58, 59, 68, 69, 70, 73, 74, 75.

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History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 265, 104 O.R. (3d) 641, 276 O.A.C. 347, 331 D.L.R. (4) 352, 75 C.B.R. (5) 19,

89 C.C.P.B. 39, 17 P.P.S.A.C. (3d) 194, [2011] O.J. No. 1621 (QL), 2011 CarswellOnt 2458, setting aside a decision of Campbell J., 2010 ONSC 1114, 79 C.C.P.B. 301, [2010] O.J. No. 974 (QL), 2010 CarswellOnt 893. Appeals allowed, LeBel and Abella JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Juriansz JJ.A.), 2011 ONCA 578, 81 C.B.R. (5) 165, 92 C.C.P.B. 277, [2011] O.J. No. 3959 (QL), 2011 CarswellOnt 9077. Appeal dismissed.

Counsel:

Benjamin Zarnett, Frederick L. Myers, Brian F. Empey and *Peter Kolla*, for the appellant Sun Indalex Finance, LLC.

Harvey G. Chaiton and *George Benchetrit*, for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors.

David R. Byers, Ashley John Taylor and *Nicholas Peter McHaffie*, for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited.

Darrell L. Brown, for the appellant/respondent the United Steelworkers.

Andrew J. Hatnay and *Demetrios Yiokaris*, for the respondents Keith Carruthers, et al.

Hugh O'Reilly and *Amanda Darrach*, for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership).

Mark Bailey, Leonard Marsello and *William MacLarkey*, for the respondent/intervener the Superintendent of Financial Services.

Robert I. Thornton and *D. J. Miller*, for the intervener the Insolvency Institute of Canada.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Kenneth T. Rosenberg, Andrew K. Lokan and *Massimo Starnino*, for the intervener the Canadian Federation of Pensioners.

Éric Vallières, Alexandre Forest and *Yoine Goldstein,* for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Mahmud Jamal, Jeremy Dacks and *Tony Devir,* for the intervener the Canadian Bankers Association.

The judgment of Deschamps and Moldaver JJ. was delivered by

1 **DESCHAMPS J.**:-- Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting

Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the

motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficiencies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the

Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary

obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?
2. If so, does the deemed trust supersede the DIP charge?
3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?
4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. *Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Wind-up Deficiencies?*

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57...** .
>
> (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the protection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions -- the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments

required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, 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 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.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well

after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete -- have accrued -- before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306, Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted -- and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* -- a debt for example which is *debitum in praesenti solvendum in futuro*. [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the

wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. M.N.R.*, (1998), 41 O.R. (3d) 606 (C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the wind-up deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed

trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. *Does the Deemed Trust Supersede the DIP Charge?*

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

> (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> 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. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to

apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
> (c) there is no other alternative available to the Applicants for a going concern solution;
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the

Applicants;

(g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ... ; and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906, at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. *Did Indalex Have Fiduciary Obligations to the Plan Members?*

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by

Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator -- when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with

interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex*

parte. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were

represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. *Would an Equitable Remedy Be Appropriate in the Circumstances?*

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice

of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency - at its essence - is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.

Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

84 I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

The reasons of McLachlin C.J. and Rothstein and Cromwell JJ. were delivered by

CROMWELL J. (Concurring in Result):--

I. Introduction

85 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

[para86 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension*

Benefits Act, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

[para87 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

> A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?
>
> B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?
>
> C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?
>
> D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

[para88 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. *Overview*

[para89 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

90 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

91 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought

protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

92 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

93 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

94 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

95 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

96 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

97 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114,

79 C.C.P.B. 301). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. *Indalex's CCAA Proceedings*

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

98 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

99 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;

- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or leave of the court, until May 1, 2009: para. 15;

- He granted the DIP lenders a so-called super priority:

> THIS COURT ORDERS that each of the Administration Charge, the Directors' Charge and the DIP Lenders Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trust, liens, charges and encumbrances,

> statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis added; para. 45.]
>
> - He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

100 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J.), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

101 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

102 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

103 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 (Ont. S.C.J.), at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no alternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J.))

104 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders. [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

105 On July 20, 2009, Indalex brought two motions before Campbell J.

106 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

107 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

108 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

109 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision

on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the wind-up deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

110 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

111 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

112 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

113 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

114 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

115 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex

subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

116 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. *First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?*

(1) Introduction

117 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

118 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

119 The wind-up deficiency payments are "employer contributions" which are "not yet due" as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the wind-up".

120 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4)

"applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

121 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

122 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

123 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "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". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

124 For convenience, the provision as it then stood is set out here.

> **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 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.

125 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

126 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

127 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

128 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the

liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

129 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 -- i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

130 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

131 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

132 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

133 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

134 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations."

135 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

136 The issue we confront is one of statutory interpretation and the well-settled approach is 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": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) *Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"*

137 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "are due ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up but [are] not yet due". Amounts "due" are covered by the s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

138 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

139 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

140 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53. However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

141 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Hydro-Electric Power Commission of Ontario v. Albright* (1922), 64 S.C.R. 306.

142 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook - Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

143 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum estimated by him to be equal to sinking fund payments [on the bonds and debentures] which shall have accrued but shall not be due at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having

> regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

144 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. M.N.R.* (1998), 41 O.R. (3d) 606 (C.A.)).

145 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

146 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

147 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up -- that is, the wind-up deficiency -- are included.

148 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> ...
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.0. 2010, c. 9, s. 52(5)), read as follows:

> (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.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

149 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "accrued to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued to the date of the wind up" (s. 57(4)).

(b) *The Scheme of the Act*

150 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

151 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "due and not paid". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "not yet due".

152 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

153 It is striking how closely the text of s. 75(1)(a) -- which does not relate to the wind-up deficiency -- tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is

difficult to understand why, if the intention had been for s. 57(4) to capture the wind-up deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

154 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) *Legislative History and Evolution*

155 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43.

156 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

157 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency.*

158 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the wind-up deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113

159 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a* (1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a* (3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80

160 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

161 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ... , up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

162 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) *The Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2

163 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the

amendments.

164 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

165 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are* "in addition to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

166 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due).*

167 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

168 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions... .
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214. [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

169 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust

employer liabilities that arise only upon wind up of the plan.

(iv) *Pension Benefits Act, 1987*, S.O. 1987, c. 35

170 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

171 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued to the date of the wind up but not yet due".

172 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have accrued to and including the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

173 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) *The Purpose of the Legislation*

174 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at paras. 13-14.

175 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

176 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

178 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the interpretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

179 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. *Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?*

(1) Introduction

180 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

181 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

182 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict -- the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

183 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?
(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) *Legal Principles*

184 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1, at para. 55.

185 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty... . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. [Emphasis added; pp. 646-47.]

186 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

(b) *The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer*

187 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

188 Turning first to the plan documents, I take the salaried plan as an example. Under it, the

company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

189 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> ...
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

190 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential

beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

191 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

192 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

193 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

194 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) *Breaches of Fiduciary Duty*

195 Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

196 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

197 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

198 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

199 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal -- those inherent in the employer's exercise of business judgment -- cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

200 How, then, should we identify conflicts of interest in this context?

201 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at s. 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those tasks and duties that I have described above.

202 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice

of Them

203 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

204 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

205 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> 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.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

206 Second, the facts of this case do not support the contention that the interests of the plan beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend

to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

207 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **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.

208 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate -- even necessary -- step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 (*"Rescue!")*; see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194, at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

209 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive Properties Ltd,.Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47, a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that

such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169, Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater inc.(Arrangement relatif à)*, 2009 QCCS 6459 (CanLII). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

210 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

211 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

212 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

213 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

214 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

215 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of

interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

216 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

217 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

218 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299 (CanLII); *Nortel Networks Corp., Re*, (2009), 75 C.C.P.B. 206 (Ont. S.C.J.). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. (Gen. Div.)), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

219 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the

plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

220 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

221 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

222 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

223 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

224 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85, cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it would be unjust for the party in breach to retain it.

225 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed

trust for the executive plan.

226 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

227 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

228 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

229 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from

retaining property which in 'good conscience' they should not be permitted to retain": *Soulos*, *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

230 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

231 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy... . [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

232 The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

233 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being

fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

234 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

235 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs": trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

236 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust -- i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff -- had been established.

237 I would add only two further comments with respect to the constructive trust. A major concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

238 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

239 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach -- the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process -- had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

240 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

241 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. *Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?*

242 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. *Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?*

(1) Introduction

243 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

244 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun

Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165, at para. 7.

245 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

246 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

247 In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

(3) Analysis

248 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of

Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

249 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

250 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

251 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

252 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

253 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

254 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

255 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation -- the vast majority I would add -- would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

256 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

257 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

258 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

259 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

260 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

261 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

262 I would dismiss the USW costs appeal, but without costs.

The reasons of LeBel and Abella JJ. were delivered by

LeBEL J. (dissenting):--

I. Introduction

263 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

264 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

265 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

266 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

267 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

268 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

269 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

270 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an

independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

271 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

272 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to abandon this role and diligently transfer its function as manager to an independent administrator.

273 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried

Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction -- but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

274 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in *CCAA* Proceedings

275 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

276 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

277 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

278 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to fill in gaps in the law when this is necessary in order to grant justice to the parties (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 pp. 78-79).

279 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

280 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

* * * * *

APPENDIX

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

> **6.** The said Act is amended by adding thereto the following sections:
>
> 23*a*. -- (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.
>
> (2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.
>
> (3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

> **21...** .
>
> (2) Upon the termination or winding up of a pension plan filed for registration as required by

section 17, the employer is liable to pay all amounts that would otherwise have been required to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

...

23. -- (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

...

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(*b*) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

...

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(*a*) the value of the assets of the plan; and

(*b*) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension plan.

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be money received by the employer from the employee.

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and
(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

...

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. -- (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. -- (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the

pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

...

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

59. -- (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

75. -- (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan 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.

...

76. -- (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 regulations if the Commission 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 40 (3) (50 per cent rule) and section 75,

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.

Pension Benefits Act, R.S.O. 1990, c. P.8

57. (1) [Trust property] Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

(2) [Money withheld] For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

(3) [Accrued contributions] An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

(4) [Wind up] Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the

beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

...

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

...

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.
2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).
3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event 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 activating event had not occurred 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 activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] 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 activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] 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.

(7) [Consent of employer] 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.

(7.1) [Consent of administrator, jointly sponsored pension plans] 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.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

...

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, 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 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.

Appeals of Sun Indalex Finance, George L. Miller and FTI Consulting allowed, LEBEL *and* ABELLA JJ. *dissenting. Appeal of USW dismissed.*

Solicitors:

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Solicitors for the appellant George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors: Chaitons, Toronto.

Solicitors for the appellant FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited: Stikeman Elliott, Toronto.

Solicitors for the appellant/respondent United Steelworkers: Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondents Keith Carruthers, et al.: Koskie Minsky, Toronto.

Solicitors for the respondent Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership): Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the respondent/intervener the Superintendent of Financial Services: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Insolvency Institute of Canada: Thornton Grout Finnigan, Toronto.

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cp/e/qlecl/qlmlt/qlhcs/qlced/qljac/qlced

TAB 2

> [W]here a final judicial decision has been pronounced on the merits by ... [a] judicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party (and in the case of a decision *in rem* ["against the thing"] any person whatsoever, as against any other person) is estopped in any subsequent litigation from disputing or questioning such decision on the merits. ...[137]

Underlying *res judicata* and its concerns about re-litigation is the balancing of two public policy concerns: first, access to justice, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, finality of adjudication, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause.[138] Or, in the words of American civil procedure scholars, *res judicata* exists to protect the "moral force of court judgments".[139]

The general idea behind *res judicata* is that as a matter of justice and good sense, if a claim, defence or issue has been adjudicated, then the adjudication is binding on the parties to the proceedings and their "privies" (those interested or affected by the adjudication), and, therefore, the claim, defence or issue should not be re-adjudicated in a second proceeding.[140] There should be an end to litigation, and a party and his or her privies should not be harassed with duplicative proceedings. These ideas are linked to Latin maxims such as: "*interest reipublicae ut sit finis litium*" ("it is in the public interest that there should be an end to litigation"); and *nemo debet bis vexari si constet curiae quot sid pro una et eadem causa* ("no man ought to be twice troubled or harassed if it appears to the court that it is for one and the same cause").

The public policy rationales for the principle of *res judicata* are that the preclusive effect of the rule advances consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, most especially in situations where a party or privy to a party has had his or her day in court.[141]

(ii) The Effect of the Rule of Res Judicata

The effect of the rule of *res judicata* is preclusive. It is a bar to litigation that precludes or prevents a party and his or her privies from asserting a claim,

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[137] K.R. Handley, *Spencer Bower, Turner, and Handley – The Doctrine of Res Judicata*, 3d ed. (London: Butterworths, 1969) at para. 9. See also J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham, ON: Butterworths, 1999) at 1069.

[138] This phrasing is borrowed from Cromwell J.A. writing in *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430 at para. 37, 162 N.S.R. (2d) 321 (N.S.C.A.), leave to appeal refused [1997] S.C.C.A. No. 656, 167 N.S.R. (2d) 400*n* (S.C.C.).

[139] F. James, Jr., G.C. Hayward, Jr. & J. Leubsdorf, *Civil Procedure*, 4th ed. (New York: Foundation Press, 1992) at 581.

[140] While one refers to a decision as "binding", *res judicata* is not a branch of *stare decisis*, which is the doctrine of law about the precedential value of a court judgment.

[141] *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46, [2001] 2 S.C.R. 460 (S.C.C.).

TAB 3

Indexed as:

Danyluk v. Ainsworth Technologies Inc.

Mary Danyluk, appellant;

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson, respondents.

[2001] 2 S.C.R. 460

[2001] S.C.J. No. 46

2001 SCC 44

File No.: 27118.

Supreme Court of Canada

2000: October 31 / 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (82 paras.)

Administrative law -- Issue estoppel -- Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions -- Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions -- Employment standards officer dismissing employee's complaint -- Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel -- Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel -- Whether preconditions to application of issue estoppel satisfied -- If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the Employment Standards Act ("ESA") seeking [page461] unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

[page462]

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in Harelkin and collateral attack in Maybrun.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter [page463] of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

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Considered: Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; disapproved in part: Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267; referred to: Re Downing and Graydon (1978), 21 O.R. (2d) 292; Farwell v. The Queen (1894), 22 S.C.R. 553; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223; Robinson v. McQuaid (1854), 1 P.E.I.R. 103; Bell v. Miller (1862), 9 Gr. 385; Raison v. Fenwick (1981), 120 D.L.R. (3d) 622; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182; Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326; Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112; Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; McIntosh v. Parent, [1924] 4 D.L.R. 420; British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1; Schweneke v. Ontario (2000), 47 O.R. (3d) 97; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173; Guay v. Lafleur, [1965] S.C.R. 12; Thoday v. Thoday, [1964] P. 181; Machado [page464] v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L.

(2d) 132; Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19; Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183; Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145; Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58; Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535; R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; Poucher v. Wilkins (1915), 33 O.L.R. 125; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321; Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89; General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72; Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41; Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660; Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1.

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Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. idem, s. 9(2)] 67(1) [am. idem, s. 10(1)], (2) [rep. & sub. idem, s. 10(2)], (3) [ad. idem], (5) [idem], (7) [idem], 68(1) [am. idem, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).
Employment Standards Improvement Act, 1996, S.O. 1996, c. 23, s. 19(1).
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APPEAL from a judgment of the Ontario Court of Appeal (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and J. Michael Mulroy, for the appellant. John E. Brooks and Rita M. Samson, for the respondents.

Solicitors for the appellant: Lang Michener, Toronto. Solicitors for the respondents: Heenan Blaikie, Toronto.

The judgment of the Court was delivered by

1 **BINNIE J.**:-- The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the Employment Standards Act, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice [page466] should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had

resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed [page467] damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant $2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs [page468] from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. Ontario Court (General Division) (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 (C.A.), he

concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. Court of Appeal for Ontario (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

> This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision [page469] should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered Re Downing and Graydon (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other

> information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider [page470] and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature. Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

[page471]

III. Relevant Statutory Provisions

17 Employment Standards Act, R.S.O. 1990, c. E.14

> 1. In this Act,
>
> ...
>
> "wages" means any monetary remuneration payable by an employer to an

employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a) tips and other gratuities,
(b) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
(c) travelling allowances or expenses,
(d) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

...

6. -- (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. -- (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a) arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;
(b) receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or
(c) issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the [page472] Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

...

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding

against the employer even though a review hearing is held to determine another person's liability under this Act.

...

67. -- (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

...

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

...

[page473]

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

> 68. -- (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.
>
> ...
>
> (3) The Director shall select a referee from the panel of referees to hear the review.
>
> ...
>
> (7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of [page474] justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or

material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making [page475] process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in The Doctrine of Res Judicata in Canada (2000), at p. 94 et seq., including Robinson v. McQuaid (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and Bell v. Miller (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include Raison v. Fenwick (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); Rasanen, supra; Wong v. Shell Canada Ltd. (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); Machin v. Tomlinson (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and Hamelin v. Davis (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also Thrasyvoulou v. Environment Secretary, [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, inter alia, to their legal nature and the position within the state structure of the institutions that issue them": R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on [page476] the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in McIntosh v. Parent, [1924] 4 D.L.R. 420, at p. 422:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action.

> The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in Angle, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in Angle, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that [page477] were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:

> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel per rem judicatem in the circumstances of this case, and erred in failing to do so.

A. The Statutory Scheme

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum [page478] employment standards for the protection of employees. These include hours of

work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There [page479] are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director [page480] does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "peut nommer un arbitre de griefs pour tenir une audience" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim de novo and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

[page481]

B. The Applicability of Issue Estoppel

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in Angle, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; Schweneke v. Ontario (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in Angle, supra, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, The Doctrine [page482] of Res Judicata (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

> It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.
>
> (Spencer Bower, Turner and Handley, supra, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent ex curia statement of Handley J. (the current editor of The Doctrine of Res Judicata) that:

> The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to res judicata estoppels.
>
> ("Res Judicata: General Principles and Recent Developments" (1999), 18 Aust. Bar Rev. 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard capable of supporting an issue [page483] estoppel? In my opinion, the answer to this question is yes.

(a) The Institutional Framework

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: Re Downing and Graydon, supra, per Blair J.A., at p. 305:

> In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important indicia of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) The Nature of ESA Decisions Under Section 65(1)

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative [page484] from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in Guay v. Lafleur, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in Thoday v. Thoday, [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (1998), vol. 2, s. 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) Particulars of the Decision in Question

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision ought to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in Rasanen, supra, per Abella J.A., at p. 280:

[page485]

> As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: Machado v. Pratt & Whitney Canada Inc. (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); Randhawa v. Everest & Jennings Canadian Ltd. (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); Heynen v. Frito-Lay Canada Ltd. (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); Perez v. GE Capital Technology Management Services Canada Inc. (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in Munyal v. Sears Canada Inc. (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

> The plaintiff relies on [Rasanen] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In Wong, supra, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also Alderman v. North Shore Studio Management Ltd., [1997] 5 W.W.R. 535 (B.C.S.C.).

[page486]

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as R. v. Nat Bell Liquors Ltd., [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: Harelkin v. University of Regina, [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel per rem judicatem is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in Harelkin, supra. In that case a university student failed in his judicial review application to quash the decision of a [page487] faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the Harelkin barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though Maybrun, supra, says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to

Maybrun, on which forum [page488] the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law [page489] governing judicial review in Harelkin, supra, and collateral attack in Maybrun, supra.

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in Angle, supra, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) That the Same Question Has Been Decided

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same

issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law [page490] that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) That the Judicial Decision Which Is Said to Create the Estoppel Was Final

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike Harelkin, supra, the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA [page491] decision must nevertheless be treated as final for present purposes.

(c) That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: Machin, supra; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321 (C.A.), per Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd. (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, supra, at 21 s. 24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 Can. Bar Rev. 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in The Law of Evidence in Canada (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

[page492]

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In General Motors of Canada Ltd. v. Naken, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In Bugbusters, supra, Finch J.A. (now C.J.B.C.) observed, at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel per rem judicatem is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s dictum was adopted and applied by the Ontario Court of Appeal in Schweneke, supra, at paras. 38 and 43:

[page493]

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist... . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask -- is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?
>
> ...
>
> ... The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also Braithwaite, supra, at para. 56.

64 Courts elsewhere in the Commonwealth apply similar principles. In Arnold v. National Westminster Bank plc, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, per Lord Keith of Kinkel, at p. 50:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result ... .

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

> In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of [page494] the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in Maybrun in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in Minott, supra. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives

68 In this case the ESA includes s. 6(1) which provides that:

> No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: Rasanen, supra, per Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

[page495]

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings -- including any available appeals -- has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) The Purpose of the Legislation

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In Bugbusters, supra, a forestry company was compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. Forest Act, R.S.B.C. 1979, c. 140. The expense claim was allowed despite an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, per Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the Forest Act].

A similar point was made in Rasanen, supra, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery [page496] and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American Restatement of the Law, Second: Judgments 2d (1982), vol. 2 s. 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages... .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) The Availability of an Appeal

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: Harelkin, supra, at p. 592. Here the employee had no right of appeal, but the existence of a potential administrative review and her failure to take advantage of it [page497] must be counted against her: Susan Shoe Industries Ltd. v. Ricciardi (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) The Safeguards Available to the Parties in the Administrative Procedure

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in Rasanen, supra, at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in Minott, supra, at pp. 341-42.

(e) The Expertise of the Administrative Decision Maker

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (Maybrun, supra, at para. 50):

[page498]

> ... where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or raison d'être, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) The Circumstances Giving Rise to the Prior Administrative Proceedings

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in Minott, supra, at pp. 341-42:

> ... employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them ... .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) The Potential Injustice

80 As a final and most important factor, the Court should stand back and, taking into account the

entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the [page499] problem identified by Jackson J.A., dissenting, in Iron v. Saskatchewan (Minister of the Environment & Public Safety), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

> The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

cp/e/qllls

TAB 4

Indexed as:

Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board (Ont. C.A.)

Between
Ontario Dairy Cow Leasing Limited (Applicant/Appellant), and The Ontario Milk Marketing Board, Buchanan & Hall Limited, Joe Makowski, Paul Curzon in Trust, Laurie Brown and Harold Breedon (Respondent)

[1993] O.J. No. 464

4 P.P.S.A.C. (2d) 269

38 A.C.W.S. (3d) 807

Action No. C10171

Ontario Court of Appeal
Toronto, Ontario

Brooke, Galligan and Osborne JJ.A.

Heard: February 18, 1993
Judgment: February 22, 1993

(3 pp.)

Personal property -- Security interests -- Registration -- Priorities.

This was an appeal from the decision of a motions court that certain documents created an absolute assignment of the proceeds of the sale of the milk quota in favour of the defendant, M.

HELD: The appeal was allowed and the decision below was set aside. The appellant was entitled to two-thirds of the proceeds of the sale of the milk and the respondent was entitled to one- third. The documents in question created security interests in the proceeds of sale but these security interests were not perfected due to defective registration. Priority of the security interests was determined pursuant to section 30(1)4 of the Personal Property Security Act.

Statutes, Regulations and Rules Cited:

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 30(1)4.

A.G. Van Klink, for the Appellant.
G.D. Walkden, for the Respondent.

The following judgment was delivered by THE COURT (allowing the Appeal):-- In our opinion this appeal must succeed.

1. We do not agree with the motions court judge that the documents signed on June 4, 1986 created an absolute assignment of the proceeds of the sale of the milk quota in favour of Mr. Makowski. In the circumstances in which the assignment was given equity would always have granted a right of redemption. These documents did, however, in our opinion, create a valid security interest in the proceeds of the sale of the milk quota, but the security interest was not perfected because of defective registration.
2. The documents executed on April 18, 1988, on their face, did not create a security interest in the proceeds of the sale of the milk quota. Therefore, whether or not there was proper registration is immaterial.
3. The documents executed on March 1, 1989, created a valid security interest in the proceeds of the sale of the milk quota. That security interest, however, was not perfected because of defective registration.
4. The priority issue between the parties must be resolved as of the time when their respective security interests came into conflict. On the facts of this case, it is our opinion that those interests came into conflict prior to April 1990 and probably during the month of December 1989.
5. At the time that the security interests came into conflict there were no perfected security interests. Therefore priority must be determined pursuant to s. 30(1)4. of the Personal Property Security Act. The respective security interests attached at the same time because both security interests were in existence at the time the debtor obtained rights to the proceeds of the sale of the quota.
6. It is our opinion, therefore, that the parties are entitled to share rateably in the funds held by the stakeholder. The calculation of the pro rata shares would be somewhat complicated. In order to avoid further litigation or argument the parties agreed before this court that the fair pro rata sharing should be on the basis of two-thirds to the appellant and one-third to the respondent.

DISPOSITION

The appeal is allowed and the judgment below is set aside. In its place judgment will issue declaring that the appellant is entitled to two-thirds of the proceeds of the sale of the milk quota and that the respondent is entitled to one-third of those proceeds. Success has been divided in this court and in the ultimate result. Therefore each party should bear their own costs. There will no order of costs here or in the court below.

BROOKE J.A.
GALLIGAN J.A.
OSBORNE J.A.

TAB 5

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, and in the Matter of a Plan or Plans of Compromise or Arrangement of Ivaco Inc. et al.

[Indexed as: Ivaco Inc. (Re)]

83 O.R. (3d) 108

Court of Appeal for Ontario,

Laskin, Rosenberg and Simmons JJ.A.

October 17, 2006

Debtor and creditor -- Companies' Creditors Arrangement Act -- Pensions -- Monitor appointed under CCAA not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Powers of court -- Motions judge ordering transfer of debtor Companies' head offices from Québec to Toronto -- CCAA not giving motions judge authority to order transfer -- Motions judge not having to resort to CCAA because he had express authority to order transfer under s. 191 of Canada Business Corporations Act -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 191 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. [page109]

Pensions -- Monitor appointed under Companies' Creditors Arrangement Act not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors

Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

In 2003, the Companies sought and obtained court-ordered protection under the Companies' Creditors Arrangement Act ("CCAA"). In order to avoid imperiling the possibility of restructuring, a pension stay order was granted, and the Companies were relieved from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. Paragraph 4 of the pension stay order stipulated that the Companies would not incur any obligation because of the failure to make these past service contributions and special payments during the stay period. Paragraph 5 of the pension stay order recognized that statutory deemed trusts, liens or other charges might arise because the Companies were relieved from paying past service contributions, but that they would not have priority over the charges in the initial stay order. The Companies were unable to restructure, and their assets were sold. The employees and retirees in the underfunded non-union pension plans, claiming under the deemed trust and lien provisions of the Pension Benefits Act (the "PBA"), sought to recover unpaid contributions to the plans outside of bankruptcy. The Companies' financial and trade creditors wished to put the Companies into bankruptcy. Provincial deemed trusts do not enjoy priority under the Bankruptcy and Insolvency Act (the "BIA"). The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions which the Companies were deemed to hold in trust for the beneficiaries of the pension plans under the PBA, or alternatively, an order segregating that amount in a separate account. Two of the Companies' lenders brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy. The motions judge dismissed the Superintendent's motion, lifted the stay and permitted the bankruptcy to proceed, but did not put the Companies into bankruptcy. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Québec to Toronto. The Superintendent appealed.

Held, the appeal should be dismissed.

The motions judge did not err in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account. The motions judge was not required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. The language of s. 57 of the PBA does not require the employer to keep its unpaid contributions to a pension plan in a separate account. Moreover, the Superintendent's argument amounted to an impermissible collateral attack on para. 4 of the pension stay order. The Monitor appointed under the CCAA did not stand in the shoes of the Companies and did not have a fiduciary duty to the pension beneficiaries. The motions judge was not required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings but before bankruptcy. [page110] The CCAA itself did not require the motions judge to execute the deemed trusts. Moreover, absent an agreement, it was doubtful that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent,

it was questionable whether the court had any authority to order a distribution of the sale proceeds. The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rested on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. That is not the case. There is no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation.

The motions judge's order lifting the stay and permitting the bankruptcy petitions to proceed was a discretionary order. Appellate review of a discretionary order under the CCAA is limited. The motions judge did not exercise his discretion improperly by ignoring the unfair and prejudicial effects of his order on the pension beneficiaries. Numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. He exercised his discretion properly.

While the CCAA did not give the motions judge jurisdiction to order the transfer of the head offices of two of the Companies from Québec to Toronto, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the Canada Business Corporations Act.

Cases referred to

GMAC Commerical Credit Corp. - Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202 (C.A.); Toronto-Dominion Bank v. Usarco Ltd., [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.), distd

Other cases referred to

Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176, [1998] O.J. No. 1298, 158 D.L.R. (4th) 65, 37 C.C.E.L. (2d) 276, 2 C.B.R. (4th) 243 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 276] (sub nom. Abraham v. Coopers and Lybrand Ltd.); Air Canada (Re) (2003), 66 O.R. (3d) 257, [2003] O.J. No. 2976, 229 D.L.R. (4th) 687, 43 C.B.R. (4th) 1 (C.A.), supp. reasons [2003] O.J. No. 3943, 45 C.B.R. (4th) 23 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.); Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 57 D.L.R. (4th) 623, [1989] 4 W.W.R. 566, 73 C.B.R. (N.S.) 273 (C.A.); Beatrice Foods Inc. (Re), [1996] O.J. No. 5495, 43 C.B.R. (4th) 10 (C.J.); British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1; Buth-na-bodhiaga, Inc. v. Lambert (2002), 60 O.R. (3d) 787, [2002] O.J. No. 3163,

216 D.L.R. (4th) 330, 36 C.B.R. (4th) 256 (C.A.), supp. reasons [2002] O.J. No. 3664, 36 C.B.R. (4th) 269 (C.A.); Dallas/North Group Inc. (Re), [2001] O.J. No. 2743, 27 C.B.R. (4th) 40 (C.A.), affg (1999), 46 O.R. (3d) 602, [1999] O.J. No. 5744, 17 C.B.R. (4th) 56 (Gen. Div.); General Chemical Canada Ltd. (Re), [2005] O.J. No. 5436, 51 C.C.P.B. 297, 144 A.C.W.S. (3d) 405 (S.C.J.); Harrop of Milton Inc. (Re) (1979), 22 O.R. (2d) 239, [1979] O.J. No. 4015, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289 (S.C.); [page111] Husky Oil Operations Ltd. v. Canada (Minister of National Revenue), [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 26 O.R. (3d) 81, 137 Sask. R. 81, 128 D.L.R. (4th) 1, 188 N.R. 1, 107 W.A.C. 81, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1; Royal Crest Lifecare Group Inc. (Re), [2004] O.J. No. 174, 46 C.B.R. (4th) 126 (C.A.); Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 9 C.B.R. (5th) 135, 2 B.L.R. (4th) 238 (C.A.); United Maritime Fishermen Co-op (Re), [1988] N.B.J. No. 308, 87 N.B.R. (2d) 333, 221 A.P.R. 333, 68 C.B.R. (N.S.) 170 (Q.B.)

Statutes referred to

Bank Act, S.C. 1991, c. 46, s. 427 [as am.]
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43 [as am.], 67 [as am.]
Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 109 [as am.], 173 [as am.], 191 [as am.]
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2 "debtor company" [as am.], 11 [as am.], 11.7 [as am.], 13 [as am.]
Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57
Pension Benefits Act, 1987, S.O. 1987, c. 35
Truck Transportation Act, R.S.O. 1990, c. T.22
Wage Earner Protection Program Act, S.C. 2005, c. 47 [not yet in force]

Rules and regulations referred to

Load Brokers, O. Reg. 556/92 ("Truck Transportation Act"), s. 15

Authorities referred to

Gillese, E.E., The Fiduciary Liability of the Employer as Pension Plan Administrator (Toronto: The Canadian Institute, November 1996)

APPEAL from the three orders of Farley J. of the Superior Court of Justice, [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.).

Frederick L. Myers and Jason Wadden, for appellant The Superintendent of Finance Services (Ontario).

Andrew Hatnay, for respondent Québec Pension Committee of Ivaco Inc.

Jeffrey S. Leon and Richard B. Swan, for respondent National Bank of Canada.

Dan V. MacDonald, for respondent Bank of Nova Scotia.

Geoff R. Hall, for respondent QIT-Fer et Titane Inc.

Robert W. Staley and Evangelia Kriaris, for respondent Informal Committee of Noteholders.

Peter F.C. Howard, for Monitor Ernst & Young Inc.

The judgment of the court was delivered by

LASKIN J.A.: --

A. Introduction

[1] This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its [page112] related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bankruptcy statute.

[2] Ivaco and its related group of companies (collectively the "Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are moneys due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded.)

[3] The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

[4] The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Québec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

[5] Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005, he dismissed the Superintendent's motion [page113] and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

[6] The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

[7] Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most vulnerable creditors.

[8] The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Québec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

[9] This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. Relevant Facts and Chronology

(a) The Companies

[10] Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations -- Ivaco, IRM, Ifastgroupe and Docap -- established the non-union pension plans in issue on this appeal.

[11] Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets. [page114]

(b) The non-union pension plans

[12] The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Québec and has both Québec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

[13] The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

(c) The initial stay under the CCAA

[14] After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

[15] During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

(d) The pension stay order

[16] When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

[17] Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003,

were granted a pension stay order. [page115]

[18] The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

[19] Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

> THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

[20] Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

> THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated order.

[21] Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

> Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

(e) The sale to Heico

[22] As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going [page116] concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

[23] Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

[24] The motions judge made two orders -- on August 18, 2004 and November 30, 2004 -- vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

[25] In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

(f) The pension claims

[26] The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about $1.4 million and the solvency deficiency amounted to approximately $11.1 million. By December 2004, these figures had grown to approximately $11.6 million and $29.1 million respectively. They continued to grow while the pension stay order remained in place.

[27] The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is 67 years old and earns a pension of $14,000 per year. These pensioners will receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full [page117] solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

(g) The claims of the financial creditors

[28] The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

[29] The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about $40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003, the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

[30] The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005, it had a secured claim against Ivaco for $17 million,[1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

[31] A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling $554.9 million; Docap has 82 creditors with claims totalling $111.1 million; and Ifastgroupe has 645 creditors with claims totalling $253.3 million.

C. Analysis

(a) What is in issue on this appeal

[32] The scope of this appeal is quite narrow. There are three issues:

(1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?
(2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions [page118] to proceed, without protecting the claims of the pension beneficiaries?
(3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Québec to Toronto?

(b) What is not in issue on this appeal

[33] There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the Bank Act, S.C. 1991, c. 46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

[34] On my view of the appeal, the first of these issues does not have to be resolved. It may

become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176, [1998] O.J. No. 1298 (C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

[35] In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

[36] In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion. [page119]

[37] The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example Re Dallas/North Group Inc. (1999), 46 O.R. (3d) 602, [1999] O.J. No. 5744 (Gen. Div.); Buth-na-bodhiaga, Inc. v. Lambert (2002), 60 O.R. (3d) 787, [2002] O.J. No. 3163 (C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

[38] The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78; Husky Oil Operations Ltd. v. Canada (Minister of National Revenue), [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77. Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

[39] The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes -- the three certainties -- of a common law trust: certainty of intent; certainty of subject matter; and

certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example Henfrey Sampson, supra. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

[40] I now turn to the issues that do arise on this appeal.

(c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

[41] The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA [page120] proceedings. The submission that the motions judge was legally required to order payment or segregation of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

[42] I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

[43] The deemed trusts for unpaid past service and special contributions are found in s. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind-up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind-up are also deemed to be held in trust:

> 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[44] At para. 11 of his decision, the motions judge said that both unpaid contributions and

wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in Toronto-Dominion Bank v. Usarco Ltd., [1991] O.J. No. 1314, 42 E.T.R 235 (Gen. Div.), Farley J. said, at para. 25, that the equivalent legislation then in force under the Pension Benefits Act, 1987, S.O. 1987, c. 35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in Usarco is correct, but I do not need to resolve the issue on this appeal.

[45] Under s. 57(5) of the PBA, the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4). [page121]

[46] The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

[47] The Superintendent argues that the pension stay order supports her position because para. 5 [of] the order, supra, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, supra, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation -- statutory, fiduciary or otherwise -- for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

[48] The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

[50] Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion. [page122]

[51] Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, The Fiduciary Liability of the Employer as Pension Plan Administrator (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

[52] Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

> THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the Pension Benefits Act (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise.

(Emphasis added)

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

[53] Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, and an earlier decision of the motions judge in Usarco, supra, support the argument for segregation. In my view, both cases are distinguishable.

[54] In TCT Logistics, this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the Load Brokers regulation, O. Reg. 556/92 (passed under the Truck Transportation Act, R.S.O. 1990, c. T.22) to hold carriers' fees that it had collected in a separate trust account. TCT Logistics and this case differ in three critical ways.

[55] First, the interim receiver in TCT Logistics was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

[56] Second, in TCT Logistics the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the [page123] pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

[57] Third, and perhaps most important, the applicable legislation in TCT Logistics, s. 15(2) of the Load Brokers regulation required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in TCT Logistics, despite s. 15(2) of the regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. TCT Logistics thus does not support the Superintendent's position.

[58] In Usarco, supra, at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in Usarco, did not step into the shoes of the debtor. Thus, Usarco does not assist the Superintendent.

[59] For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

[60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example Re United Maritime Fishermen Co-op, [1988] N.B.J. No. 308, 68 C.B.R. (N.S.) 170 (Q.B.), at p. 173 C.B.R. (N.S.).

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and [page124] insolvency regime and to the principle that the province cannot re-order priorities in bankruptcy.

[62] The federal insolvency regime includes the CCAA and the BIA. The two statutes are related. A debtor company under the CCAA is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a 30-day stay of any current or prospective proceedings under the BIA, and

s. 11(4) authorizes an extension of the initial 30-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See Husky Oil, supra, at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so. [page125]

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in Usarco, supra. In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the PBA. However, the facts in Usarco differed materially from the facts in this case.

[67] In Usarco, CCAA proceedings did not precede the bankruptcy petition. Moreover, in Usarco the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in Usarco it was unclear whether bankruptcy proceedings would ever take place.

[68] Recently in Re General Chemical Canada Ltd., [2005] O.J. No. 5436, 51 C.C.P.B. 297 (S.C.J.), Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at

para. 35:

> To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between General Chemical and this case on the one hand, and Usarco on the other, render Usarco of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the Wage Earner Protection Program Act, S.C. 2005, c. 47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

> (d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

[70] In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for [page126] rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

> In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[71] Appellate review of a discretionary order under the CCAA is limited. See Re Air Canada (2003), 66 O.R. (3d) 257, [2003] O.J. No. 2976 (C.A.), at para. 25; Re Royal Crest Lifecare Group Inc., [2004] O.J. No. 174, 46 C.B.R. (4th) 126 (C.A.), at para. 23; Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly -- on a wrong principle -- because he ignored the "unfair and prejudicial" effects of his order on the Companies' most

vulnerable class of creditors: the pension beneficiaries. I disagree.

[72] The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

[73] Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded [at para. 4]:

> [O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. [page127]

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

[74] Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

[75] The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

[76] Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

-- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution. [page128]

-- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 57 D.L.R. (4th) 623, 73 C.B.R. (N.S.) 273 (B.C.C.A), at pp. 627, 630-31 D.L.R.; Re Harrop of Milton Inc. (1979), 22 O.R. (2d) 239, [1979] O.J. No. 4015 (S.C.), at pp. 244-45 O.R.

-- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

-- The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

[77] The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

(e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Québec to Toronto?

[78] Ivaco's head office was in Montréal; Ifastgroupe's head office was in Marieville, Québec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light [page129] of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

[79] The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See Re Stelco Inc. (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A), at para. 38.

[80] I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA"). Section 191(1) and (2) provide:

> 191(1) In this section, "reorganization" means
>
> a court order made under;
> (a) section 241;
>
> (b) the Bankruptcy and Insolvency Act approving a proposal; or
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> (2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

[81] The applicable section here is s. 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See Re Beatrice Foods Inc., [1996] O.J. No. 5495, 43 C.B.R. (4th) 10 (C.J.). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office: [page130]

> 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> . . . . .

(b) change the province in which its registered office is situated;

[82] On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and Ifastgroupe's head offices from Québec to Toronto. Resort to the CCAA was unnecessary.

[83] The Superintendent and the QPC rely on this court's decision in Re Stelco in support of their argument. However, that case differs from the present case in a material way. In Re Stelco, the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

[84] By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

[85] However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

[86] Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court -- Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same [page131] time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

[87] The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Québec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Québec law for satisfying the obligation to fund the plan.

[88] The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Québec law and therefore should be decided by a Québec court. Whether the Québec or

the Ontario Superior Court presides over this future motion will turn on the application of the forum conveniens principle. One relevant factor in assessing the forum conveniens is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

[89] It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. Conclusion

[90] The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the Pension Benefits Act or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Québec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

[91] If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

Appeal dismissed. [page132]

Notes

1 Taking into accout a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

TAB 6

TAB 6

Case Name:

Afton Food Group Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Afton Food Group Ltd., Afton Food Group Inc., Joint Technologies Inc., Kedard Holdings Ltd., Robin's Foods Inc., Mrs. Powell's (Canada) Inc., 241 Pizza (1997) Inc., Ruffage International Inc., Cybersensations Café Inc., Mrs. Powell's, Inc. and Kidsports Capital Corporation and other applicants listed on Schedule "A", Applicants

[2006] O.J. No. 1950

18 B.L.R. (4th) 34

21 C.B.R. (5th) 102

148 A.C.W.S. (3d) 396

2006 CarswellOnt 3002

Court File No. 04-CL-5491

Ontario Superior Court of Justice
Commercial List

N.J. Spies J.

Heard: May 2, 2006.
Judgment: May 16, 2006.

(70 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- The court made three findings after the receiver brought a motion for directions, including that the indemnification provisions in the CCAA order and continued in the receivership order extended to liabilities for

which the directors might be personally liable that existed before the date of the CCAA order if they otherwise fell within the meaning of para. 37(1) of that order -- Companies' Creditors Arrangement Act.

Insolvency law -- Receivers, managers and monitors -- Duties and powers -- The court made three findings after the receiver brought a motion for directions, including that the indemnification provisions in the CCAA order and continued in the receivership order extended to liabilities for which the directors might be personally liable that existed before the date of the CCAA order if they otherwise fell within the meaning of para. 37(1) of that order -- Companies' Creditors Arrangement Act.

The court made three findings after the receiver brought a motion for directions -- The receiver brought a motion for directions from the court with respect to six issues, but as an agreement was reached with respect the three of them, the court was asked to make a ruling on the other three -- HELD: In a preliminary determination, the court found that the claimants did not have standing to intervene on the interpretation issues with regard to the Directors' Charge, as the provisions in issue were for the direct benefit of the Former Directors only -- The indemnification provisions in the CCAA order and continued in the receivership order extended to liabilities for which the directors might be personally liable that existed before the date of the CCAA order if they otherwise fell within the meaning of para. 37(1) of that order -- The $1 million directors' charge, which secured the indemnification provisions in the orders, was exclusive of legal fees, and disbursement that had been paid by the applicants to counsel for the directors in accordance with the terms of the orders -- Finally, the Koehle Group of Directors were entitled to retain separate counsel and the indemnity as to legal fees applied to reasonable fees and disbursements of that counsel, subject to assessment in the case of the claim asserted against MacDonald.

Statutes, Regulations and Rules Cited:

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

Counsel:

G. Benchetrit and F. Tayar for the Receiver

Christopher W. Besant, for the Former Directors of Afton

R. van Kessel for Hans Koehle, Ian Barrett and Robert Coffey

B. Sachdeva and M. Nowina for Robert Macdonald and K. Kraft for Rabobank

ENDORSEMENT

N.J. SPIES J. (endorsement):--

Overview

1 By Order of Madam Justice Hoy dated February 28, 2005 (the "Receivership Order"), Zeifman Partners Inc. was appointed interim receiver and receiver and manager (the "Receiver") of all of the current and future assets, undertakings and properties of Afton Food Group Ltd. and certain of its subsidiaries and related corporations (collectively referred to herein as the "Debtors" or the "Applicants").

2 Prior to the appointment of the Receiver, the Debtors had been operating under the Companies' Creditors Arrangement Act ("CCAA") pursuant to the Order of Mr. Justice Cameron dated July 16, 2004 (the "CCAA Order"). The CCAA Order included only certain of the Debtors as applicants under the CCAA, but was later amended nunc pro tunc to include those Debtors not originally named. By way of several subsequent orders of this Court, the terms of the CCAA Order had been extended from time to time.

3 In an endorsement dated October 18, 2004, Mr. Justice Farley ordered that the legal accounts of the Former Directors be paid on an ongoing basis, subject to an overall taxation at the end, with the proviso as to any "outrageous accounts".

4 By Order of Mr. Justice Campbell dated March 10, 2006 (the "D&O Claims Order"), a claims process was established for the submission of D&O Claims (as defined therein) to the Receiver on or before April 3, 2006 (the "D&O Claims Bar Date).

5 The Receiver received a total of 8 D&O Proofs of Claim by April 3, 2006 (including the motion record of Robert Macdonald referred to below). The Receiver also received a Proof of Claim filed by Cassels Brock & Blackwell LLP ("Cassels") as a precaution to preserve and assert the former directors' rights in connection with any actual or potential claims against them.

6 The Receiver is not admitting or denying the validity or the quantum of any of these claims. Pursuant to Paragraph 12 of the D&O Claims Order, the process for review, resolution and adjudication of these claims is to be determined by further order of this Court.

7 The Senior Lenders provided operating lines of credit to the Debtors pursuant to a Restated Credit Agreement dated October 23, 2003 (the "Credit Agreement"). Rabobank Nederland, Canadian Branch, is the agent for the Senior Lenders. The Senior Lenders are owed in excess of $21 million pursuant to the Credit Agreement. There seems to be no doubt that the Senior Lenders are going to suffer a significant shortfall on their recovery in any scenario.

8 At present, there are 3 sets of counsel representing former directors of the Debtors:

a. Cassels represents all of the former directors of Afton; Robert Macdonald, Robert Coffey, Hans Koehle and Ian Barrett (the "Former Directors");
b. Lawrence, Lawrence, Stevenson LLP ("Lawrence") represents Robert Coffey, Hans Koehle and Ian Barrett (the "Koele Group") in connection with the claims made against them by Robert Macdonald; and
c. Pallett Valo LLP ("Pallett") represents Robert Macdonald in connection with his claims made against the Debtors and the Koehle Group for unpaid salary and pension entitlements.

9 Following discussions among counsel for the Receiver, counsel for the Secured Lenders and counsel for the Former Directors, it was decided that there are a number of "threshold" issues relating to the scope of the Directors' Charge (as defined in the CCAA Order), which ought to be submitted to the Court for a determination. Accordingly, it was agreed that the Receiver would bring a motion for advice and submit these issues to the court for determination

10 In addition to the Receiver's motion for advice there are motions from: (i) the Former Directors seeking an order directing the Receiver to pay accounts of Cassels (ii) Robert Macdonald, one of the former directors, seeking an order that Issue #1 be answered in the affirmative, and in the alternative, an order for leave to commence an action against the Koehle Group and (iii) a cross motion from the Koehle Group seeking to vary the terms of the CCAA Order and Receivership Order if necessary.

Issues

11 The Receiver brings this motion for advice and directions in connection with the following 6 issues listed in paragraph (b) of the Notice of Motion[1]:

1. Do the indemnification provisions of the various orders extend to liabilities for which the directors may be personally liable that existed before July 16, 2004, or do the provisions only secure liabilities that arose on or after that date?
2. Is the $1 million Directors' Charge on the indemnification provisions inclusive or exclusive of legal fees paid or payable to directors' counsel?
3. Does the indemnification for legal fees extend to counsel for Mr. Macdonald and to counsel for the other three former directors in response to the claims of Mr. Macdonald?
4. Is Afton obliged to pay the outstanding accounts of Cassels before any assessment or approval related thereto?
5. Has the Receiver, in any way, waived the rights of Afton or the senior lenders in relation to the accounts of Cassels that were paid during and after the CCAA process was ongoing?
6. On the assumption that the answer to question 5 is negative, where is the

appropriate forum to have those accounts reviewed?

12 The Receiver also sought advice and direction of the Court with respect to whether any of the D&O Claims create any liability for the Receiver separate and apart from any liability that the Debtors or the Directors may have in connection with such claims, but this question was not pursued on the motion.

13 Counsel advised that an agreement had been reached, which settled Issues numbered 4-6. The terms of the agreement are as follows:

> With respect to the relief sought in paragraph (b)(5) of the Receiver's notice of motion, the former Directors of Afton shall respond to the questions posed in writing by the Receiver on or preceding June 15, 2006. The adequacy of the responses and the procedure for the taxation ordered by Farley, J. may be the subject-matter of a further motion to be brought either by Cassels Brock or the Receiver.
>
> The relief sought in paragraph (b)(6) of the Receiver's notice of motion and in paragraph (c) of the notice of motion of Robert Coffey, Robert MacDonald, Hans Koehle and Ian Barrett ("Former Directors"), are hereby withdrawn, without costs.
>
> The relief sought in paragraph (b) of the motion of the Former Directors is hereby adjourned sine die. Similarly Item (b)(4) of the Receiver's motion shall be adjourned sine die. Pending the return of those motions, the Receiver shall continue to pay the legal accounts of the Former Directors in accordance with the endorsement of Madam Justice Mesbur of February 23, 2006. For greater certainty, payments by Afton shall be made directly to Cassels Brock and, conversely, any reductions of the Cassels Brock accounts (if any) are to be repaid by Cassels Brock directly to Afton (provided that this provision does not alter any rights between Cassels Brock and its clients concerning its accounts).

14 This agreement also resolves the motion brought by the Former Directors.

Preliminary Issue

15 Notice of this motion was not given to all of the claimants who filed claims in response to the D&O Claims Order. No counsel took the position that the claimants ought to be given notice.

16 It is the position of counsel for the Receiver that the claimants do not have standing to make submissions on the Directors' Charge, which is in favour of the Former Directors. I agree. I am

interpreting two court orders and in particular the rights of the Former Directors with respect to the indemnification provisions and the Directors' Charge. Although the claimants may be indirectly impacted by this decision, in my view the claimants do not have standing to intervene on the interpretation issues I have been asked to consider. The provisions is issue are for the direct benefit of the Former Directors only.

17 Counsel for the Former Directors suggested that these issues should not be answered at this time, as the scope of the Directors' Charge should be interpreted in the context of specific claims. He submitted that the applicability of the CCAA Order, as it applies to any particular claim, needs to be considered in relation to specific claims, and in a manner that binds the claimant asserting the claim against the Directors. Counsel for the Receiver disagreed and submitted that I have all of the necessary facts in order to decide the issues put before me and that the Receiver needs to know the answers to the questions at this time.

18 The issues I have been asked to decide do not determine whether or not the indemnification provisions of the Directors' Charge cover any particular claims. Counsel for Macdonald made some submissions concerning his client's claim but I am not prepared to express an opinion on that claim nor do I need to do so in order to answer the issues before me. Accordingly in my opinion the issues can be considered and answered at this time.

Principles of Interpretation

19 It is submitted by counsel for the Koehle Group that an initial order, like the CCAA Order, should be given a large and liberal interpretation and that the purpose of the CCAA must be kept in mind in interpreting a CCAA Order.

20 Counsel relies on the decision of the Alberta Court of Appeal; Smoky River Coal Ltd. (Re)[2], which considered the principles that ought to be applied in interpreting CCAA orders. The court held that the purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The court referred to the following passage from the decision of Farley J. in Re Lehndorff General Partner Ltd.[3] wherein he stated as follows:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan [sic] of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

21 In considering CCAA orders, the court in Smoky River stated that these orders become the "roadmap" for the proceedings and the litigation which may follow and so they must be drafted with clarity and precision:

> It is particularly important that the terms and scope of any charge created by an order be clearly defined. Creditors need to know from the outset whether or not they are entitled to benefit in any charge or other priority created by the order. Those extending credit ... should not be forced to participate in litigation after the CCAA proceeding to discover whether or not they hold some form of security or are entitled to a super-priority. Similarly, secured creditors of a troubled company need to know from the outset the effect the CCAA process will have on their security. They should not be forced to wait until the end of the proceedings to discover that their security has been whittled away due to a **broad judicial interpretation** of qualification for super-priority status. A precise CCAA order will ensure commercial practicality by allowing all creditors of the debtor company to properly adjust the terms of their credit[4] (emphasis mine).

22 In the Smoky River case the appeal court was faced with a CCAA order that did not define a post-petition trade creditors charge. The court found that because the parties had failed to define the term, that the court had to attempt to balance the interests of the parties and presume that creditors would be taken to understand the purpose of the CCAA and to expect that the PPTC Charge would be interpreted to accord with the commercial reality that the insolvent business would operate in its ordinary course. In the circumstances of that case the court decided that they would interpret the issue on "commercially reasonable terms"[5].

23 In applying these principles to the issues before me, I conclude that it is only if a provision of the CCAA Order is ambiguous or there is a gap or omission, that the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order. In the first instance, I should assume that the parties carefully drafted the terms of the CCAA Order and to the extent that the order is clear and unambiguous, I should interpret the order in accordance with its plain meaning and not engage in a "broad judicial interpretation." In doing so I am entitled to assume that the terms of the CCAA Order reflect the agreement negotiated between the parties, within the legal parameters that the court will impose, and that the agreement was codified in the order approved by the court.

24 This is particularly important in addressing the issues raised in this case as the interests of the Former Directors and the Secured Lenders conflict. The directors argue that the indemnification provisions and Directors' Charge were fundamental to the agreement of the Directors to stay in office during the CCAA process and without the Directors continuing in office through the CCAA process, the Applicants would have had much more difficulty in preserving going concern value. The Secured Lenders on the other hand, are concerned if their security is eroded by payments made by the Applicants that will result in a reduced recovery of their outstanding loans.

The CCAA and Receivership Orders

25 The CCAA Order includes provisions indemnifying the Former Directors of the Afton Group for certain liabilities, and the indemnity provisions are secured by a third-ranking charge on the Debtors' assets (the Directors' Charge). This charge was continued under the Receivership Order on certain specified terms.

26 The indemnity provisions of the CCAA Order are as follows (emphasis mine):

> 27. THIS COURT ORDERS that the Applicants shall and do hereby **indemnify** the **Directors**, the Monitor, counsel to the Monitor and counsel to the Applicants of and from all claims, liabilities and obligations **of any nature whatsoever**, including, without limitation, legal fees and disbursements on a substantial indemnity basis, which **may arise** out of their involvement with the Applicants, the Restructuring or the Plan, **from and after the date hereof** in the above-mentioned capacities, save and except as may arise from wilful misconduct or negligence on the part of any of them.
>
> 37. THIS COURT ORDERS that, **in addition to any existing indemnities**, the Applicants shall and do hereby **indemnify** each of the Directors (which for the purposes of this paragraph, for greater certainty, shall include all persons having actual or deemed or defacto director or officer liabilities) of the Applicants from **(i)** all costs, claims, disputes, liabilities, charges, expenses and obligations of any nature whatsoever (including, without limitation, legal fees on a full indemnity basis) ("**Claims**") which may arise from any **future** claims, disputes, liability, charges, expenses and obligations relating to the failure of the Applicants **to at any time pay their obligations**; **(ii)** all Claims which the Directors **sustain or incur** from their respective involvement with the Applicants, any sale of the Applicants of all or any part of the Property **from and after the date of this Order** in the above mentioned capacities save and except as may arise from the willful misconduct or gross negligence of such Director; and **(iii)** all reasonable fees and disbursements on a substantial indemnity basis of Director's counsel.

27 The CCAA Order also contains a provision dealing with the payment of legal fees of counsel to the former directors of the Debtors as follows:

> 17. THIS COURT ORDERS that the Applicants shall pay the reasonable fees and disbursements on a substantial indemnity basis of counsel to the Directors in connection with these proceedings or in the preparation therefore, including without limitation in relation to any proceedings brought against any Director in such capacity seeking to assert claims against them relating in any way to the Directors Charge as defined herein.

28 In addition the CCAA Order provides for a Directors' Charge in the following terms (emphasis mine):

38. THIS COURT ORDERS that **each of Directors** of the Applicants shall be entitled to the benefit of and are hereby granted a third ranking priority, security interest, fixed charge, mortgage and lien in the **maximum aggregate amount of $1,000,000.00** (the "Directors' Charge") upon the present and future Property of the Applicants **as security for the indemnity provided in this Order**, but such Directors' Charge shall only apply to the extent that the Directors do not have coverage or are not in fact covered under the provisions of any applicable directors' and officers' or fiduciary insurance. In respect of any Claim that is asserted against the Directors of the Applicants, if the Directors against whom the Claim is asserted (collectively, "Respondent Directors") do not receive satisfactory confirmation from the applicable insurer within 21 days of delivery of notice of the Claim to the applicable insurer confirming that the applicable insurer will provide coverage for and indemnify the Respondent Directors against the full amount of the Claim if successfully brought, then, without prejudice to the subrogation rights hereinafter referred to, the Applicants shall pay the amount of the Claim as it becomes payable by the Respondent Directors and, **failing such payment, the Respondent Directors shall be entitled to enforce the Directors' Charge**; provided that the Respondent Directors shall reimburse the Applicants (or, in the event that all or substantially all of the Applicants' assets are transferred pursuant to the Plan, the entity to which such assets are transferred) to the extent that they subsequently receive insurance proceeds in respect of a Claim paid by the Applicants, and provided further that the Applicants shall, in the event of such payment being made, be subrogated to the rights of the Respondent Directors to pursue recovery thereof from the applicable insurer as if no such payment had been made; and that the foregoing shall not constitute a contract of insurance and shall not constitute other valid and collectible insurance as such term may be used in any existing policy of insurance issued in favour of the Applicants, or any of its Directors.

29 The corresponding provisions of the Receivership Order are paragraphs 24, 25 and 31 which provide as follows (emphasis mine):

24. THIS COURT ORDERS that the Administrative Charge and the **Directors Charge**, both as defined in the July 16, 2004, Order of this Court, as amended (the "Initial CCAA Order"), **are hereby continued and shall both retain their respective priorities**, and have **priority** over the Receiver's Charge and the Receiver's Borrowing Charge **in respect of the period ending February 28, 2005 (the "CCAA Period"), in respect of any matter covered by the charge pertaining to the CCAA Period and in respect of the continuing legal fees and expenses of the Former Directors for any matters arising during the CCAA Period to the extent those legal fees and expenses pertain to matters covered by the Directors Charge** (as defined in the Initial Order) or to the

continuing provisions of the CCAA Order as set out below in this Order, and in relation to such legal fees and expenses, the provisions regarding current payment of such amounts in the October 6, 2004, order in the CCAA proceedings of this Court shall continue subject to Receiver's rights to require a taxation thereof. For greater certainty the reasonable fees and expenses of counsel to the Former Directors incurred on and after February 28, 2005, in connection with the rights and/or obligations of the Former Directors in their capacities as directors of the Applicants shall hereby be paid by the Receiver as invoiced and shall hereby be covered by the Directors Charge subject to the Receiver's rights to require a taxation thereof.

25. THIS COURT ORDERS that as of the date hereof the Initial CCAA Order shall be of no further force or effect, save and except for paragraphs 2, 3, 5(f), 9, 10, 16 (insofar as is necessary to keep the policy and extended reporting period in force, but without the obligation to further renew coverage after February 28), **17 (insofar as is necessary to give full effect to paragraph 24)**, 20(e), 23, **27 (in respect of any matters arising during or pertaining to the CCAA Period),** 28, 32, 34, **37-39 (to the extent provided in the immediately preceding paragraph)**, 42, 43 (subject to paragraph 24 above), 44-46, and 48 of the Initial CCAA Order.

31. THIS COURT ORDERS that the Receiver shall pay **in the ordinary course out of the cash flow under its control** in the same manner as previously done by the Applicants all amounts owing by the Applicants to any person for obligations or expenses incurred during the CCAA Period including:

(c) the fees and expenses of counsel to the directors;

provided that all such fees and expenses shall be subject to taxation if so required by the Receiver, and shall allow all outstanding cheques approved by the Monitor and issued prior to or on the date hereof for such amounts to clear.

30 Paragraph 24 of the Receivership Order includes a reference to "the provisions regarding current payment of [legal fees and expenses of the Former Directors] in the October 6, 2004, order in the CCAA proceedings of this Court." The only Order dated October 6, 2004, is the Order of Mr. Justice Farley, but that order does not include any provisions dealing with payments of legal fees and expenses. The reference to the "October 6, 2004, order" appears to be a reference to the endorsement made by Justice Farley on October 18, 2004.

Do the indemnification provisions extend to liabilities for which the directors may be personally liable that existed before July 16, 2004 (the date of the CCAA Order), or do the provisions only secure liabilities that arose on or after that date?

31 The position of the Secured Lenders is that the indemnification provisions extend only to liabilities that arose on or after the date of the initial CCAA Order. It is submitted that the indemnification provisions do not extend to obligations for which the Former Directors may be personally liable that were already in existence at the time of the initial CCAA Order and that the order was drafted this way, as there were significant arrears of GST and PST in existence at the time of the CCAA Order.

32 Paragraph 27 of the CCAA Order is a general indemnity provision, which indemnifies not only the Directors but the Monitor and others. The description of the nature of the claims covered by the indemnity is broad in that it specifies "all claims, liabilities and obligations of **any nature whatsoever**," including legal fees, provided, in the case of the Former Directors, those claims arise out of their "involvement" as Directors with the Applicants, the Restructuring or the Plan, "**from and after the date hereof**," referring to the date of the CCAA Order. On a plain reading of this paragraph, this indemnity only covers claims and liabilities arising from activities of the Directors after the date of the order and as such would not indemnify the Directors for claims and liabilities that existed before July 16, 2004.

33 I must also consider however, the wording of paragraph 37 of the CCAA Order. In doing so the first question is the meaning of the introductory words: "in addition to any existing indemnities." Counsel for the Former Directors argue that the indemnity provided to the Directors pursuant to paragraph 37 of the CCAA Order is in addition to the indemnity provided by paragraph 27. On the other hand, counsel for the Secured Lenders argues that paragraph 37 is more specific and is limited by paragraph 27 or is intended to explain the indemnity provided by paragraph 27 of the order and as such should be interpreted as being limited to claims and liabilities arising after the date of the Order.

34 In my opinion, the reference in the opening words of paragraph 37 of the CCAA Order to "existing indemnities" is not a reference to paragraph 27 of the order, which is an indemnity created by the order, but rather a reference to whatever indemnities the Directors may have had at the time of the order as a result of the terms of the corporate by-laws, any prior agreements or at common law. Had this paragraph been intended to explain the scope of the indemnity provided at paragraph 27 of the order, paragraph 37 would have referred back to paragraph 27. Similarly, if it was intended that paragraph 27 of the order limit the scope of paragraph 37, again the order would have said so. Accordingly in my opinion, if the indemnity provided to the Directors by paragraph 37 of the order is different in scope than the indemnity provided by paragraph 27, I conclude that the Directors can claim the benefit of both indemnities.

35 The question then is what is the meaning of the indemnity provided by paragraph 37 of the Order? As set out above, there are really three indemnities in that paragraph. The first indemnity, paragraph 37(i), defines the term "Claims" which is then used in subparagraph (ii). Again the nature of claims covered is broadly defined and includes legal fees.

36 In order for the indemnity in 37(i) to apply, the Claims must "arise from **future** claims, disputes, liability, charges, expenses and obligations ..." which I take to mean claims and disputes asserted against the Directors after the date of the order or liability determined or expenses incurred after the date of the order. However, paragraph 37(i) goes on to say that the claims, disputes, liability etc. must relate to "the failure of the Applicants to **at any time** pay their obligations." Read as a whole, I find that paragraph 37(i) indemnifies the Directors for Claims as defined, which are asserted against the Directors after July 16, 2004, even if the Claim relates to a failure of the Applicants to pay their obligations before July 16, 2004.

37 The language of paragraph 37(ii) however clearly provides for an indemnity that only applies to Claims (as defined in paragraph 37(i)) that the Directors "sustain or incur" "from and after the date of this Order" which in my opinion refers to claims that arise after July 16, 2004. This language is also found in paragraph 27 and does not appear in paragraph 37(i), which reinforces the conclusion I have reached as to the meaning of paragraph 37(i).

38 Finally paragraph 37(iii) provides for an indemnity of all reasonable fees and disbursements on a substantial indemnity basis of "Director's counsel". I note that the reference here is to a single Director rather than counsel acting for all of the Directors. This is consistent with the conclusion that I reach in answer to Issue #3.

39 The Secured Lenders rely on the provisions in the order dealing with Crown Priorities. Pursuant to paragraph 15 of the CCAA Order the Applicants were ordered only to pay or remit in accordance with legal requirements all Crown Priorities, which "accrue on or after the date [of the CCAA Order]." The definition of "Crown Priorities" is specifically referenced in Schedule 1 to the CCAA Order as referring to amounts for which the Directors bear personal **liability arising after the date of the Initial Order**. The fact that this provision, which deals with Crown Priorities, clearly refers to liabilities arising after the date of the CCAA Order does not in my view mean that other provisions of the order are to necessarily be interpreted in the same way. The obligations of the Applicants to pay certain liabilities may or may not match the indemnification provisions or what the Directors Charge covers.

40 The terms of the Receivership Order do not alter my interpretation of the CCAA Order in order to answer this question. With respect to the indemnity provided in paragraph 27 of the CCAA Order, paragraph 25 of the Receivership Order reinforces the fact that that indemnity applies to the period after and during the CCAA Period. The indemnities in paragraph 38 of the CCAA Order however are continued "to the extent provided in the immediately preceding paragraph," referring to paragraph 24 of the Receivership Order and so the meaning of paragraph 24 must be considered.

41 I find that paragraph 24 of the Receivership Order continues the indemnities in paragraph 37 of the CCAA Order and does not change the nature or scope of those indemnities. I should note however, that I express no opinion on whether or not the nature of the priority provided by the Directors' Charge in paragraph 38 of the CCAA Order is altered in any way. The language in

paragraph 24 of the Receivership Order that I have bolded above, will have to be considered in determining priority issues, but that is not before me.

42 According I find that the indemnification provisions in the CCAA Order and continued in the Receivership Order extend to liabilities for which the directors may be personally liable that existed before July 16, 2004, the date of the CCAA Order, if they otherwise fall within the meaning of paragraph 37(i) of the CCAA Order.

Is the $1 million Directors' Charge on the indemnification inclusive or exclusive of legal fees paid or payable to directors' counsel?

43 The Secured Lenders submit that the fees of the Directors' counsel are specifically incorporated within the indemnification and Directors' Charge and are subject to the "cap" of $1 million. Therefore, it is argued that the legal fees paid to the Directors' counsel form part of the $1 million cap and to the extent Directors' counsel fees are paid, the amount available to cover the Former Directors' legal obligations is correspondingly reduced on a dollar for dollar basis.

44 I should also say that I have not been asked to give advice on the issue of Directors' insurance referred to in paragraph 37 of the CCAA Order. The issue I am really being asked to consider is whether or not the $1 million Directors' Charge is being reduced as legal fees are being paid to counsel for the Directors by the Applicants.

45 Paragraph 17 of the CCAA Order requires the Applicants to pay certain reasonable fees and disbursements, on a substantial indemnity basis, of counsel to the Directors. Paragraphs 24 and 31 of the Receivership Order continue the Directors' Charge and expressly set out again the obligation of the Receiver to pay legal fees and expenses of counsel for the Directors. The legal fees and expenses are to be paid "in the ordinary course out of the cash flow" and "as invoiced" subject to the right of the Receiver to have the costs assessed.

46 The first issue with respect to the Directors' Charge is the submission made by counsel for the Koehel Group that **each** Director has the benefit of a $1 million charge, which would mean that the aggregate charge is in fact $8 million. He suggests that if the order intended a single charge for all directors it would be worded differently. I do not accept that argument. Although the opening words of paragraph 38 of the CCAA Order could have been clearer (for e.g. "the directors"), reading that paragraph as a whole, it is clear that each Directors has the benefit of a single $1 million charge. This is clear from the words; "maximum **aggregate** amount of $1,000,000.00" in paragraph 37.

47 This meaning is also reinforced by paragraph 42(c) of the CCAA Order which refers to the Directors' Charge as being limited to $1 million as a third charge in terms of priority.

48 There was no issue raised by counsel concerning the fact that paragraph 38 uses the term "indemnity" rather than "indemnities". Although I considered in connection with Issue #1, whether or not that gave some support for the proposition that I should read paragraphs 27 and 37 of the

CCAA Order together as one indemnity, I concluded, for the reasons already stated, that those paragraphs together are not capable of such an interpretation. In my opinion, the use of the term "indemnity" in paragraph 38 of the order is a reference to the two indemnities provided by paragraphs 27 and 37 and although it is used in the singular form, it makes no specific reference to either indemnity and in my view is used to refer to both.

49 The Directors' Charge is security for the Directors for the indemnities provided by paragraphs 27 and 37 of the CCAA Order and those indemnities include an indemnity for the legal fees of counsel for the Directors. As such the Directors' Charge is security for the legal fees.

50 This is restated in paragraph 24 of the Receivership Order, which continues the Directors' Charge and also states that the reasonable fees and expenses of counsel to the Former Directors "shall be covered by the Directors' Charge." I interpret that phrase as being consistent with the wording of paragraph 38(iii) of the CCAA Order and simply confirming that the Directors' Charge is security for legal fees.

51 Whether or not paragraph 24 changes the precise terms of the security provided by the Directors' Charge in terms of priority issues was not argued before me. As I have already stated it is not necessary for me to consider that in order to answer this question.

52 What is clear is that if the Directors were compelled to look to the Directors' Charge for claims asserted against the Directors including legal fees, then those legal fees would be included in the $1 million charge. On that basis the legal fees would reduce the amount of the security available for the claims. That however is not what has occurred in this case, nor is it what was contemplated by the orders.

53 It is not disputed before me that subject to the number of counsel (see Issue #3) that the reasonable legal fees and disbursements of counsel for the Directors are payable by the Applicants as they are invoiced, subject to the right to have the accounts assessed. Although there have been issues about this in the past, if there was any doubt about this is in CCAA order, that was settled by the order of Farley J. at a time when the CCAA Order was in effect. This issues was revisited in paragraphs 24 and 31 of the Receivership Order and the subsequent agreement reached between counsel with respect to Issues numbered 4-6.

54 Accordingly, in the ordinary course, the legal fees and disbursement of counsel for the Directors will be paid when invoiced and there will be no need for the Directors to look to the Directors' Charge. In that event the payment of the legal fees and disbursements does not reduce the $1 million amount of the Directors' Charge.

55 In the course of argument it seemed that some counsel confused the Directors' Charge with what might in other circumstances be considered the limits of insurance coverage for the Directors. The Secured Lenders described the Charge as a "cap" and that is how the issue before me originally was drafted. In my opinion however, although the maximum amount that is secured by the

Directors' Charge is $1 million, it does not operate as a "cap" in the manner suggested by the Secured Lenders.

56 There is no monetary limit on the indemnification provisions for the Former Directors, to the extent that they apply to particular claims. The Directors' Charge however, is limited to the amount of $1 million and is security for the claims including legal costs up to the $1 million limit. It is not a line of credit or other source of funds that is notionally applied to the payment of those amounts, where the Applicants are obliged to pay and do pay. As long as the Applicants continue to pay the legal costs in the ordinary course out of the cash flow from ongoing operations, as required by the terms of the orders, subject to taxation and there is no need for the Directors to look to the Directors' Charge.

57 Similarly to the extent that the Applicants pay obligations that might otherwise give rise to claims against the Directors if unpaid, there is no need for the Directors to look to the Directors' Charge for payment. It is only when the Applicants fail to make any of these payments that the Charge will be engaged.

58 This interpretation is made clear by the language of the Directors' Charge itself. Paragraph 38 provides that the Applicants shall pay the amount of the Claim (as defined) "as it becomes payable by the Respondent Directors and **failing such payment,** the Respondent Directors shall be entitled to enforce the Directors' Charge."

59 Accordingly the $1 million Directors' Charge, which secures the indemnification provisions, is exclusive of the legal fees and disbursements **paid** by the Applicants to counsel for the Former Directors in accordance with the terms of the orders.

Does the indemnification for legal fees extend to counsel for Mr. Macdonald and to counsel for the other three former directors in response to the claims of Mr. Macdonald?

60 Although the Receiver framed the issue as liability of legal fees for both Mr. Macdonald and the Koehle Group, there is only a claim for legal fees that the Koehle Group asserts. The issue raised by this question is whether or not the Koehle Group is entitled to counsel at all given that the suit is by one of the directors and whether or not the Applicants are responsible for the reasonable fees and disbursements of a second law firm representing some of the Directors.

61 By a Notice of Motion dated February 13, 2006, Macdonald moved for, inter alia, an order for leave to sue the Koehle Group and for an order that the Koehle Group is liable to MacDonald for $125,000 for unpaid wages pursuant to the provisions of the Business Corporations Act R.S.O. 1990, c. B.16 as amended and s. 81 of the Employment Standards Act, 2000 S.O. 2000, c. 41 and for $285,567 for unpaid pension obligations. Counsel for Macdonald has confirmed that Macdonald's wage arrears claim against the Koehle Group is confined to the period prior to the CCAA Order

62 Cassels is in a clear conflict because it acts for all of the Former Directors and one member of the Board, Macdonald, has taken legal action against the three other directors. There is no doubt that Cassels is unable to act on behalf of the Koehle Group in respect of the claims made against them by Macdonald. Accordingly, it was necessary for the Koehle Group to seek and obtain independent counsel to represent them in connection with the claims made against them by McDonald.

63 Counsel for the Secured Lenders relies on paragraph 37 of the CCAA Order, although as I have already it refers to counsel for each Director as it used the phrase "Director's counsel", which suggests the possibility of more than one counsel. Paragraph 17 of the CCAA Order deals with "counsel to the Directors." Counsel for the Secured Lenders argues that these provisions speak to counsel acting for all the Directors and that although it is conceivable that there can be a situation where the Former Directors as a group may need to retain a second law firm to deal with an issue, it defies conventional logic to think that the indemnification extends to a situation where one of the Former Directors is suing the remaining Former Directors which is the case here.

64 I disagree. The provisions of the CCAA Order and the Receivership Order do not provide that there is no indemnity for legal costs where the plaintiff is another Director. Mr. Macdonald is suing the Koehle Group in their capacity as Directors. Furthermore, at no place in the orders is it indicated that the type of proceeding that is covered excludes claims by one Director against the others. Counsel raised an issue as to whether or not Mr. Macdonald is suing in his capacity as an employee or Director but in my view it makes no difference. It is the capacity of the defendant Directors that is in issue and clearly they are being sued as Directors.

65 Furthermore, at no place in the CCAA Order or the Receivership Order is it indicated that only one law firm can act for the Former Directors. The phrase in paragraph 17, which is the main provision providing for the payment of legal fees, refers to "counsel to the Directors" the phrase does not preclude more than one firm acting for the Directors. The term "counsel" can of course refer to one or more persons or more than one law firm. Furthermore there are no terms in the orders that suggest that all the Directors must be sued together in one proceeding for paragraph 17 to apply.

66 Clearly the intention was only to pay for legal costs of counsel retained by the Former Directors to defend claims and Mr. Macdonald has not asked to be indemnified for his costs in prosecuting his action against the rest of the Directors. In my opinion however, given the conflict and the fact that Cassels is unable to act for the Koehle Group, the Directors are entitled to retain separate counsel and the indemnity as to legal fees applies to that counsel in the case of the claim by Mr. Macdonald.

Conclusion

67 Accordingly, in answer to Issue #1, I find that the indemnification provisions in the CCAA Order and continued in the Receivership Order extend to liabilities for which the directors may be personally liable that existed before July 16, 2004, the date of the CCAA Order, if they otherwise

fall within the meaning of paragraph 37(i) of the CCAA Order.

68 In answer to Issue #2, I find that the $1 million Directors' Charge, which secures the indemnification provisions in the Orders, is exclusive of legal fees and disbursement that have been **paid** by the Applicants to counsel for the Directors in accordance with the terms of the Orders.

69 In answer to Issue #3, I conclude that the Koehle Group of Directors are entitled to retain separate counsel and the indemnity as to legal fees applies to the reasonable fees and disbursements of that counsel, subject to assessment, in the case of the claim asserted against the Koehle Group by Mr. Macdonald.

70 Given my conclusion with respect to Issue #1, it is not necessary for me to consider the motion by the Koehle Group to amend the CCAA Order and the Receivership Order or Macdonald's motion for an order for leave to commence an action against the Koehle Group.

N.J. SPIES J.

cp/e/qw/qlmxf/qlrsg

1 The wording of the issues was modified slightly during argument, with the agreement of all counsel, from the wording in the Receiver's Report.

2 [2001] A.J. No. 1006.

3 (1992), 17 C.B.R. (3d) 24.

4 Supra, at paras. 16 and 17.

5 Supra, at para. 19.

TAB 7

Case Name:

AbitibiBowater inc. (Re)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC., BOWATER CANADIAN HOLDINGS INC. and The other Petitioners listed on Schedules "A", "B" and "C", Petitioners
And
ERNST & YOUNG INC., Monitor

[2009] Q.J. No. 16097

2009 QCCS 6453

EYB 2009-164656

58 C.B.R. (5th) 62

2009 CarswellQue 9964

No.: 500-11-036133-094

Quebec Superior Court
District of Montreal

The Honourable Clément Gascon, J.S.C.

Heard: May 1, 5 and 6, 2009.
Judgment: May 6, 2009.
Reasons transcribed and revised: May 8, 2009.

(171 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act matters -- Compromises and arrangements -- Alteration or modification -- Applications -- Initial applications -- In the context of the restructuring process undertaken by AbitibiBowater Inc. under the protection of the CCAA, the Abitibi Petitioners sought approval of a DIP financing agreement as well as approval of amendments to the initial order -- The benefits of the DIP Facility and super-priority for all stakeholders outweighed the potential prejudice to the term lenders -- The Court was satisfied that it was just and equitable to approve the DIP facility at this stage -- Petition granted.

In the context of the restructuring process undertaken by AbitibiBowater Inc. under the protection of the CCAA, the Abitibi Petitioners sought approval of a DIP financing agreement as well as the approval of amendments to the initial order -- The agreement was between the Bank of Montreal, and the borrowers, Abitibi-Consolidated Inc. (ACI) and Donohue Corporation, providing a 100,000,000 USD super-priority senior secured debtor-in-possession credit facility -- The term lenders opposed the DIP facility sought -- They felt it was premature, unnecessary, and fell short of the applicable criteria for it to be granted -- They added that the wording of the DIP charge was insufficient to adequately protect their interests -- Finally, they insisted upon the inclusion of an adequate protection charge to compensate them for the inevitable deterioration of their position as a result of their security being used and continuing to be used by the Abitibi Petitioners during the restructuring process -- HELD : Petition granted -- The DIP Facility enjoyed huge support from most stakeholders, as well as favourable endorsement from the Monitor -- Financing was urgently needed -- The benefits of the DIP Facility and super-priority for all stakeholders outweighed the potential prejudice to the term lenders -- No one proposed a better solution -- The Court was satisfied that it was just and equitable to approve the DIP facility at this stage -- It was better to leave the issue concerning the steps to follow in the event of the subrogation clause open -- As for the adequate protection charge in the event of the diminishing of value of the Term Lenders' collateral because of the ongoing operations of ACI, the Court found the request unfounded -- There was no convincing evidence of any sort to justify a charge to the extent of $200,000,000 CAN for a facility not exceeding $100,000,000 USD -- The charge was therefore limited to $140,000,000 CAN.

Statutes, Regulations and Rules Cited:

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

Counsel:

Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud and Me Mélanie Béland (STIKEMAN, ELLIOTT), attorneys for Petitioners.

Me Avram Fishman and Me Gilles Paquin (FLANZ FISHMAN MELAND PAQUIN), attorneys for the Monitor.

Me Robert Thornton (THORNTON GROUT FINNINGAN), attorneys for the Monitor.

Me Bernard Boucher (BLAKE CASSELS & GRAYDON LLP), attorneys for BI Citibank, N.A. (London Branch), as agent and Citibank, N.A., as bank.

Me Sébastien Guy (BLAKE CASSELS & GRAYDON LLP), attorneys for Cater Pillar Financial Services.

Me Éric Vallières (McMILLAN LLP), attorneys for Bank of Montreal.

Me Patrice Benoît (GOWLING LAFLEUR HENDERSON LLP), attorneys for Investissement Québec.

Me Alain Riendeau and Me Serge Guérette (FASKEN MARTINEAU DuMOULIN), attorneys for Silver Oak Capital LLC et al., DDJ Capital Management, LLC et al.

Me Philippe H. Bélanger (McCARTHY TÉTRAULT LLP), attorneys for Bank of Nova Scotia.

Me Gordon Levine (KUGLER KANDESTIN), attorneys for Jenkins Shipping Company Limited and Jenkins Shipping (GB) Limited.

Me Gerald F. Kandestin (KUGLER, KANDESTIN), attorneys for McBurney Corporation and McBurney Power Limited.

Me Marc Duchesne (BORDEN, LADNER, GERVAIS), attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders.

Me Frederick L. Myers (GOODMANS LLP), attorneys for the Ad hoc Committee of Bondholders.

Me Michael B. Rotsztain (TORYS LLP), attorneys for Fairfax Financial Holdings Ltd.

Me Nicolas Plourde (HEENAN BLAIKIE), attorneys for Fairfax Financial Holdings Ltd.

REASONS FOR JUDGMENT
ON ABITIBI PETITIONERS' MOTION FOR APPROVAL
OF A DIP FINANCING (# 39)
AND SECOND AMENDED INITIAL ORDER

INTRODUCTION

1 [1] In the context of the restructuring process undertaken by AbitibiBowater Inc. under the protection of the *CCAA*[1], the Abitibi Petitioners[2] seek[3]:

a) An order authorizing them to enter into an ACI DIP Agreement[4] and a Guarantee Offer[5];

b) Amendments to the First Amended Initial Order to provide for the necessary orders in connection with the ACI DIP Facility; and

c) Other minor amendments to the First Amended Initial Order, most of which are either uncontested or mere clarifications.

2 [2] In short, the ACI DIP Facility at issue includes:

1) A Loan Agreement between the DIP Lender, the Bank of Montreal, and the borrowers, Abitibi-Consolidated Inc. (**ACI**) and Donohue Corporation (**DCorp**), providing a $100,000,000 USD super-priority senior secured debtor-in-possession credit facility; and

2) A Loan Guarantee by Investissement Québec (**IQ**) authorized by the Government of Québec.

3 [3] While barely a few days ago, a large number of issues raised by numerous contesting parties against the ACI DIP Facility were still outstanding, thanks to the efforts of counsels, and with the help and guidance of the Monitor, just one difficulty remains and requires resolution by Judgment of this Court. These efforts include those of today by IQ's counsel.

4 [4] The difficulty still pending concerns the ACI Term Lenders. They oppose the ACI DIP Facility sought[6]. They feel it is premature, unnecessary, and failing short of the applicable criteria for it to be granted.

5 [5] Subsidiarily, they contend that the wording of the Subrogation ACI DIP Charge[7], negotiated amongst counsels and approved by all the other interested parties, is insufficient to adequately protect their interest.

6 [6] Finally, the Term Lenders insist upon the inclusion of an Adequate Protection Charge to compensate them for the inevitable deterioration of their position as a result of their security being used and continuing to be used by the Abitibi Petitioners during the restructuring process.

7 [7] It is worth noting that the contestations initially filed by the Senior Secured Note holders[8] and by some construction liens holders[9] have been in essence withdrawn at this stage, pursuant to the negotiation process undertaken since last Thursday.

THE QUESTIONS AT ISSUE

8 [8] The questions that the Court needs to resolve are accordingly the following ones:

1) Should the ACI DIP Facility of $100,000,000 USD be granted?
2) Do paragraphs 61.10 and 61.11 of the Second Amended Initial Order sought here constitute a reasonable compromise under the circumstances in view of the priming nature of the ACI DIP Facility?
3) Are there any other paragraphs of the Second Amended Initial Order sought that require modifications?

9 [9] Before turning to these three (3) questions, a brief overview of the significant terms of the ACI DIP Facility is appropriate. As well, a short summary of the Monitor's reports[10] dealing with the ACI DIP Facility is also necessary. Mr. Morrison from Ernst & Young, the Monitor appointed by the Court, was the only witness heard on this application.

THE ACI DIP FACILITY

10 [10] The main characteristics of the ACI DIP Facility are detailed at pages 6 to 12 of the Third Report of the Monitor. They can be summarized as follows:

1) The ACI DIP Facility consists of a $1 00,000,000 USD commitment, subject to a minimum availability of $12,500,000 USD to be maintained at all times. The proceeds are to be used for working capital and other general corporate purposes. The term is April 30, 2010, but it must be repaid by the earliest of November 1st, 2009 or the filing of a plan either in Canada or in the US.
2) The proposed fee structure, which encompasses both the returns to the DIP Lender and, for a portion of the Upfront fees, to IQ, includes:

- Upfront fees of $4,400,000 USD;
- An interest rate of LIBOR plus 1.75%, subject to a 3% LIBOR floor. A U.S. base rate option is also available. Interest accrues daily and 5 to be paid monthly in arrears;

- An undrawn fee of 0.525% per year.

3) The borrowers assume all legal and out-of-pocket expenses of the DIP Lender and IQ in connection with the ACI DIP Facility.
4) The ACI DIP Facility is not subject to the stay imposed upon all creditors by the initial Order such that, upon the occurrence of any default, the DIP Lender is free to exercise ail its recourses and realize upon all its collateral.
5) The other significant features of the ACI DIP Facility consist of provisions in regard to the following issues:

   a) A facility of up to $10,000,000 USD may be available to DCorp, provided it obtains the appropriate orders from the U.S. Bankruptcy Court;
   b) The borrowings by ACI and DCorp under the Facility are guaranteed by certain other Abitibi Petitioners and secured by a first-priority charge granted on a post-petition super-priority basis on all present and after acquired property, including the proceeds from the sale of property of both the ACI Group or the DCorp Group;
   c) The ACI DIP Charge is subordinated only to the ACI Administration Charge, the Abitibi D&O First Tranche, and the interest of the Securitization Agent in the accounts receivable sold under the Securitization Program;
   d) Because the maximum amount of $100,000,000 USD provided for in the IQ Loan Guarantee is in respect of principal and interest, a minimum availability of $12,500,000 USD is required to be maintained at all times under the Facility;
   e) The borrowers can make voluntary prepayments of the Facility at any time, and must make certain mandatory prepayments with the net cash proceeds of asset sales, insurance claims and expropriation claims;
   f) The borrowings must be repaid in full at the earliest of the acceleration of the Facility or occurrence of a specified event of default, the effective date of a *CCAA* or Chapter 11 plan, or the unenforceability of the IQ Loan Guarantee;
   g) The borrowers have ongoing reporting obligations to both the DIP Lender and IQ twice on a weekly basis, first, for rolling cash flow forecasts detailing cash receipts and cash disbursements, and second, for combined weekly cash flow results.

THE MONITOR'S REPORTS

11 [11] In his third report and second supplemental report, the Monitor discusses the ACI DIP Facility. In a nutshell, the Monitor is of the view that:

   a) ACI needs to raise DIP financing to ensure stability of its operations and availability of sufficient cash reserves to fund its operations disbursements and payroll costs; and

b) The financial terms and conditions of the $100,000,000 USD funding are competitive and reasonable, given the current capital market conditions.

12 [12] In his reports, the Monitor adds that, pursuant to lengthy negotiations and discussions, and following concessions made by many, most of the concerns or objections voiced by various stakeholders have been either alleviated or resolved through acceptable compromises.

ANALYSIS AND DISCUSSION

1) Should the DIP be granted?

13 [13] In the Court's opinion, the answer to the first question is yes.

14 [14] No one disputes that the Court, in the context of a *CCAA* process, has the jurisdiction and authority to grant a DIP financing super-priority, provided the requirements for such are met.

15 [15] It is indeed known and accepted that the *CCAA*'s effectiveness depends on a broad and flexible exercise of the Courts jurisdiction, so as to facilitate a restructuring and continue the debtors as a going concern in the meantime[11]. Bearing this in mind, DIP financing super-priorities are regularly granted by Canadian courts in *CCAA* proceedings.

16 [16] That notwithstanding, any protection afforded by the *CCAA* and its DIP financing super-priority necessarily have a prejudicial effect on the debtors' creditors. Thus, before allowing a DIP financing or priming charge, the Court must notably satisfy itself that the benefits to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

17 [17] Over the years, Courts in this country, including this one[12], have listed various factors one should consider before granting a DIP financing. These factors are not cast in stone. They are indeed normally presented as non-exhaustive guidelines. As anything within the realm of the *CCAA*, they evolve with time. They should be approached with flexibility.

18 [18] Just a few years back, some courts were still wondering whether or not they had the authority to grant such priorities. Today, it appears to be well settled that such authority exists. In the near future, these priorities will be part of the new legislative provisions adopted by Parliament for inclusion in the *CCAA*. This shows that nothing is definite or absolute in terms of DIP financing in a *CCAA* restructuring process.

19 [19] With the necessary adaptations, the Court considers that the applicable factors or guidelines are met by ACI under the circumstances.

20 [20] First, the ACI DIP Facility enjoys huge support from most stakeholders, as well as favourable endorsement from the Monitor.

21 [21] Second, the evidence given by the Monitor, which the Court accepts, is sufficient to establish that the need for the DIP financing is essential for the ongoing operations and successful restructuring of ACI.

22 [22] The Monitor explains that the ACI DIP Facility will stabilize the business and bring most-needed comfort to key suppliers and customers.

23 [23] Based on his experience, he considers that ACI's levels of cash flow and liquidity are not high enough. His assessment is not based upon speculation or mere apprehension. He relies upon the market cycles, movements, variances and volatility within the industry at stake. He takes into

consideration the average weekly fixed cash disbursements for payroll and key vendors. He finally considers as well his own experience in terms of large restructurings and the level of liquidity normally maintained by peer companies in the same industry.

24 [24] From that standpoint, the Court accepts Mr. Morrison's comment that a business such as this one cannot take the risk of a lack of liquidity that could entail the missing of a payroll payment or the turning away of key suppliers' deliveries.

25 [25] Third, along the same lines, the circumstances do support the urgent need for such financing. Urgency is a relative factor. If is not an absolute and static concept. Notably in view of its size and complexity, the situation of ACI is peculiar. One cannot expect an organization such as this one to wait to the last minute and call the firemen once the tire has started. Reasonable caution is required. When such prudence is reasoned, articulated and explained as it is here, it is sufficient to justify the immediate need alleged.

26 [26] The Court cannot ignore that it took no less than three weeks of intensive work, negotiations and discussions to reach this hearing on the present ACI DIP Facility, and yet, there are still some unresolved issues that the Court must rule upon. ACI does not have the luxury of waiting to the last minute, and the Court agrees with that assessment.

27 [27] Fourth, there is no doubt that considering the support of many at this stage, there is a reasonable prospect of a successful restructuring. Indeed, at this point, the Term Lenders stand alone as opposing parties to the request sought.

28 [28] As well, the term of the facility is relatively short, and the amounts somewhat reasonable when compared to other large restructurings such as Quebecor World or Air Canada.

29 [29] Moreover, here, the first tranche available under the facility is limited $30,000,000 USD. In view of paragraph 61.11 of the order sought, a party such as the Term Lenders will be able to apply to the Court to oppose future borrowing requests should they consider such to be inappropriate. If need be, they could thus seek interim order to prevent future advances before they are disbursed.

30 [30] Fifth, it is the Courts view that the benefits of the ACI DIP Facility and super-priority for all stakeholders outweigh the potential prejudice to the Term Lenders. The facility stabilizes the continued operations of the debtors. This adds value to the whole business. Thus, it potentially adds value as well to the collateral of the Term Lenders essentially composed of the short-term assets.

31 [31] Of course, the priming nature of the DIP facility causes some prejudice to the Term Lenders. No perfect solution exists in such situations. It is a question of balance. Here, the balance definitely tilts towards the benefits that the facility brings.

32 [32] Furthermore, from a practical standpoint, the Court notes that the compromise offered in terms of subrogation rights and opportunity to contest future borrowing requests alleviates, albeit only in part, the prejudice suffered by the Term Lenders.

33 [33] In addition, the Court cannot ignore either the assessment of the Term Lenders' collateral value. Even in the context of a liquidation scenario, such as the one detailed at page 14 of the Monitor's third report, it still leaves a positive margin of some $60,000,000 USD over and above what is owed to the Term Lenders. This is enough to at least cover, if worst comes to worst, the initial draw of $30,000,000 USD.

34 [34] If one looks at the assessment of this collateral value outside of the liquidation scenario, the margin is even bigger. All this, in a context where the ACI DIP Facility of $1 00,000,000 USD is said to be a bridge to the receipt of proceeds from the contemplated sales of the MPCo and ACH hydro assets expected by November 1st, 2009. ACI intends to repay the ACI DIP Facility from the proceeds of these sales or other sales of non-core assets under consideration.

35 [35] This is not perfect, obviously. But, this is not enough either to say that the Term Lenders prejudice outweighs the benefits that stability brings to the ongoing operations of the business.

36 [36] Finally, the reality is such that, in the current credit market, no DIP financing is available to ACI without such priming nature. No one brings forward a better solution.

37 [37] DIP financings of a priming nature are neither unusual, nor unheard of. Canadian courts have ruled before that where a debtor seeks to obtain DIP financing, the authorization of the pre-existing secured creditors is not necessary. Their consent is certainly preferable, but if a super-priority could not be granted without the consent of secured creditors, the protection of the *CCAA* would effectively be denied[13].

38 [38] In essence, the Term Lenders suggest to wait and see. With respect, the Court prefers the Monitor's view and to cautiously move forward. The potential cost of the gamble is not worth the risk. That is even more true when one considers the obvious broader public dimension in a case such as this one.

39 [39] All in all, the Court is satisfied that it is just and equitable to approve the DIP facility at this stage.

2) What about paragraphs 61.10 and 61.11? Is this enough?

40 [40] Turning to the compromise offered by ACI and acceptable to all save for the Term Lenders, the Court considers that paragraphs 61.10 and 61.11 are adequate as they stand.

41 [41] The Term Lenders do not quarrel with paragraph 61.11. However, they would like to see a more detailed order in terms of the steps to follow in the event of the subrogation clause (paragraph 61.10) coming into play.

42 [42] With respect, the Court agrees with counsels for the other interested parties that if is better to leave this issue open and subject to future determination by subsequent application to the Court. Trying to predict at this stage the best formula for the most equitable outcome may not lead to the best results.

43 [43] As for the Adequate Protection Charge in the event of the diminishing of value of the Term Lenders' collateral because of the ongoing operations of ACI, the Court finds the request unfounded, and in fact questionable.

44 [44] On the one hand, it appears that the value of the Term Lenders' collateral is better served by the ongoing operations than by an immediate liquidation of ACI. On the other hand, the U.S. concept of Adequate Protection Charge is seldom, if ever, applied in Canadian courts. It has been issued here in the context of the Bowater Petitioners for a single reason. That is, to mirror the U.S. order approving such a charge in the context of the Chapter 11 proceedings. This hardly stands as valid precedent for the Term Lenders' request in the context of ACI.

3) What else?

45 [45] Only a few remarks remain with respect to some of the modifications sought.

46 [46] First, the Court is satisfied with the explanations of IQ's counsel with respect to Clause 6.13 of Annex A to Exhibit R-2. The intent there is not to overrule the corporate decisions of ACI, nor to interfere with the conduct of its business. Neither is this clause included to second-guess the Court's approval of the steps taken by ACI in the context of its restructuring.

47 [47] Second, the Court is satisfied with the wording of paragraph 61.11 as it stands. The Court understands the concerns of IQ in this respect. However, the reading of the paragraph indicates that it is for those who want to contest a borrowing request to react. It is for them to move before a disbursement is made. Without a Court interim order staying a disbursement, the terms of the ACI DIP Facility simply apply.

48 [48] Third, in terms of the amount of the charge for the $100,000,000 USD ACI DIP Facility, the Court is not satisfied with the explanations provided to support the level of $200,000,000 CAN that is sought. The Monitor does not understand the figure. The explanations offered by ACI's counsel are vague and speculative at best, with no supporting evidence.

49 [49] As this Court stated before in the *Mecachrome*[14] matter, and as Justice Morawetz reiterated in the *InterTAN* case[15], the burden of presenting sufficient support for the protection sought rests upon the Petitioners. There is no convincing evidence of any sort to justify a charge to the extent of $200,000,000 CAN for a facility not exceeding $100,000,000 USD.

50 [50] Under the ACI DIP Facility, interest is to be paid monthly in arrears, while the maximum available amount is in reality $87,500,000 USD. Even factoring in a reasonable cushion for accrued interest and for the exchange rate between the U.S. and Canadian dollars in the event a realization becomes necessary, a figure of more than $140,000,000 CAN is hardly justifiable.

51 [51] Even there, a 40% cushion over and above the maximum amount of the facility is close to twice the level of the similar cushion sought by Fairfax for the BI DIP facility (a $600,000,000 USD facility versus a $728,760,000 CAN charge).

52 [52] The charge at paragraph 61.3 will therefore be limited to an amount of $140,000,000 CAN.

53 [53] Finally, for the modification sought by Fairfax at paragraph 56.1, small corrections are needed. In the opinion of the Court, the requirements should refer to a certified copy of this order instead of mere copies. Also, what will be provided to the Registrars should include the required applications that the law demands.

4) Summary

54 [54] It is appropriate to summarize.

55 [55] The Court agrees to issue the Second Amended Initial Order with the modifications sought at paragraphs 30, 52, 53, 54, 56, 61.1 and 61.2, 61.4 to 61.8, 61.10, 61.11, 89, 92.1, 92.2 and 95, as they stand.

56 [56] The order includes some corrections to the wording of paragraph 56.1. The order also refers to an amount of $140,000,000 CAN instead of $200,000,000 CAN at paragraph 61.3.

57 [57] Lastly, the references to the Court Appointed Officer are deleted from paragraphs 61.9 and 76, and as agreed, paragraphs 77.1 to 77.5 are not included.

58 [1] CONSIDERING Petitioners' Motion for the Approval of a DIP Financing in Respect of the Abitibi Petitioners;

59 [2] CONSIDERING the representations of the parties;

60 [3] GIVEN the provisions of the *CCAA*;

FOR THE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:

61 [1] **GRANTS** the Petition.

62 [2] **ISSUES** an order pursuant to Sections 4, 5, 11 and 18.6 of the CCAA (the "**Order**"), divided under the following headings:

a) Service
b) Application of the CCAA
c) Effective Time
d) Plan of Arrangement
e) Recognition of U.S. Proceedings
f) Procedural Consolidation
g) Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others
h) Possession of Property and Carrying on Business
i) Securitization Program
j) Restructuring
k) Directors Indemnification and Charge
l) BCFPI DIP Financing
m) ACI DIP Financing
n) Subrogation to ACI DIP Charge
o) Inter-Company Advances
p) Bowater Adequate Protection Charge
q) Powers of the Monitor
r) Appointment of Information Officer in Respect of U.S. Proceedings
s) Approval and Appointment of Financial Advisor
t) Priorities and General Provisions Relating to CCAA Charges
u) General
v) Effect, Recognition and Assistance

Service

63 [3] **EXEMPTS** AbitibiBowater Inc. ("**ABH**"), Abitibi-Consolidated Inc. ("**ACI**"), the Petitioners listed on Schedule "A" hereto (collectively with ACI, the "**Abitibi Petitioners**"), Bowater Canadian Holdings Inc. ("**BCHI**") and the Petitioners listed on Schedule "B" hereto (collectively with BCHI, the "*Bowater Petitioners*") from having to serve the Petition and from any notice of presentation.

Application of the CCAA

64 [4] **DECLARES** that the Abitibi Petitioners and the Bowater Petitioners (collectively the "**Petitioners**") are debtor companies to which the CCAA applies.

Effective time

65 [5] **DECLARES** that from immediately after midnight (Montréal time) on the day prior to this Order i.e. from the beginning of the day on April 17, 2009 (the "**Effective Time**") to the time of the granting of this Order, any act or action taken or notice given by any Person in respect of the Petitioners, the 18.6 Petitioners, the Directors or the Property (as those terms are defined hereinafter), are deemed not to have been taken or given, as the case may be, to the extent such act, action or notice would otherwise be stayed after the granting of this Order.

Plan of Arrangement

66 [6] **ORDERS** that the Petitioners shall file with this Court and submit to their creditors one or more plans of compromise or arrangement under the CCAA (collectively, the "**Plan**") between, among others, the Petitioners and one or more classes of their creditors as the Petitioners may deem appropriate, on or before the Stay Termination Date (as defined hereinafter) or such other time or times as may be allowed by this Court.

Recognition of U.S. Proceedings

67 [7] **ORDERS AND DECLARE** that the proceedings (the "**U.S. Proceedings**") commenced by ABH and the Petitioners listed on Schedule "C" hereto (collectively, the "**18.6 Petitioners**") under Chapter 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "**US. Court**") be and are hereby recognized as foreign proceedings for purposes of Section 18.6 of the CCAA.

68 [8] **DECLARES** that the 18.6 Petitioners are debtor companies within the meaning of the CCAA and, as such, are entitled to relief under Section 18.6 of the CCAA.

Procedural Consolidation

69 [9] **ORDERS** that the consolidation of these CCAA proceedings in respect of the Abitibi Petitioners, the Bowater Petitioners and the 18.6 Petitioners shall be for administrative purposes only and shall not effect a consolidation of the assets and property of the Petitioners including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others

70 [10] **ORDERS** that, until and including May 14, 2009, or such later date as the Court may order (the "**Stay Termination Date**", the period from the date of this Order to the Stay Termination Date being referred to as the "**Stay Period**"), no right, legal or conventional, may be exercised and no proceeding, at law or under a contract, by reason of this Order or otherwise, however and wherever taken (collectively the "**Proceedings**") may be commenced or proceeded with by anyone, whether a person, firm, partnership, corporation, stock exchange, government, administration or entity exercising executive, legislative, judicial, regulatory or administrative functions (collectively, "**Persons**" and, individually, a "**Person**") against or in respect of the Petitioners, the 18.6 Petitioners and the entities listed on Schedule "D" hereto (the "**Partnerships**"), or any of the present or future property, assets, rights and undertakings of the Petitioners, the 18.6 Petitioners or the Partnerships, of any nature and in any location, whether held directly or indirectly by the Petitioners, the 18.6 Petitioners or the Partnerships, in any capacity whatsoever, or held by others for the Petitioners, the 18.6 Petitioners or the Partnerships (collectively, the "**Property**"), and all Proceedings already commenced against the Petitioners, the 18.6 Petitioners, the Partnerships or any of the Property, are

stayed and suspended until the Court authorizes the continuation thereof, the whole subject to the provisions of the CCAA.

71 [11] **ORDERS** that, without limiting the generality of the foregoing, during the Stay Period, all Persons having agreements, contracts or arrangements with the Petitioners, the 18.6 Petitioners, the Partnerships or in connection with any of the Property, whether written or oral, for any subject or purpose:

a) are restrained from accelerating, terminating, cancelling, suspending, refusing to modify or extend on reasonable terms such agreements, contracts or arrangements or the rights of the Petitioners, the 18.6 Petitioners, the Partnerships or any other Person thereunder;

b) are restrained from modifying, suspending or otherwise interfering with the supply of any goods, services, or other benefits by or to such Person thereunder (including, without limitation, any directors' and officers' insurance, any telephone numbers, any form of telecommunications service, any oil gas, electricity or other utility supply); and

c) shall continue to perform and observe the terms and conditions contained in such agreements, contracts or arrangements, so long as the Petitioners, the 18.6 Petitioners or the Partnerships pay the prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with the law or as may be hereafter negotiated (other than deposits whether by way of cash, letter of credit or guarantee, stand-by fees or similar items which the Petitioners, the 18.6 Petitioners or the Partnerships shall not be required to pay or grant);

Unless the prior written consent of the Petitioners, the 18.6 Petitioners or the Partnerships, as well as that of the Monitor, is obtained or leave is granted by this Court.

72 [12] **ORDERS** that, without limiting the generality of the foregoing and subject to Section 18.1 of the CCAA, if applicable, cash or cash equivalents placed on deposit by the Petitioners, the 18.6 Petitioners or the Partnerships with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of this Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by the Petitioners, the 18.6 Petitioners or the Partnerships and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into the Petitioners', the 18.6 Petitioners' or the Partnerships' account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

73 [13] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, bond or guarantee (the "**Issuing Party**") at the request of the Petitioners, the 18.6 Petitioners or the Partnerships shall be required to continue honouring any and all such letters, bonds and guarantees, issued on or before the date of this Order; however, the Issuing Party shall be

entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid therefore.

74 [14] **DECLARES** that, to the extent any rights, obligations, or time or limitation periods, including, without limitation, to file grievances, relating to the Petitioners, the 18.6 Petitioners or Partnerships or any of the Property may expire, other than the term of any lease of real property, the term of such rights or obligations, or time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners, the 18.6 Petitioners or the Partnerships become bankrupt or a receiver within the meaning of paragraph 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") is appointed in respect of the Petitioners, the 18.6 Petitioners or the Partnerships, the period between the date of this Order and the day on which the Stay Period ends shall not be calculated in respect of the Petitioners, the 18.6 Petitioners or the Partnerships in determining the 30-day periods referred to in Sections 81.1 and 81.2 of the BIA.

75 [15] **ORDERS** that no Person may commence, proceed with or enforce any Proceedings against any former, present or future director or officer of the Petitioners, the 18.6 Petitioners, the Partnerships or any person that, by applicable legislation, is treated as a director of the Petitioners, the 18.6 Petitioners or the Partnerships, or that will manage in the future the business and affairs of the Petitioners, the 18.6 Petitioners or the Partnerships (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director that arose before this Order was issued and that relates to obligations of the Petitioners, the 18.6 Petitioners or the Partnerships for which such Director is or is alleged to be liable (as provided under Section 5.1 of the CCAA) until further order of this Court or until the Plan, if one is filed, is refused by the creditors or is not sanctioned by the Court.

76 [16] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, officers, employees, legal counsel or financial advisers of the Petitioners, the 18.6 Petitioners, the Partnerships, the Monitor, the BI DIP Lenders (as defined hereinafter) or the legal counsel or financial advisers to the Monitor or to the BI DIP Lenders, for or in respect of the Restructuring (as defined hereinafter) or the formulation and implementation of the Plan without first obtaining leave of this Court, upon seven days written notice to the Petitioners' and the Partnerships' ad litem counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

Possession of Property and Carrying on Business

77 [17] **ORDERS** that, subject to the terms of this Order, the Petitioners shall remain in possession of their Property until further order in these proceedings.

78 [18] **ORDERS** that the Petitioners and the Partnerships shall continue to carry on their business and financial affairs, including the business and affairs of any person, firm, joint venture or corporation owned by a Petitioner or in which a Petitioner owns an interest, in a manner consistent with the commercially reasonable preservation thereof.

79 [19] **ORDERS** that the Petitioners and Partnerships shall be authorized and empowered to continue to retain and employ the employees, consultants, individual self-employed contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably

necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

80 [20] **ORDERS** that the Petitioners and the Partnerships shall be entitled to continue to utilize the existing centralized cash management systems currently in place as described in this Petition or, subject to the terms of the BI DIP Documents (as defined hereinafter), replace them with other substantially similar central cash management system(s) (together, the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners or the Partnerships of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shah be entitled to provide the Cash Management System without any liability in respect thereof to any Person other than the Petitioners and the Partnerships, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System. The Monitor shall review and monitor the Cash Management System and report to this Court from time to time.

81 [21] **ORDERS** that the Petitioners and the Partnerships shall be entitled to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, commissions, vacation pay, current pension contributions and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts payable to former, current or future employees, officers or directors on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;
b) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Petitioners' business;
c) all outstanding amounts payable to third party customer brokers or agents on or after the date of this Order;
d) all outstanding amounts payable on or after the date of this Order in respect of (i) customer programs including, *inter alia*, rebates, adjustments, performance and volume discounts and (ii) billing errors, including duplicative invoicing, improper invoicing, duplicative payment, mispricing and various other billing and payment errors;
e) the fees and disbursements of any Assistants retained or employed by the Petitioners or the Partnerships in respect of these proceedings, at their standard rates and charges; and
f) the interest, fees and expenses payable under the Canadian Credit Agreement (as defined hereinafter).

82 [22] **[Intentionally omitted]**

83 [23] **[Intentionally omitted]**

84 [24] **[Intentionally omitted]**

85 [25] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the business in the ordinary course from and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses and capital expenditures reasonably necessary for the preservation of their Property or the business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
b) payment for goods or services actually supplied to the Petitioners or the Partnerships following the date of this Order.

86 [26] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;
b) amounts accruing and payable by a Petitioner or a Partnership in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees;
c) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners or the Partnerships in connection with the sale of goods and services by the Petitioners or the Partnerships, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the business by the Petitioners or the Partnerships.

87 [27] **ORDERS** that, except as specifically permitted herein, the Petitioners and the Partnerships are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners or Partnerships to any of their creditors as of this date unless such amounts have been approved by the Monitor; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the business.

88 [28] **ORDERS** that the Petitioners and the Partnerships are authorized to pay any pre-filing amounts outstanding and to complete any outstanding transactions and engage in new transactions with each other and with any of their respective affiliates and other entities, partnerships and joint ventures within and among the ABH Group (as defined hereinafter) in which they have a direct or indirect ownership interest (the Petitioners collectively with Abitibi-Bowater US Holding LLC, Bowater Newsprint South LLC and Bowater Incorporated and their respective subsidiaries are referred to herein as the "ABH Group") and the Petitioners and the Partnerships may, *inter alia*, continue on and after the date hereof to buy and sell goods and services and allocate, collect and pay costs, including without limitation head office expenses and shared goods and services, from and to each other and from and to the other members of the ABH Group in the ordinary course of business on terms consistent with existing arrangements or past practice (including without limitation, pursuant to the Securitization Program Agreements (as defined hereinafter) and sales of inventory by ACI to ACSC (as defined hereinafter).

Securitization Program

89 [29] **ORDERS** that the execution and delivery by ACI of the "Omnibus Amendment No. 5 to Amended and Restated Receivables Purchase Agreement and Amendment No. 3 to Amended and Restated Purchase and Contribution Agreement and Waiver Agreement", **Exhibit R-19** in support of the Petition, (the "**Waiver Agreement**") to:

a) a certain Amended and Restated Receivables Purchase Agreement, dated as of January 31, 2008 (as heretofore amended, the "**RPA**"), **Exhibit R-17** in support of the Petition, among Abitibi-Consolidated U.S. Funding Corp. ("**ACUSFC**" - a wholly-owned subsidiary of ACSC that is not a debtor in the U.S. Proceedings), Eureka Securitisation, plc ("**Eureka**"), Citibank, N.A. ("**Citibank**"), Citibank, N.A. London Branch (the "**Securitization Agent**"), ACI, in its capacity as Subservicer and an Originator, and Abitibi-Consolidated Sales Corporation ("**ACSC**", a debtor in the U.S. Proceedings), in its capacity as Servicer and an Originator; and

b) a certain Amended and Restated Purchase and Contribution Agreement, dated as of January 31, 2008 (as heretofore amended, the "**PCA**"), **Exhibit R-16** in support of the Petition, among ACI and ACSC as Sellers and ACUSFC as Purchaser (the terms "**Receivables**" and "**Related Security**" shall have the meanings attributed thereto in the PCA),

as well as all related documents and instruments executed or to be executed and delivered in connection therewith (as amended by the Waiver Agreement, collectively referred to as the "**Receivables Agreements**") are hereby ratified and approved.

90 [30] **ORDERS** that ACI is hereby authorized and empowered to perform or continue to perform its obligations, including the sale and servicing of Receivables and all Related Security, under the Receivables Agreements and under the following agreements to which it is a party, **Exhibit R-18** in support of the Petition:

a) the Undertaking Agreement (Servicer) dated as of October 27, 2005 by ACI in favour of Eureka, Citibank and the other Banks (as defined in the RPA) that are party to the RPA, as amended;
b) the Undertaking Agreement (Originator) dated as of October 27, 2005 by ACI in favour of ACI Funding, as amended;
c) the Deposit Account Control Agreement dated as of January 31, 2008 among ACUSFC, ACI, ACSC, Citibank and the Securitization Agent;
d) the Blocked Accounts Agreement dated as of October 27, 2005 among ACI, ACSC, the Securitization Agent, Royal Bank of Canada and ACUSFC;
e) the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 among ACSC, ACI, ACUSFC, the Securitization Agent and LaSalle Bank National Association;
f) the Second Amended and Restated Four Party Agreement for Sold Accounts (General) dated as of January 31, 2008 among Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch, ACI, ACUSFC, the Securitization Agent and Citibank;
g) the Intercompany Agreement dated as of December 20, 2007 between ACI and ACSC; and
h) the Accounts Receivable Policy (Shipments) General Terms and Conditions, plus the Coverage Certificate effective September 1, 2008 (together with all schedules and endorsements thereto) issued by Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch to ACI;

(collectively with the Receivables Agreements, and such non-material amendments and modifications thereto as may be agreed upon, from time to time, the "**Securitization Program Agreements**").

91 [31] **ORDERS** that ACI is hereby authorized and empowered to sell the relevant Receivables and Related Security to ACUSFC pursuant to and in accordance with the Securitization Program Agreements, and such sale shaLl be free and clear of any lien, claims, charges or encumbrances and other interests of any of ACI, ACSC, the Petitioners or their respective creditors, including any charges created pursuant to this Order.

92 [32] **DECLARES** that the transfers by ACI of its Receivables and Related Security to ACUSFC under the PCA shall constitute true sales under applicable non-bankruptcy law and are hereby deemed true sales and were or will be for fair consideration. Upon the transfer of the Receivables to ACUSFC, the Receivables and Related Security did (with respect to transfers occurring prior to the Effective Time as defined in the RPA) and will (with respect to transfers occurring on or after the date hereof) become the sole property of ACUSFC, and none of the Petitioners, nor any creditors of the Petitioners, shall retain any ownership rights, claims, liens or interests in or to the Receivables and Related Security, or any proceeds therefrom including, without limitation, pursuant to any theory of substantive consolidation or otherwise.

93 [33] **DECLARES** that each Securitization Program Agreement constitutes a valid and binding obligation of ACI, enforceable against ACI in accordance with its terms and that the terms

and conditions of the Securitization Program Agreements have been negotiated in good faith and at arm's length and the transfers made or to be made and the obligations incurred or to be incurred shall be deemed to have been made for fair or reasonably equivalent value and in good faith.

94 [34] **DECLARES** that upon the transfer by ACI pursuant to the Securitization Program Agreements neither the Receivables nor the Related Security, nor the proceeds thereof, shall constitute property of the patrimonies of any of the Petitioners or their affiliates, including notwithstanding any intentional or inadvertent deposit of any proceeds of the Receivables in bank accounts owned or controlled by any of the Petitioners or their affiliates.

95 [35] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein; (ii) any bankruptcy application or bankruptcy motion filed pursuant to the BIA in respect of the Petitioners and any bankruptcy order or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by ACI under Chapter 15 of Title 11 of The United States Code ("**ACI's Chapter 15 Proceedings**"); or (iv) the provisions of any federal or provincial statute, the transfers of Receivables and Related Security made by ACI pursuant to the Securitization Program Agreements and this Order do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

96 [36] **DECLARES** that the performance by ACI, ACSC and ACUSFC of their respective obligations under the Securitization Program Agreements, and the consummation of the transactions contemplated by the Securitization Program Agreements, and the conduct by ACI, ACSC and ACUSFC of their respective businesses, whether occurring prior to or subsequent to the Effective Time, do not, and shall not, provide a basis for a substantive consolidation of the assets and liabilities of ACI and ACSC, or any of them, with the assets and liabilities of ACUSFC or a finding that the separate corporate identities of ACI, ACSC and ACUSFC may be ignored. Notwithstanding any other provision of this Order, the Agent, Citibank, Eureka and the other parties thereto have agreed to enter into the Securitization Program Agreements in express reliance on ACUSFC being a separate and distinct legal entity, with assets and liabilities separate and distinct from those of any of the Petitioners.

97 [37] **DECLARES** that the transfers of Receivables and Related Security by ACI pursuant to the Securitization Program Agreements and this Order shall be valid and enforceable as against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

98 [38] **DECLARES**, for greater certainty, that the Facility Termination Date and the Commitment Termination Date (as each is defined in the Receivables Agreements) have not occurred as a consequence of the commencement of these proceedings, the U.S. Proceedings, ACI's Chapter 15 Proceedings or the taking of corporate actions by ACI or ACSC to approve such proceedings, or the failure of ACI or ACSC to pay any debts that are otherwise stayed by any of the foregoing or the written admission by ACI or ACSC of its inability to pay such debts.

99 [39] **ORDERS AND DECLARES** that collections of Receivables and other funds which are subject to the Deposit Account Control Agreement dated as of January 31, 2008, the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 and the Second Amended and Restated Four Party Agreement for Sold Accounts (General), dated as of January 31, 2008 referred to above,

shall be processed and transferred pursuant to such deposit account agreements and each deposit bank party thereto is directed to comply therewith.

100 [40] **ORDERS** that ACI is hereby authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts (including, without limitation, the perfection of ACUSFC's ownership interest in the Receivables) that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby; it being expressly contemplated that pursuant to the terms of the Securitization Program Agreements, ACI and ACSC shall be expressly authorized and empowered to service, administer and collect the Receivables on behalf of ACUSFC pursuant to the Securitization Program Agreements, and with respect to ACI, ACSC and ACUSFC, each shall be expressly authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby.

101 [41] **ORDERS** that ACI is hereby authorized and empowered to use the proceeds of the arrangements contemplated by the Securitization Program Agreements in the operation of the Petitioners' businesses, provided however, that the use of the proceeds are consistent with the terms of the Securitization Program Agreements, this Order or as may otherwise be agreed in writing by the Securitization Agent.

102 [42] **ORDERS AND DECLARES** that without limiting ACI's duty to comply with and fulfill any obligations under the Securitization Program Agreements, ACI shall perform and pay all indemnification and other obligations to the Securitization Agent, Eureka, Citibank and any other Indemnified Parties (as defined in the RPA) under the Securitization Program Agreements, all obligations to ACUFSC under the Securitization Program Agreements, and all of its obligations in respect of the Insurance Policy (as defined in the RPA).

103 [43] **ORDERS AND DECLARES** that, notwithstanding the terms of this Order, the parties to the Securitization Program Agreements other than ACI shall in that capacity be unaffected in these proceedings and by any plan of compromise or arrangement proposed by any of the Petitioners under the CCAA or by any proposal filed by any of the Petitioners under the BIA, and for greater certainty, paragraph 46(f) of this Order shall not apply to the Securitization Program Agreements.

104 [44] **DECLARES** that this Order shall not stay or otherwise apply to restrict in any way the exercise of any rights of any Person under any of the Securitization Program Agreements.

105 [45] **ORDERS AND DECLARES** that subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraph 28 hereof in respect of the Securitization Program, or inventory sales by ACI and the sale of inventory by ACI to ACSC and paragraphs 29 to 45 hereof or any other reference to the Securitization Program or the Securitization Program Agreements herein, unless either (a) notice of a motion for such order is served on the Securitization Agent and ACI by the moving party within seven (7) days after that party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) the Securitization Agent and ACI apply for or consent to such order.

Restructuring

106 [46] **DECLARES** that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**"), the Petitioners and Partnerships shall have the right, subject to approval of the Monitor or further order of the Court and to:

a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provisions for the consequences thereof in the Plan;
b) pursue all avenues to market and sell, subject to subparagraph (c), their Property, in whole or part;
c) convey, transfer, assign, lease, or in any other manner dispose of their Property, in whole or in part, provided that the price in each case does not exceed $10 million or $50 million in the aggregate, and provided that Petitioners or Partnerships apply any proceeds thereof in accordance with the Interim Financing Documents (as defined hereinafter) and the Securitization Program Agreements;
d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision for any consequences thereof in the Plan, as the Petitioners or Partnerships may determine;
e) subject to paragraphs 48 and 49 hereof, vacate or abandon any leased real property or repudiate any lease and ancillary agreements related to any leased premises as they deem appropriate, provided that the Petitioners or Partnerships give the relevant landlord at least seven days prior written notice, on such terms as may be agreed between the Petitioners or Partnerships and such landlord, or failing such agreement, to make provision for any consequences thereof in the Plan; and
f) repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate, on such terms as may be agreed between the Petitioners or Partnerships and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any amended or new agreements or arrangements.

107 [47] **DECLARES** that, in order to facilitate the Restructuring, the Petitioners and Partnerships may, subject to approval of the Monitor:

a) settle claims of customers and suppliers that are in dispute; and
b) subject to further orders from this Court, establish a plan for the retention of key employees and the making of retention payments or bonuses in connection therewith.

108 [48] **DECLARES** that, if leased premises are vacated or abandoned by the Petitioners or Partnerships pursuant to subparagraph 46(e), the landlord may take possession of any such leased premises without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners or Partnerships, provided the landlord mitigates its damages, if any, and re-leases any such leased premises to third parties on such terms as any such landlord may determine.

109 [49] **ORDERS** that the Petitioners and Partnerships shall provide to any relevant landlord notice of the Petitioners' or Partnerships' intention to remove any fixtures or leasehold improve-

ments at least seven days in advance. If the Petitioners or Partnerships have already vacated the leased premises, they shall not be considered to be in occupation of such location pending the resolution of any dispute.

110 [50] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Petitioners and Partnerships are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners or Partnerships binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioners or Partnerships or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners or Partnerships.

Directors' Indemnification and Charge

111 [51] **ORDERS** that, in addition to any existing indemnities, the Petitioners shall indemnify each of the Directors from and against the following (collectively, "**D&O Claims**"):

a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations, of any nature whatsoever, which may arise on or after the date of this Order (including, without limitation, an amount paid to settle an action or a judgment in a civil, criminal, administrative or investigative action or proceeding to which a Director may be made a party), provided that any such liability relates to such Director in that capacity, and, provided that such Director (i) acted honestly and in good faith in the best interests of the Petitioners and Partnerships and (ii) in the case of a criminal or administrative action or proceeding in which such Director would be liable to a monetary penalty, such Director had reasonable grounds for believing his or her conduct was lawful, except if such Director has actively breached any fiduciary duties or has been grossly negligent or guilty of willful misconduct; and

b) all costs, charges, expenses, claims, liabilities and obligations relating to the failure of the Petitioners or Partnerships to make any payments or to pay amounts in respect of employee or former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits, or any other amount for services performed prior to or after the date of this Order and that such Directors sustain, by reason of their association with the Petitioners as a Director, except to the extent that they have actively breached any fiduciary duties or have been grossly negligent or guilty of willful misconduct.

The foregoing shall not constitute a contract of insurance or other valid and collectible insurance, as such term may be used in any existing policy of insurance issued in favour of the Petitioners, the Partnerships or any of the Directors.

112 [52] **DECLARES** that, as security for the obligation of the Abitibi Petitioners to indemnify the Directors of the Abitibi Petitioners pursuant to paragraph 51 hereof, the Directors of the Abitibi Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of $75 million (the "**Abitibi D&O Charge**"), having the priority established by paragraphs 89 and 91 hereof. Such Abitibi D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Abitibi D&O Charge shall only apply to the extent that the Directors of the Abitibi Petitioners (collectively, the "**Abitibi Respondent Directors**") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Abitibi D&O Charge or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Abitibi D&O Charge.

113 [53] **DECLARES** that, as security for the obligation of the Bowater Petitioners to indemnify the Directors of the Bowater Petitioners pursuant to paragraph 51 hereof, the Directors of the Bowater Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of $25 million (the "**Bowater D&O Charge**"), having the priority established by paragraphs 90 and 91 hereof. Such Bowater D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Bowater D&O Charge shall only apply to the extent that the Directors of the Bowater Petitioners (collectively, the "**Bowater Respondent Directors**") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Bowater D&O Charge or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Bowater D&O Charge.

BCFPI DIP Financing

114 [54] **ORDERS** that the Bowater Petitioners (which for the purposes only of paragraphs 54 to 60, 90, 91, 93, 94 and 97 of this Order shall include, in addition to the Bowater Petitioners, Bowater Pulp and Paper Canada Holdings Limited Partnership and Bowater Canada Finance Limited Partnership and Bowater Ventures Inc., in its capacity as the general partner of Bowater Pulp and Paper Canada Holdings Limited Partnership) are hereby authorized and empowered to enter into, obtain and borrow under credit facilities provided pursuant to a Senior Secured Superpriority Debtor in Possession Credit Agreement among Avenue Investments, L.P., as a lender, Fairfax Financial Holdings Limited ("**Fairfax**"), as a lender, the other lenders party thereto from time to time (collectively, the "**BI DIP Lenders**" and, Fairfax as Administrative Agent and Collateral Agent (the Administrative Agent and the Collateral Agent, as either such agent may be replaced from time to time in accordance with the BI DIP Documents, as hereinafter defined, collectively, the "**BI DIP Agent**") substantially in the form communicated as **Exhibit R-23** in support of the Petition (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor) (the "**BI DIP Credit Agreement**"), provided that bor-

rowings under such credit facility shall not exceed the principal amount of US$600 million unless permitted by further Order of this Court, and the BI DIP Credit Agreement is hereby approved.

115 [55] **ORDERS** that the Bowater Petitioners are hereby authorized and empowered to execute and deliver the BI DIP Credit Agreement and such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, with the BI DIP Credit Agreement, the "**BI DIP Documents**"), as are contemplated by the BI DIP Credit Agreement or as may be reasonably required by the BI DIP Lenders or the BI DIP Agent pursuant to the terms thereof, and the Bowater Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the BI DIP Lenders and the BI DIP Agent under and pursuant to the BI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

116 [56] **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN$728,760,000 (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the "**BI DIP Lenders Charge**") in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement) (collectively, the "**BI DIP Secured Parties**") as security for all obligations of the Bowater Petitioners to the BI DIP Secured Parties with respect to all amounts owing, including principal, interest and the BI DIP Lenders Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the BI DIP Documents. The BI DIP Lenders Charge shall have the priority established by paragraphs 90 and 91 hereof.

> [56.1] **ORDERS AND DIRECTS** all the Registrars of all the Land Registry Offices for all Registration Divisions where property, immovables, hands and premises of the Bowater Petitioners are located and to whom certified copies of this Order (and any and all documentation ancillary thereto, if presented to them) will be presented, to accept, upon payment of the prescribed fees and filing of the required applications, such certified copies for registration in their respective register, of a charge and hypothec in an amount of CDN$728,760,000 on immovables, lands and premises of the Bowater Petitioners, in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement).

117 [57] **ORDERS** that, notwithstanding any other provision of this Order, the Bowater Petitioners shall pay to the BI DIP Agent and the BI DIP Lenders when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the BI DIP Agent and the BI DIP Lenders on a full indemnity basis (the "**BI DIP Lenders Expenses**")) under the BI DIP Documents and shall perform all of their other obligations to the BI DIP Agent and to the BI DIP Lenders pursuant to the BI DIP Documents and this Order.

118 [58] **ORDERS** that the claims of the BI DIP Agent and the BI DIP Lenders pursuant to the BI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the BI DIP Agent and the BI DIP Lenders, in that capacity, shall be treated as unaffected credi-

tors in these proceedings and in any Plan or any proposal filed by a Bowater Petitioner under the BIA.

119 [59] **ORDERS** that the BI DIP Agent and the BI DIP Lenders may:

a) notwithstanding any other provision of this Order, take such steps from time to time as they may deem necessary or appropriate to register, record or perfect the BI DIP Lenders Charge and the BI DIP Documents in all jurisdictions where they deem it is appropriate; and

b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of an Event of Default (as defined in the BI DIP Documents), refuse to make any advance to the Bowater Petitioners and terminate, reduce or restrict any further commitment to the Bowater Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the BI DIP Agent or by the BI DIP Lenders to the Bowater Petitioners against the obligations of the Bowater Petitioners to the BI DIP Agent and the BI DIP Lenders under the BI DIP Documents or the BI DIP Lenders Charge, make demand, accelerate payment or give other similar notices, and the foregoing rights and remedies of the BI DIP Lenders under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Bowater Petitioners or the Property of the Bowater Petitioners, the whole in accordance with and to the extent provided in the BI DIP Documents.

120 [60] **ORDERS** that the BI DIP Lenders shall not take any enforcement steps under the BI DIP Documents or the BI DIP Lenders Charge without providing a five (5) business days (the "**Notice Period**") written enforcement notice of a default thereunder to the Bowater Petitioners, the Monitor and to creditors requesting a copy of such notice. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the BI DIP Agent and the BI DIP Lenders shall be entitled to take any and all steps and exercise all rights and remedies provided for under the BI DIP Documents and the BI DIP Lenders Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the BIA.

121 [61] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 54 to 61 hereof, the approval of the BI DIP Documents or the BI DIP Lenders Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the BI DIP Agent and the BI DIP Lenders by the moving party and returnable within seven (7) days after that party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) the BI DIP Agent and the BI DIP Lenders apply for or consent to such order.

ACI DIP Financing

[61.1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a "Letter Loan Agreement US$100,000,000 Super-priority, Senior Secured Debtor-in-Possession Credit Facility" among Abitibi and Donohue Corp., as borrow-

ers, and the Bank of Montreal, as lender (the "**ACI DIP Lender**") (the "**ACI DIP Agreement**") and to enter into the offer of loan guarantee from Investissement Québec ("**IQ**") (the "**IQ Guarantee Offer**"), in each case substantially in the forms communicated as Exhibits R-1 and R-2 in support of the Motion for Approval of DIP Financing in Respect of the Abitibi Petitioners dated April 27, 2009 (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor), provided that borrowings under such credit facility shall not exceed the principal amount of US$100 million, unless permitted by further Order of this Court, and the ACI DIP Agreement and the IQ Guarantee Offer are hereby approved, subject to the terms of this Order.

[61.2] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ACI DIP Agreement and the IQ Guarantee Offer, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ACI DIP Agreement and the IQ Guarantee Offer, the "**ACI DIP Documents**"), as are contemplated by the ACI DIP Agreement or the IQ Guarantee Offer or as may be reasonably required by the ACI DIP Lender or IQ pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ACI DIP Lender or IQ under and pursuant to the ACI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

[61.3] **ORDERS** that all of the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge (as defined below) shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN$140 million (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the "**ACI DIP Charge**") in favour of the ACI DIP Lender and IQ as security for all obligations of the Abitibi Petitioners to the ACI DIP Lender and IQ with respect to all amounts owing, including principal, interest and the ACI DIP Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the ACI DIP Documents. The ACI DIP Charge shall have the priority established by paragraphs 89 and 91 hereof.

[61.4] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ACI DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all

fees and disbursements of counsel and all other advisers to or agents of the ACI DIP Lender and IQ on a full indemnity basis (the "**ACI DIP Expenses**") under the ACI DIP Documents and shall perform all of their other obligations to the ACI DIP Lender and IQ pursuant to the ACI DIP Documents and this Order.

[61.5] **ORDERS** that the claims of the ACI DIP Lender and IQ pursuant to the ACI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ACI DIP Lender and IQ, in such capacities, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the BIA.

[61.6] **ORDERS** that the ACI DIP Lender may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ACI DIP Documents in all jurisdictions where it deems it to be appropriate; and

(b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of a Specified Event of Default or a Termination Event (as each such term is defined in the ACI DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ACI DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ACI DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ACI DIP Documents, the ACI DIP Lender shall be entitled to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ACI DIP Lender in accordance with the ACI DIP Documents and the DIP Lender's Charge.

[61.7] **ORDERS** that the foregoing rights and remedies of the ACI DIP Lender under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ACI DIP Documents.

[61.8] **ORDERS** that the ACI DIP Lender shall not take any enforcement steps under the ACI DIP Documents or the ACI DIP Charge without providing a five (5) business days (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners and the Monitor. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ACI

DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ACI DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the BIA. For greater certainty, the ACI DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[61.9] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 hereof, the approval of the ACI DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the ACI DIP Lender and IQ by the moving party on or before June 5, 2009 or (b) the ACI DIP Lender applies for or consents to such order.

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such impaired Secured Creditor that is used directly to pay the ACI DIP Lender (including by any means of realization) on account of principal, interest or costs, in whole or in part as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to the impaired Secured Creditor that are secured by its Existing Security. For this purpose "ACI DIP Lender" shall be read to include Bank of Montreal, IQ, and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce the right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that the right of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer and for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee

Offer. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge, such impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[61.11] **ORDERS** that, subject to the execution and delivery of non-disclosure agreements satisfactory to the Petitioners and the Monitor, **(i)** copies of any borrowing request given to the Lender and the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor, the Secured Creditors and their respective financial advisors and the Ad Hoc Committee of Unsecured Noteholders (collectively, the "**Notice Parties**"); and **(ii)** all financial information, documents and reports required to be provided to the Lender or the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor and the Notice Parties. The Monitor will advise the Notice Parties of the Monitor's understanding of the proposed timing of any requested advance. All advances shall be subject to the prior approval of the Monitor and any Notice Party may apply to the Court to contest any Borrowing Request.

Inter-Company Advances

122 [62] **ORDERS** that any Abitibi Petitioner is authorized to borrow, repay and reborrow (such party being an "**ACI Inter-Company Borrower**") from any member of the ABH Group (such party being an "**ACI Inter-Company Lender**"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "**ACI Inter-Company Advances**") pursuant to a promissory note issued in favour of the ACI Inter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

123 [63] **ORDERS** that all of the Property of an ACI Inter-Company Borrower (other than the Property subject to the Securitization Program Agreements) is hereby charged by a lien, mortgage and security interest (the "ACI Inter-Company Advances Charge") in favour of the ACI Inter-Company Lender as security for the obligations of the ACI Inter-Company Borrower to the ACI Inter-Company Lender with respect to the ACI Inter-Company Advances made to it. The ACI Inter-Company Advances Charge shall have the priority established by paragraphs 89 and 91 hereof.

124 [64] **ORDERS** that the claims of the ACI Inter-Company Lender pursuant to the ACI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the ACI Inter-Company Lender in respect thereof under the ACI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

125 [65] **ORDERS** that, subject to the terms of the BI DIP Documents, any Bowater Petitioner is authorized to borrow, repay and reborrow (such party being a "**BI Inter-Company Borrower**") from any member of the ABH Group (such party being a "**BI Inter-Company Lender**"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "**BI Inter-Company Advances**") pursuant to a promissory note issued in favour of the BI In-

ter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

126 [66] **ORDERS** that all of the Property of an BI Inter-Company Borrower is hereby charged by a lien, mortgage and security interest the ("**BI Inter-Company Advances Charge**") in favour of the BI Inter-Company Lender as security for the obligations of the BI Inter-Company Borrower to the BI Inter-Company Lender with respect to the BI Inter-Company Advances made to it. The BI Inter-Company Advances Charge shall have the priority established by paragraphs 90 and 91 hereof.

127 [67] **ORDERS** that the claims of the BI Inter-Company Lender pursuant to the BI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the BI Inter-Company Lender in respect thereof under the BI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

Bowater Adequate Protection Charge

128 [68] **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a lien, mortgage and security interest the ("**Bowater Adequate Protection Charge**") as security for the diminution in the value of the BI Bank Syndicate Security (as defined below), if any, subsequent to April 16, 2009 by sale, lease or use of the BI Bank Syndicate Security. The Bowater Adequate Protection Charge shall have the priority established by paragraphs 90 and 91 hereof.

129 [69] **ORDERS** that the obligations secured and the Property affected by the Bowater Adequate Protection Charge shall be subject to approval of such charge in the U.S. Proceedings and, in the event a lesser charge is approved or a lesser obligation is secured, the Bowater Adequate Protection Charge shall be reduced *pro tanto*. The exercise of any remedies under the Bowater Adequate Protection Charge shall be subject to the stay provided for in this Order.

Powers of the Monitor

130 [70] **ORDERS** that Ernst & Young Inc. is hereby appointed to monitor the business and financial affairs of the Petitioners and Partnerships as an officer of this Court and that the Monitor shall, in addition to the duties and functions referred to in Section 11.7 of the CCAA:

a) give notice of this Order, within 10 days, to every known creditor of the Petitioners having a claim of more than $5,000.00 against it, advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor (the "**Website**") or, failing that, from the Monitor and the Monitor shall, upon request, so provide it. Such notice shall be deemed sufficient in accordance with Subsection 11(5) of the CCAA;
b) review and monitor the receipts and disbursements of the Petitioners and Partnerships including without limitation the intercompany transactions referred to in paragraphs 28 and 62 to 67 of this Order;
c) assist the Petitioners, to the extent required by the Petitioners and Partnerships, in dealing with their creditors and other interested Persons during the Stay Period;
d) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the preparation of their cash flow projections and any other

projections or reports and the development, negotiation and implementation of the Plan;

e) advise and assist the Petitioners, to the extent required by the Petitioners and Partnerships, to review the Petitioners' and Partnerships' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

f) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

g) report to the Court on the state of the business and financial affairs of the Petitioners and Partnerships or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;

h) report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

i) retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

j) engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceedings, under this Order or under the CCAA;

k) may act as a foreign representative of the Petitioners in any proceedings outside of Canada;

l) may give any consents or approvals as are contemplated by this Order; and

m) perform such other duties as are required by this Order, the CCAA or this Court from time to time.

The Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioners and Partnerships, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioners and Partnerships.

131 [71] **ORDERS** that the Petitioners and their directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioners and Partnerships in connection with the Monitor's duties and responsibilities hereunder.

132 [72] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioners' counsel. The Monitor shall not have any duties or liabilities in respect of such information disseminated by it pursuant to the provisions of this Order or the

CCAA, other than as provided in paragraph 74 hereof. In the case of information that the Monitor has been advised by the Petitioners, the BI DIP Agent or the BI DIP Lenders is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioners, the BI DIP Agent and the BI DIP Lenders unless otherwise directed by this Court.

133 [73] **DECLARES** that the Monitor shall not be, nor be deemed to be, an employer or a successor employer of the employees of the Petitioners and Partnerships or a related employer in respect of the Petitioners and Partnerships within the meaning of any federal, provincial or municipal legislation governing employment, labour relations, pay equity, employment equity, human rights, health and safety or pensions or any other statute, regulation or rule of law or equity for any similar purpose and, further, that the Monitor shall not be, nor be deemed to be, in occupation, possession, charge, management or control of the Property or business and financial affairs of the Petitioners pursuant to any federal, provincial or municipal legislation, statute, regulation or rule of law or equity which imposes liability on the basis of such status, including, without limitation, the *Environment Quality Act* (Québec), the *Canadian Environmental Protection Act*, 1999 or the *Act Respecting Occupational Health and Safety* (Québec) or similar other federal or provincial legislation.

134 [74] **DECLARES** that, in addition to the rights and protections afforded to the Monitor by the CCAA, this Order or its status as an officer of the Court, the Monitor shall not incur any liability or obligation as a result of its appointment and the fulfilment of its duties or the provisions of this Order, save and except any liability or obligation arising from a breach of its duties to act honestly, in good faith and with due diligence, and no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel.

135 [75] **ORDERS** that the Petitioners shall pay the fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisers, incurred in connection with or with respect to the Restructuring, whether incurred before or after this Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

136 [76] **DECLARES** that the Monitor, the Monitor's legal counsel, the Abitibi Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Abitibi Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of $6 million (the "**Abitibi Administration Charge**"), having the priority established by paragraphs 89 and 91 hereof.

137 [77] **DECLARES** that the Monitor, the Monitor's legal counsel, the Bowater Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Bowater Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of $2 mil-

lion (the "**Bowater Administration Charge**"), having the priority established by paragraphs 90 and 91 hereof.

Appointment of Information Officer in Respect of U.S. Proceedings

138 [78] **ORDERS** that, in respect of the U.S. Proceedings of the 18.6 Petitioners, Ernst & Young Inc. is hereby appointed as an information officer with the powers and obligations set out herein (the "**Information Officer**").

139 [79] **ORDERS** that the Information Officer shall report to this Court at such times and intervals as the Information Officer deems appropriate and, in any event, shall deliver a report to this Court at least once every two months outlining the status of the U.S. Proceedings of the 18.6 Petitioners, and such other information as the Information Officer believes to be material with copies of such reports provided to the BI DIP Agent and the BI DIP Lenders and report to the BI DIP Lenders on such additional issues related thereto upon the request of the BI DIP Agent and the BI DIP Lenders or their counsel.

140 [80] **ORDERS** that, in addition to the rights and protections afforded to the Information Officer as an officer of this Court, the Information Officer shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except from a failure to act in good faith and to take reasonable care. Nothing in this Order shall derogate from the protections afforded to the information Officer by the CCAA or any applicable legislation.

141 [81] **ORDERS** that the Information Officer shall provide any creditor of the 18.6 Petitioners located in Canada with information provided by the 18.6 Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the 18.6 Petitioners is confidential, the Information Officer shall not provide such information to creditors unless as otherwise directed by this Court or on such terms as the Information Officer and the 18.6 Petitioners may agree upon.

142 [82] **ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the business of the 18.6 Petitioners and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the business or Property of the 18.6 Petitioners, or any part thereof. For greater certainty, the Information Officer shall not employ any employee of the 18.6 Petitioners;

143 [83] **ORDERS** that nothing herein contained shall require the Information Officer to occupy or to take control, care, charge, possession or management of any of the Property of the 18.6 Petitioners that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Environment Quality Act* (Quebec), the *Canadian Environmental Protection Act*, 1999 or similar other federal or provincial legislation and regulations under such legislation (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Information Officer from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Information Officer shall not, as a result of this Order or anything done in

pursuance of the Information Officer's duties and powers under this Order, be deemed to be in possession of any of the Property of the 18.6 Petitioners within the meaning of any Environmental Legislation, unless if is actually in possession of such property.

144 [84] **[Intentionally omitted]**

145 [85] **[Intentionally omitted]**

146 [86] **[Intentionally omitted]**

147 [87] **[Intentionally omitted]**

148 [88] **[Intentionally omitted]**

Priorities and General Provisions Relating to CCAA Charges

149 [89] **DECLARES** that the priorities of the Abitibi Administration Charge, Abitibi D&O Charge, ACI inter-Company Advances Charge and the ACI DIP Charge (collectively, the "**Abitibi CCAA Charges**"), as between them with respect to any Property of the Abitibi Petitioners to which they apply, shall be as follows:

a) first, the Abitibi Administration Charge;
b) second, the Abitibi D&O Charge, up to a maximum of $22.5 million (the "**Abitibi D&O First Tranche**");
c) third, the ACI DIP Charge;
d) fourth, the ACI inter-Company Advances Charge; and
e) fifth, the Abitibi D&O Charge in respect of the balance Of amounts, if any, secured thereby (the "**Abitibi D&O Second Tranche**").

150 [90] **DECLARES** that the priorities of the Bowater Administration Charge, Bowater D&O Charge, BI DIP Lenders Charge, Bowater Adequate Protection Charge and BI Inter-Company Advances Charge (collectively, the "**Bowater CCAA Charges**"), as between them with respect to any Property of the Bowater Petitioners to which they apply, shall be as follows:

a) first, the Bowater Administration Charge;
b) second, the Bowater D&O Charge, up to a maximum of $7.5 million (the "**Bowater D&O First Tranche**");
c) third, the BI DIP Lenders Charge;
d) fourth, the Bowater Adequate Protection Charge;
e) fifth, the BI Inter-Company Advances Charge; and
f) sixth, the Bowater D&O Charge in respect of the balance of amounts, if any, secured thereby (the "**Bowater D&O Second Tranche**").

151 [91] **DECLARES** that the Abitibi CCAA Charges and the Bowater CCAA Charges (collectively, the "**CCAA Charges**") shall rank in priority to any and all other hypothecs, mortgagees, liens, trusts, security, priorities, conditional sale agreements, financial leases, charges, encumbrances or security of whatever nature or kind (collectively, "**Encumbrances**") affecting the Property Of the Petitioners, other than:

a) in the case of the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater

D&O Second Tranche, valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Bowater Petitioners and currently held pursuant to the Credit Agreement dated as of May 31, 2006, as amended and restated (the "**Canadian Credit Agreement**") or supplemented, among BCFPI, as borrower, the lenders named thereto and the Bank of Nova Scotia, as administrative agent (the "**BI Bank Syndicate Security**"), which BI Bank Syndicate Security shall rank in priority to the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater D&O Second Tranche; and

b) in the case of the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche above:

   a. valid and perfected Encumbrances in respect of principal and interest affecting the Property of the Abitibi Petitioners and currently held pursuant to the Credit and Guaranty Agreement dated as of April 1, 2008 among, *inter alia*, ACI, as borrower, Abitibi-Consolidated Company of Canada ("**ACCC**") as guarantor, the Lenders party thereto and Goldman Sachs Credit Partners L.P. as administrative agent (the "**ACI Bank Security**"); and
   b. valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Abitibi Petitioners and currently held pursuant to the US$413 million 13.75% Senior Secured Notes due April 1, 2011 (the "**Senior Notes Security**");

which ACI Bank Security and Senior Notes Security shall rank in priority to the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche.

152 [92] **ORDERS** that nothing in this Order shall affect any determination of (i) the validity or perfection of the BI Bank Syndicate Security, the ACI Bank Security or the Senior Notes Security, (ii) whether such security is opposable to third parties, or (iii) whether such security is avoidable under applicable Canadian or United States laws.

[92.1] **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever (i) any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to CIBC by ACCC under the Facility Agreement dated as of April 1st, 2008, as it may be renewed or amended (the "**Facility Agreement**"); and (ii) set-off rights available to CIBC under the Facility Agreement or at law.

[92.2] **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to Bank of Nova Scotia by ACCC with respect to that certain letter of credit bearing number S 51151-1 78519 in the face amount of $1,075,824.97 issued by Bank of Nova Scotia to WSIB at the request of ACCC.

153 [93] **ORDERS** that, except as otherwise expressly provided for herein, the Petitioners shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners obtain the prior written consent of the Monitor and in the case of the Bowater Petitioners, the prior consent of the BI DIP Agent, the BI DIP Lenders and the prior approval of the Court.

154 [94] **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time of this Order, to all present and future Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or the Bowater Petitioners, as the case may be, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

155 [95] **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any application for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners or any bankruptcy order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title 11 of The United States Code; or (iv) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, or the granting of financial assistance between affiliated companies, contained in (y) any federal or provincial statute or (z) any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach, by the Petitioners, of any Third Party Agreement to which they are a party; and
b) any beneficiary of the CCAA Charges shall not be held liable against any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

156 [96] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners and any bankruptcy order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title 11 of The United States Code; or (iv) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioners pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

157 [97] **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or of the Bowater Petitioners as the case may be and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

General

158 [98] **DECLARES** that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply, by the Petitioners, under any statute, regulation, license, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

159 [99] **DECLARES** that, except as otherwise specified herein, the Petitioners are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery (if by personal delivery or electronic transmission), on the following business day (if delivered by courier), or three business days after mailing (if by ordinary mail).

160 [100] **DECLARES** that the Petitioners may serve any Court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

161 [101] **DECLARES** that any party in these proceedings, other than the Petitioners, may serve any Court materials electronically, by emailing a PDF or other electronic copy of all materials to counsels' email addresses, provided that such party shall deliver both PDF or other electronic copies and "hard copies" of all materials to counsel to the Petitioners and the Monitor and to any other party requesting same.

162 [102] **DECLARES** that, unless otherwise provided herein or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court.

163 [103] **DECLARES** that the Petitioners or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

164 [104] **DECLARES** that any interested Person may apply to this Court to vary or rescind this Order or seek other relief upon seven days notice to the Petitioners, the Monitor, the BI DIP Agent, the BI DIP Lenders and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Effect, Recognition and Assistance

165 [105] **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

166 [106] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body and any federal or State Court or administrative body in the United States of America including, without limitation, the U.S. Bankruptcy Court, and other nations and states to give effect to this Order and to assist the Petitioners, the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings. All Courts or administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative

status to ACI and/or the Monitor in any foreign proceedings and to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings, including, without limitation, recognizing the Petitioners' CCAA proceedings as a foreign main proceeding under applicable law.

167 [107] **DECLARES** that each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and any other Order granted by this Court including, without limitation, applications under Chapter 15 of the U.S. Bankruptcy Code in respect of ACI and ACCC, and to recognize or give effect to or otherwise further the Restructuring.

168 [108] **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada and in particular in the U.S. Bankruptcy Court in respect of proceedings commenced under Chapter 15 of the U.S. Bankruptcy Code and any ancillary relief in respect thereto, ACI shall be appointed as and is hereby authorized and directed to act as the foreign representative of the Petitioners and to seek such aid and recognition.

169 [109] **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada, the Petitioners' centre of main interest (COMI) is ACI's principal executive offices situated at 1155 Metcalfe Street, in the city and district of Montréal, Province of Québec.

170 [110] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

171 [111] **THE WHOLE WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

* * * * *

SCHEDULE "Â"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.

16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

SCHEDULE "B"

BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC

16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"

PARTNERSHIPS

1. BOWATER CANADA FINANCE LIMITED PARTNERSHIP
2. BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP
3. ABITIBI-CONSOLIDATED FINANCE LP

cp/s/qlisl/qlesc/qlhcs/qlcla/qlhcs

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

2 For purposes of this Judgment, all capitalized terms, unless otherwise defined herein, have the same meaning as set out in the paragraphs of the Second Amended initial Order found at the end of these reasons.

3 Motion for Approval of a Dl P Financing in Respect of the Abitibi Petitioners.

4 Exhibit R-1.

5 Exhibit R-2.

6 Contestation of Respondents dated May 4, 2009 (proceeding number 74 of the court Record).

7 Paragraph 61.10 of the Second Amended Initial Order sought here.

8 Contestation of April 30, 2009 (proceeding number 47 of the Court Record).

9 Motion to Vary of April 29, 2009 (proceeding number 32 of the Court Record).

10 They include the Third Report of the Monitor dated April 27, 2009 and the Second Supplemental Report of the Monitor dated May 4, 2009.

11 *Stelco Inc. (Bankruptcy), Re*, (2005) 9 C.B.R. (5th) 135, 2005 CanLII 8671 (ON C.A.).

12 See *Mecachrome International inc. (Arrangement relatif à)*, S.C. Montreal, no 500-11-035041-082, [2009] J.Q. no 11137, 2009-01-13, Gascon J., at paragr. 31-33; *MEI Computer Technology Group Inc. (Arrangement relatif à)*, [2005] R.J.Q. 1558 (S.C.), at paragr. 25.

13 See in this respect *Hunters Trailer & Marine Ltd. (Re)*, 2001 ABQB 546 (CanLII), at paragr. 32 (Wachowich J.); *Parc industriel Laprade Inc. c. Conporec inc.*, [2008] R.J.Q. 2590

(C.A.), at paragr. 16 (Thibault J.A.), confirming *Conporec Inc. (Arrangement relatif à)*, 2008 QCCS 4813, at paragr. 50 to 54 (Parent J.); *United Used Auto & Truck Parts Ltd. (Re)*, (2000), 73 B.C.L.R. (3d) 236, at paragr. 29 (B.C.C.A.); *Temple City Housing Inc. (Companies' Creditors Arrangement Act)*, 2007 ABQB 786 (CanLII), at paragr. 14 (Romaine J.).

14 *Mecachrome International Inc. (Arrangement relatif à)*, S.C. Montreal, no 500-11-035041-082, [2009] J.Q. no 11137, 2009-01-13, Gascon J., at paragr. 37 to 51.

15 *InterTAN Canada Ltd. (Re)*, [2008] O.J. No. 5692, 2008 CarswellOnt 8040, Initial Order rendered on November 26, 2008, No. CV-0800007841-00 CL (Ont. S.C), at paragr. 57ff (Morawetz J.).

TAB 8

I.I.C. Ct. Filing 383840867021

Canadian Insolvency Court Filings
Re Shire International Real Estate Investments Ltd. — Court File No. 0901-11866

46. — Order, January 11, 2010

46. — Order, January 11, 2010

Shire *International Real Estate Investments Ltd.,* ***Shire*** *Capital Ltd., Halama Gardens LLC,* ***Shire*** *Asset Management Ltd., Winn River Resort Ltd., Fort McMoney Properties II Ltd., Halama Gardens Ltd., Maples and White Sands Investment Ltd., Fort McMoney Properties Ltd., Chemainus Properties Ltd., Skaha Lake Developments Ltd., Tsehum Harbour Ltd., Bearspaw at 144th Bonds Inc., Tsehum Harbour Equities Ltd., Tsehum Harbour Bonds Ltd, and Orillia Investments Ltd.*, Court File No. 0901-11866 (Court of Queen's Bench of Alberta, Judicial Centre of Calgary)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended, the *Judicature Act*, R.S.A. 2000, c. J-2, as Amended and the *Business Corporations Act*, R.S.A. 2000, c. B-9, as Amended and In the Matter of a Plan of Compromise or Arrangement of Shire International Real Estate Investments Ltd., Shire Capital Ltd., Halama Gardens LLC, Shire Asset Management Ltd., Winn River Resort Ltd., Fort McMoney Properties II Ltd., Halama Gardens Ltd., Maples and White Sands Investment Ltd., Fort McMoney Properties Ltd., Chemainus Properties Ltd., Skaha Lake Development Ltd., Tsehum Harbour Ltd., Bearspaw at 144th Avenue Ltd., Bearspaw at 144th Equities Ltd., Bearspaw at 144th Bonds Inc., Tsehum Harbour Equities Ltd., Tsehum Harbour Bonds Ltd., Orillia Investments Ltd., 0726028 B.C. Ltd., 0675816 B.C. Ltd. and Bosun's Holdings Ltd.

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE OF CALGARY

BEFORE THE HONOURABLE	)	
MADAM JUSTICE C.A. KENT	)	ON FRIDAY, DECEMBER 4, 2009
IN CHAMBERS, CALGARY COURTS CENTRE	)	and MONDAY, JANUARY 11, 2010
CALGARY, ALBERTA	)	

Order

UPON the application of **Shire** International Real Estate Investments Ltd., **Shire** Capital Ltd., **Shire** Asset Management Ltd., Winn River Resort Ltd., Fort McMoney Properties II Ltd., Halama Gardens LLC, Halama Gardens Ltd., Maples and White Sands Investment Ltd., Fort McMoney Properties Ltd., Chemainus Properties Ltd., Skaha Lake Development Ltd., Tsehum

Harbour Ltd., Bearspaw at 144th Avenue Ltd., Bearspaw at 144th Equities Ltd., Bearspaw at 144th Bonds Inc., Tsehum Harbour Equities Ltd., Tsehum Harbour Bonds Ltd. and Orillia Investments Ltd. (the "*Debtors*") to, among other relief, continue the stay of proceedings in the Order granted August 10, 2009, as amended (the "*Initial Order*");

AND UPON the applications of Investit Financial Inc., Romspen Mortgage Corporation and 1533021 Ontario Inc. to, among other relief, terminate the stay of proceedings, payout the DIP Loan and obtain conduct of sale, and the application of Echo Merchant Fund II Limited Partnership ("*Echo*") for the appointment of a Receiver;

AND UPON having read the pleadings and proceedings in this action;

AND WHEREAS the Debtors' are the registered owners of the real property described in Schedule "A" to this Order (the "*Lands*");

AND UPON having read the consent of Ernst & Young Inc. to act as Receiver of the Lands; AND UPON having read the Orders of this Honourable Court dated August 10, 2009 (the "*Initial Order*"), October 8, 2009 (the "*Receivership Order*"), December 4, 2009;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of the above applications are deemed to be in order.

Allocation of the DIP Lender's Charge

2. The stay of proceedings, contained in the Initial Order as extended and amended is hereby lifted.

3. The DIP Financing, as authorized in paragraph 31 of the Initial Order, be and is hereby limited to $1,000,000 plus that amount required to make the payments contemplated in paragraph 4 below.

4. Ernst & Young Inc. shall pay the outstanding fees and disbursements up to the date of entry of this Order of itself, its counsel and counsel for the Applicants from the funds advanced under the Commitment Letter pursuant to the DIP Lender's Charge (as that term is defined in the Initial Order) which are currently held by counsel to the Monitor. Notwithstanding paragraph 5 of the October 8, 2009 Order made herein no payment is to be made to Borden Ladner Gervais. Any funds remaining in trust shall be repaid to the DIP Lender subject only to a $15,000 holdback to be retained by counsel to Ernst & Young Inc. on account of the fees and disbursements of Ernst & Young Inc. and its counsel from December 21, 2009 and after. All such fees are subject to review by this Court.

5. The DIP Lender's Charge, as defined in the Initial Order, be allocated as follows:

(a) firstly to the unencumbered lands or personal property belonging to Applicants, or any of them.

(b) secondly to the extent that there is any remainder secured by the DIP Lender's Charge after the allocation contem-

plated in paragraph 5(a) above, the DIP Lender's Charge be next allocated to any equity in the lands belonging to the Applicants, or any of them, after the payment of all duly registered mortgages, charges or encumbrances; and

(c) finally, to the extent that there is any remainder secured by the DIP Lender's Charge after the allocation contemplated in paragraph 5(b) above, the DIP Lender's Charge be next allocated *pro rata* between the remaining value of the Property (as that term is defined in the Initial Order).

6. To effect the allocation set out above, the repayment of the DIP Facility and enforcement of the DIP Lender's Charge be conducted as follows:

(a) if the DIP Lender is paid from sale proceeds of a property subject to one or more duly registered mortgages, charges or encumbrances such that one or more such secured creditor(s) is not paid monies that it would otherwise have received from the net sale proceeds, that creditor (the "*Subrogated Creditor*") will be subrogated to the DIP Lender's Charge **for** that **amount** that **it would have** received (the "*Subrogated Amount*") and interest will accrue on the Subrogated Amount at the rate of interest, if any, in accordance with the terms of that creditor's security.

(b) the sale proceeds, net of standard closing costs, of any Property subject to the DIP Lender's Charge will be paid as follows:

(i) first, and until the DIP Facility is repaid in full, to the DIP Lender;

(ii) second, to Subrogated Creditors until such time as the Total Subrogated Amount is reduced to zero;

(c) where there is more than one Subrogated Creditor, the amount payable to each Subrogated Creditor pursuant to paragraph 6(b)(ii) above will be calculated as follows:

SA — (PA × TSA)

where:

(i) NSP is the sale proceeds, net of standard closing costs, of the property;

(ii) ISA (initial subrogated amount) is the aggregate amount of the NSP that would have been payable to the Subrogated Creditor if the DIP Lender's Charge did not exist;

(iii) SA is the Subrogated Amount. If the creditor becomes a Subrogated Creditor as a result of the sale of the property, the SA used in the calculation will be the ISA;

(iv) TSA (the total subrogated amount) is, at any point in time, the amount paid to repay the DIP Facility in full, plus the ISA of each Subrogated Creditor, less the aggregate sum of NSP from all sales, or if the calculation results in a negative number, zero;

(v) PA (percentage of DIP Lender's Charge Allocated for any particular property) is the NSP of the property over which the Subrogated Creditor originally held its security divided by aggregate sum of the NSPs.

7. There be liberty to apply for directions in respect of paragraphs 5 and 6 of this Order.

Transition

8. The Receivership Order is hereby terminated in its entirety concurrently with the granting of the Order herein. For greater certainty:

(a) Ernst & Young Inc. is hereby discharged as Receiver and Manager pursuant to the Receivership Order;

(b) the Receiver's Charge (as defined in the Receivership Order) is hereby discharged;

(c) all actions and conduct by the Receiver are hereby approved. The Receiver has satisfied its obligations under and pursuant to the terms of the Receivership Order up to and including the date hereof and the Receiver shall not be liable for any act or omission on its part including, without limitation, any act or omission pertaining to the discharge of its duties in the within proceedings, save and except for any liability arising out of any fraud, gross negligence or wilful misconduct on the part of the Receiver. Subject to the foregoing, any claims against the Receiver in connection with the performance of its duties are hereby stayed, extinguished and forever barred; and

(d) no action or other proceeding shall be commenced against the Receiver in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on notice to the Receiver and upon further Order securing security for costs, solicitor and its own client costs, in connection with any proposed action or proceeding.

9. Any mortgages of any of the Lands granted by the Receiver and submitted for registration with the Registrar of Land Titles shall be registered notwithstanding the requirements of section 191(1) of the *Land Tides Act*, including without limiting the foregoing the mortgages dated November 3, 2009 submitted under DRR Nos. C089048 and C089013.

Appointment of Receiver

10. Subject to paragraph 11 of the within Order and pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. C-36, as amended, Ernst & Young Inc (the "Receiver") is hereby appointed receiver, without security, of all of the Debtors' current and future interest in the Lands.

Receivers Powers

11. The Receiver shall not enter into possession, management or control of the Lands but, rather, is hereby empowered and authorized to:

(a) to receive notice of and to defend or otherwise enter an appearance in any realization proceedings taken by any creditor entitled to take realization proceedings against any of the Lands;

(b) to receive any funds the Debtors' are entitled to receive following distribution of proceeds arising from the realization proceedings undertaken by any creditor entitled to do so in connection with the Lands;

(c) with the consent of and in consultation with secured creditors holding charges against the applicable Lands, to market such Lands, including advertising and soliciting offers in respect of such Lands and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(d) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Lands and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(e) to register a copy of this Order and any other Orders in respect of the Lands against title to any of the Lands notwithstanding the provisions of section 191(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4; and

(f) to take any steps reasonably incidental to the exercise of these powers;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

12. The Receiver shall provide to the secured creditors of the Debtors reasonable cooperation, information and documents in its possession with respect to the assets charged by the security of the secured creditors of the Debtors.

Duty to Provide Access and Co-Operation to the Receiver

13. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the Lands, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "*Records*") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraph 13 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

14. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

No Proceedings against the Receiver

15. No proceeding or enforcement process in any court or tribunal (each, a "*Proceeding*"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court. Nothing herein shall be construed to prevent secured lenders from undertaking enforcement proceedings in relation to the Lands.

Receiver to Hold Funds

16. The Receiver shall hold and deposit all funds, monies, cheques, instruments and other forms of payments received or collected by the Receiver from the sale, lease or other use of the Lands, into separate and distinct new accounts standing to the credit of each the Lands to which they relate, which monies shall be held by the Receiver until further order of this Court.

Employees

17. All employees of the Debtors shall remain the employees of the Debtor. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in Proceeding before a Court or tribunal of competent jurisdiction.

Limitation on Environmental Liabilities

18.

(a) notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct;

(b) nothing in sub-section (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-section;

(c) notwithstanding anything in any federal or provincial law, but subject to sub-section (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order;

(i) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in paragraph (i), the Receiver:

(A) complies with the order, or

(B) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (i), within ten days after the order is made or within ten days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

(A) the Court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

(B) the Court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

Nothing in this Order shall derogate from the fact that the Receiver is not entering into possession, management or control of the Lands or from the protection afforded to the Receiver by Section 14.06 of the BIA or any other applicable legislation.

Receiver's Accounts

19. Any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a charge on the Lands and Property (the "*Receiver's Charge*") subject to any charges, liens and mortgages currently registered against the Lands and subject to the DIP Lender's Charge.

20. The Receiver and its legal counsel shall pass their accounts from time to time.

21. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

General

22. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

23. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

24. The aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

25. The Receiver be at liberty and is hereby authorized and empowered to apply to any Court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

Conduct of Sale

26. The following lands and premises:

Chemainus

Legal Description: Lot A, Section 18, Range 5, Chemainus District, Plan 29495 ("*Chemainus*")

Fort McMoney II

10109 Manning A venue

Legal Description: Plan 1268NY, Block 1, Lot 7, excepting thereout all mines and mineral

10313 Manning Avenue

Legal Description: Plan 1268NY, Black 1, Lot 8, excepting thereout all mines and mineral

10113 Manning Avenue

Legal Description: Plan 1268NY, Block 1, Lot 6, excepting thereout all mines and mineral

10115 Manning A venue

Legal Description: Plan 1268NY, Block 1, Lot 5, excepting thereout all mines and mineral

10117 Manning A venue

Legal Description: Plan 1268NY, Block 1, Lot 4, excepting thereout all mines and mineral

10119 Manning A venue

Legal Description: Plan 2274NY, Block 1, 3A, excepting thereout all mines and mineral

(collectively, "*Fort McMoney II*")

Skaha Lake

Legal Description: Lot A District Lot 2883S Similkameen Division Yale District Plan Kap83935 ("*Skaha*")

OK Falls

Parcel Identifier:	012-907-073	
Lot 7 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-081	
Lot 8 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-090	
Lot 9 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-111	
Lot 10 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-120	

Lot 11 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-138	
Lot 12 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-154	
Lot 13 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-162	
Lot 14 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-171	
Lot 15 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-189	
Lot 16 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
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Parcel Identifier:	012-907-197	
Lot 17 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-201	
Lot 18 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-219	
Lot 19 Block 9	District Lot 374	Similkameen Division Yale District Plan 4
—		
Parcel Identifier:	012-907-235	
Lot 20 Block 9	District Lot 374	Similkameen Division Yale District Plan 4

(collectively, "*OK Falls*")

(collectively, the "*Specified Lands*")

being the subject of the within proceeding, be offered for sale by private sale, free and clear of all encumbrances of the parties, save and except the reservations, provisos, exceptions and conditions expressed in the original grant thereof from the Crown.

27. Romspen Investment Corporation has exclusive conduct of the sale and may list the Specified Lands for sale, until further

order of the Court or until the Specified Lands or a sufficient portion thereof are sold so as to retire the DIP financing and the costs of selling the Specified Lands and may pay to any real estate agent(s) or firm(s) who arrange any sale of the Specified Lands or portion thereof real estate commissions in accordance with market real estate commission normally paid.

28. A sale of the whole or any portion of the Specified Lands is subject to the approval of this Court.

29. The Debtors, or any person or persons on behalf of the Debtors, including any person or persons in possession of the Specified Lands, do forthwith and until further order of the Court, permit any duly authorized agent on behalf of Romspen Investment Corporation to inspect, appraise, or show to any prospective purchaser or purchasers the Specified Lands or any portion thereof at any time and date commencing forthwith, and to post signs on the Specified Lands stating that the Specified Lands are offered for sale.

30. The Debtors and Ernst & Young Inc., upon request, will provide forthwith to counsel for Romspen Investment Corporation copies of any documents in their respective possession relating to the Specified Lands. The Debtors and Ernst & Young Inc. will be entitled to reimbursement of their reasonable copying costs.

31. Romspen Investment Corporation has liberty to apply for further Orders of Conduct of Sale in respect to the other Lands subject to these proceedings.

32. Romspen Investment Corporation has liberty to apply to The Supreme Court of British Columbia for:

(a) recognition of the Orders in these proceedings relating to the DIP Lender's Charge as well as this Order;

(b) the issuance and registration of Certificates of Pending Litigation on title to the Chemainus and Skaha properties;

(c) confirmation of the approval by this Court of any sale of the Chemainus and Skaha properties and the granting of vesting orders; and

(d) any other ancillary relief relating to the marketing and sale of the Chemainus and Skaha properties so as to give effect to this Order.

33. Romspen will:

(a) file a report with the Court, on or before April 12, 2010 and every 90 days thereafter, advising the Court of its progress in respect to the marketing and sale of any lands subject to an Order for Conduct of Sale; and

(b) furnish particulars of its marketing efforts to the parties upon request on an ongoing basis.

34. This Court hereby requests the aid and recognition of any Court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist Romspen Investment Corporation and its agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby respectfully

requested to make such orders and to provide such assistance to Romspen Investment Corporation and its agents as may be necessary or desirable to give effect to this Order or to assist in Romspen Investment Corporation and its agents carrying out the terms of this Order.

Payment of Echo

35. It is hereby declared that the amount of $1,832,715.35 is due and owing to Echo pursuant to the commitment letter dated October 7, 2009, as amended (the "*Commitment Letter*") inclusive of interest, fees and expenses (including legal fees) associated with the Commitment Letter up to January 13, 2010 (the "*Payout Amount*") and the Payout Amount continues to accrue interest at a per diem rate of $1,141.64.

36. Upon Romspen tendering the Payout Amount (and any applicable per diem amount) to Echo then Echo shall provide Romspen with signed copies of the Commitment Letter and all security (as defined thereunder) whereupon:

(a) Echo is released and discharged of any and all duties, covenants, agreements, representations, warranties, indemnities and obligations howsoever arising under the Commitment Letter and the transfer thereof to Romspen; and

(b) Romspen shall become the DIP Lender for all purposes hereunder.

37. Upon the filing of evidence of the payment(s) referred to in paragraph 35:

(a) the Orders in these proceedings, the commitment letter dated October 7, 2009 between Echo and the *CCAA* Applicants and the security Echo took in respect to the DIP loan (the "*Security*"), are deemed varied so as to substitute Romspen Investment Corporation as the DIP Lender in the place of Echo;

(b) the Security including the DIP Lender's Charge is deemed to have vested in Romspen Investment Corporation;

(c) Echo's interest in, and obligations under, the DIP loan, the commitment letter or the Security, are extinguished.

38. Any interested party may apply to this Court to vary or amend the provisions of this Order that relate to the powers and duties of the Receiver on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the Order sought or upon such other notice, if any, as this Court may order.

MADAM JUSTICE C.A. KENT

J.C.Q.B.A.

ENTERED this 2 day of March, 2010

..... Clerk of the Court

Schedule "A"

Shire International Real Estate Investments Ltd.

1. THE SOUTH EAST QUARTER OF SECTION THREE (3), IN TOWNSHIP TWENTY SIX (26), RANGE TWO (2), WEST OF THE FIFTH MERIDIAN, CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS

EXCEPTING:

PLAN	NUMBER	HECTARES	ACRES
—			
ROAD	7911162	1.03	2.54
—			
SUBDIVISION	9012020	15.7	38.7

EXCEPTING THEREOUT ALL MINES AND MINERALS AND THE RIGHT TO WORK THE SAME

2. PIN 42180-1007 — PCL 36864 SEC DKF; LT 166 PL M222; LT 164 PL M222; LT 169 PL M222; LT 170 PL M222; LT 171 PL M222 PT 20, 23R6802; DISTRICT OF KENORA

3. PIN 42180-1008 — PCL 36864 SEC DKF; LT 204 PL M222; DISTRICT OF KENORA

4. PIN 42180-1015 — PCL 26436 SEC DKF; 1STLY; LT 118-131 PL M222; LT 174-188 PL M222; LT 190-201 PL M222; LT 241-265 PL M222; 2NDLY: PT CENTRE ST PL M222; PT LANE PL M222; PT KENORA AV PL M222; PT SAND LAKE RD PL M222; PT WESTERN AV PL M222; PT NORTH ST PL M222 BEING PT 1, 2, 3, 6, 7, 8 23R6805 EXCEPT PT 1 & 2, 23R10132; AS TO LOT 188 AND THE LANDS HEREIN DESCRIBED AS "SECONDLY"-THE RIGHT TO OVERFLOW AND INJURIOUSLY AFFECT THE AFORESAID LANDS WITH WATERS FROM THE LAKE OF THE WOODS AND THE WINNIPEG RIVER UP TO ELEVATION 1045 FT, GEODETIC SURVEY OF CANADA DATUM 1923 ADJUSTMENT; S/T A ROW OVER THE RD AS NOW CONSTRUCTED TO A WIDTH OF 24 FT THROUGH LOTS 121 & 184, PLAN M222: DISTRICT OF KENORA

5. PIN 42180-1017 — PCL 41859 SEC DKF; PT LT 191 PL M222; PT LT 249 PL M222; PT LT 250 PL M222; PT CENTRE ST PL M222; PT SAND LAKE RD PT 1 & 2. 23R10132; DISTRICT OF KENORA

6. PIN 42180-1066 — PCL 37025 SEC DKF SRO; PT LOCATION CL4822 UNSURVEYED TERRITORY BEING; LAND BTN SLY LIMIT OF FRONT ST PL M222 & NLY LIMIT OF CANADIAN NATIONAL RAILWAY PL 144 UNSURVEYED TERRITORY; PT FRONT ST PL M222 PL M222 PT 2 & 3, 23R6806; DISTRICT OF KENORA

7. PIN 42180-1067 — PCL 37025 SEC DKF SRC); FT LOCATION CL4822 UNSURVEYED TERRITORY BEING; PT

LANE PL M222; PT LAKE AV PL M222; PT FRONT ST PL M222 PT 4, 23R6806; DISTRICT OF KENORA

8. PIN 42180-1068 — PCL 38557 SEC DKF SRO; PT LOCATION CL4822 UNSURVEYED TERRITORY BEING; PT KENORA AV PL M222 PT 1, 23R6806; DISTRICT OF KENORA

9. PIN 42180-1084 — PCL 26436 SEC DKF; LT 132-133 L M222; DISTRICT OF KENORA

10. PIN 42180-1085 — PCL 26436 SEC DKF; LT 172-173 PL M222: DISTRICT OF KENORA

11. PIN 42180-1086 — PCL 42682 SEC DKF; LT 209 PL M222; LT 210 PL M222; LT 211 PL M222; LT 230 PL M222; LT 231 M222; LT 232 PL M222; LT 232 PL M222; LT 233 PL M222; LT 234 PL M222 BEING PT 8, 23R6802; DISTRICT OF KENORA

12. PIN 42180-1087 — PCL 42682 SEC DKF; LT 159 PL M222; LT 160 PL M222; LT 161 PL M222; LT 162 PL M222 BEING PT 7, 23R6802, DISTRICT OF KENORA

13. PIN 42180-1088 — PCL 42682 SEC DKF; LT 152 PL M222; LT 151 PL M222 BEING PT 3, 23R6802, DISTRICT OF KENORA

14. PIN 42180-1089 — PCL 42682 SEC DKF; LT 212 PL M222; LT 213 PL M222; LT 214 PT M222; LT 215 PT M222 BEING PT 9, 10, 11, 23R6802, S/T 4, 5 & 6 23r3571 AS IN LT 127654; DISTRICT OF KENORA

15. PIN 42180-1090 — PCL 42682 SEC DKF; LT 155 PL M222; LT 156 PL M222; LT 157 M222; LT 158 PL M222 BEING PL M222 BEING PART 4, 5, & 6, 23R6802; S/T PT 7 & 8,23r3571 AS IN LT127654; DISTRICT OF KENORA

16. PIN 42180-1091 — PCL 42682 SEC DKF; T 147 PL M222; LT 148 PL M222; LT 149 PL M222; LT 150 PL M222 BEING PT 1 & 2, 23R6802; S/T PT 9, 23R3571 AS IN LT127654: DISTRICT OF KENORA

17. PIN 42180-1092 — PCL 42682 SEC DKF; LT 277 PL M222; LT 278 PL M222; LT 279 PL M222; LT 280 PL M222; LT 281 PL M222; DISTRICT OF KENORA

18. PIN 42180-1093 — PCL 42682 SEC DKF; LT 236-237 PL M222; DISTRICT OF KENORA

Shire Capital Ltd.

1. PARCEL IDENTIFIER: 012-907-073
   LOT 7 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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2. PARCEL IDENTIFIER: 012-907-081
LOT 8 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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3. PARCEL IDENTIFIER: 012-907-090
LOT 9 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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4. PARCEL IDENTIFIER: 012-907-111
LOT 10 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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5. PARCEL IDENTIFIER: 012-907-120
LOT 11 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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6. PARCEL IDENTIFIER: 012-907-138
LOT 12 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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7. PARCEL IDENTIFIER: 012-907-154
LOT 13 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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8. PARCEL IDENTIFIER: 012-907-162
LOT 14 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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9. PARCEL IDENTIFIER: 012-907-171
LOT 15 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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10. PARCEL IDENTIFIER: 012-907-189
LOT 16 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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11. PARCEL IDENTIFIER: 012-907-197
LOT 17 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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12. PARCEL IDENTIFIER: 012-907-201
LOT 18 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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13. PARCEL IDENTIFIER: 012-907-219
LOT 19 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

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14. PARCEL IDENTIFIER: 012-907-235
LOT 20 BLOCK 9 DISTRICT LOT 374 SIMILKAMEEN DIVISION YALE DISTRICT PLAN 4

Fort McMoney Properties Ltd.

1. MERIDIAN 4 RANGE 8 TOWNSHIP 88 SECTION 32

ALL THAT PORTION OF THE SOUTHEAST QUARTER LYING SOUTH AND EAST OF THE LEFT BANK OF THE CLEARWATER RIVER AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP DATED MAY 8, 1914; CONTAINING 63.1 HECTARES (156 ACRES) MORE OR LESS

EXCEPTING THEREOUT:

HECTARES (ACRES) MORE OR LESS

A) ALL THAT PORTION WHICH LIES SOUTH OF A LINE DRAWN PARALLEL WITH THE SOUTH BOUNDARY OF THE SAID SECTION THROUGH A POINT ON THE WEST BOUNDARY OF THE SOUTH WEST QUARTER OF SAID SECTION. 1000 FEET NORTHERLY FROM THE SOUTH WEST CORNER THEREOF AND WEST OF A LINE DRAWN PARALLEL WITH THE SAID WEST BOUNDARY THROUGH A POINT ON THE SAID SOUTH BOUNDARY 3367.6 FEET EASTERLY FROM THE SAID SOUTH WEST CORNER;

CONTAINING	6.76	16.70

—

B) PLAN 9221618 — ROAD	2.467	6.11

—

C) PLAN 9823452 — SUBDIVISION 25.01 61.80

EXCEPTING THEREOUT ALL MINES AND MINERALS

2. MERIDIAN 4 RANGE 8 TOWNSHIP 88 SECTION 32

ALL THAT PORTION OF THE NORTHEAST QUARTER LYING SOUTH AND EAST OF THE LEFT BANK OF THE CLEARWATER RIVER AS SHOWN ON A PLAN OF SURVEY OK THE SAID TOWNSHIP DATED MAY 8, 1914, CONTAINING 12.5 HECTARES (31 ACRES) MORE OR LESS

EXCEPTING THEREOUT ALL MINES AND MINERALS

Fort McMoney Properties II Ltd.

1. PLAN 2274NY

BLOCK 1

LOT 3A

EXCEPTING THEREOUT ALL MINES AND MINERALS

2. PLAN 1268NY

BLOCK 1

LOT 4

EXCEPTING THEREOUT ALL MINES AND MINERALS

3. PLAN 1268NY

BLOCK 1

LOT 5

EXCEPTING THEREOUT ALL MINES AND MINERALS

4. PLAN 1268NY

BLOCK 1

LOT 6

EXCEPTING THEREOUT ALL MINES AND MINERALS

5. PLAN 1268NY

BLOCK 1

LOT 7

EXCEPTING THEREOUT ALL MINES AND MINERALS

6. PLAN 1268NY

BLOCK 1

LOT 8

EXCEPTING THEREOUT ALL MINES AND MINERALS

Chemainus Properties Ltd.

1. PARCEL IDENTIFIER: 001-387-677

LOT A SECTION 18 RANGE 5, CHEMAINUS DISTRICT PLAN 29495

Skaha Lake Development Ltd.

1. PARCEL IDENTIFIER: 027-083-756

LOT A DISTRICT LOT 2883S SIMILKAMEEN DIVISION YALE DISTRICT PLAN KAP83935

Bosun's Holdings Ltd.

1. PARCEL IDENTIFIER: 009-231-901

LOT A, DISTRICT LOT 12 AND SECTION 15, RANGE 3 EAST, NORTH SAANICH DISTRICT. PLAN 45998

0726028 B.C. Ltd.

1. PARCEL IDENTIFIER: 008-545-944

LOT 1 SECTION 16 TOWNSHIP 22 RANGE 11 WEST OF THE 6TH MERIDIAN KAMLOOPS DIVISION YALE DISTRICT PLAN 16715

2. PARCEL IDENTIFIER: 003-654-770

LOT 6 SECTION 16 TOWNSHIP 22 RANGE 11 WEST OF THE 6TH MERIDIAN KAMLOOPS DIVISION YALE DISTRICT PLAN 31558

Orillia Investments Ltd.

1. PIN 58684-0205, LT 62 N/S CREIGHTON ST, 63 N/S CREIGHTON ST, 64 N/S CREIGHTON ST, 65 N/S CREIGHTON ST, 66 N/S CREIGHTON ST, 67 N/S CREIGHTON ST, 68 S/S CREIGHTON ST, 1 S/S VICTORIA ST, 2 S/S VICTORIA ST, 3 S/S VICTORIA ST, 4 S/S VICTORIA ST PL 292 ORILLIA, EXCEPT 51RD20, & 51RD18; PLAN BA2593 REG'D 2003 05 21 AS SC116046 CONFIRMS THE LIMITS OF THIS PIN; S/T INTEREST IN R01053087, R01053088, R01053089, R01053090, R01053091, R01053092. R01053093 & R01053094; S/T R0246368; ORILLIA

END OF DOCUMENT

TAB 9

No. S077839
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

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

AND IN THE MATTER OF THE RECEIVERSHIP OF POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

ORDER

BEFORE THE HONOURABLE THE CHIEF JUSTICE	)))	WEDNESDAY, THE 13TH DAY OF AUGUST 2008

THE MOTION of PricewaterhouseCoopers Inc. (the "Receiver") dated August 11, 2008 coming on for hearing at Vancouver, British Columbia on this day, AND ON HEARING John Grieve and Kibben Jackson, counsel for the Receiver, and those counsel listed in Schedule "B", AND UPON READING the material filed, including the Receiver's Fifth Report to the Court dated August 11, 2008 (the "Fifth Report").

THIS COURT ORDERS THAT:

Extension of Date for Filing and Service by the Province

1. Notwithstanding the provisions of the May 29, 2008 Order of this Court, the Monitor may, in its sole discretion, extend the date by which Her Majesty the Queen in Right of the Province of British Columbia (the "Province") must file in this proceeding and serve on the Monitor a notice of motion and supporting affidavit(s) seeking a determination as to the amount of the Province's post-filing claim, if any.

Subrogation Rights of Receiver

2. If the Receiver makes a payment to any person on account of any indebtedness of any of the Petitioners to such person, and such indebtedness would otherwise have constituted a Post-Filing Claim (as defined in the May 29, 2008 Order of this Court), the Receiver shall, without the need for any filing or other steps, be subrogated to the rights of such person such, and only to the extent, that the Receiver shall have a Post-Filing Claim payable from the carve-out in favour of the Post-Filing Creditors created under the DIP Loan Agreement (as those terms are

defined in the May 29, 2008 Order of this Court) to the extent and in the amount of such payment.

Amendment of July 7, 2008 Order

3. Paragraph 2(d) of Schedule "D" to the July 7, 2008 Order of this Court is hereby amended by replacing "FB122525" with "FB122526".

4. Endorsement of this Order by counsel appearing on this application, except counsel for PricewaterhouseCoopers Inc., is hereby dispensed with.

BY THE COURT

~~DISTRICT~~ REGISTRAR

APPROVED AS TO FORM:

Counsel for PricewaterhouseCoopers Inc.

SCHEDULE "A"

ADDITIONAL PETITIONERS

Pope & Talbot, Inc.

MacKenzie Pulp Landing Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

SCHEDULE "B"

LIST OF COUNSEL

Name		Party
Peter Rubin		Ableco Finance LLC
Benjamin La Borie		Canexus Chemicals
Aaron Welch and Elizabeth Rowbotham		Province of British Columbia
Shelby O'Brien		Nanaimo Forest Products Ltd.
Stephanie Drake		PPWC, Local 8
E. Jane Milton, Q.C.		Western Forest Products Inc.

TAB 10

In re POINT BLANK SOLUTIONS, INC., et al., [1] Debtors.

1 The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number and address, are: Point Blank Solutions, Inc. (9361), 2102 S.W. 2nd Street, Pompano Beach, FL 33069; Point Blank Body Armor, Inc. (4044), 2102 S.W. 2nd Street, Pompano Beach, FL 33069; Protective Apparel Corporation of America (9051), 179 Mine Lane, Jacksboro, TN 37757; and PBSS, LLC (8203), 2102 S.W. 2nd Street, Pompano Beach, FL 33069.

Chapter 11, Case No. 10-11255 (PJW), Jointly Administered

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

2010 Bankr. LEXIS 5846

May 12, 2010, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Debtors in possession (DIP) filed a motion for a final order authorizing them to obtain credit under a DIP Credit Agreement from a DIP Lender to be secured by first priority liens on property of the DIPs' estates pursuant to 11 U.S.C.S. § 364(c)(2), (c)(3), and (d), and with priority, as to administrative expenses, as provided in § 364(c)(1), and authorizing the use of cash collateral.

OVERVIEW: The loan proceeds were to be used in accordance with a Budget solely for working capital and general corporate purposes, payment of costs of administration of the bankruptcy cases, to the extent set forth in the Budget, and for payment in full of certain prepetition debt. A guarantor of prepetition debt held a security interest in the cash collateral. The guarantor was granted replacement liens and an 11 U.S.C.S. § 507(b) claim to the extent of any diminution in the value of its interest in the cash collateral as adequate protection for the granting of the liens to the DIP Lender, the subordination of the guarantor's liens to a carve out, the DIPs' use, sale, or lease of the guarantor's cash collateral, and the imposition of the automatic stay. No credit was available to the DIPs on more favorable terms under 11 U.S.C.S. §§ 503(b), 507(b).

OUTCOME: The motion was granted.

CORE TERMS: pre-petition, lender, final order, financing, collateral, post-petition, guaranties, interim order, avoidance, successor, security interests, collectively, notice, replacement, default, budget, senior, termination, reimbursement, enforceable, superpriority, modification, binding, perfected, appointed, modified, automatic stay, financing statements, full payment, administrative expenses

COUNSEL: [*1] For Point Blank Solutions, Inc., et al., aka DHB Industries, Inc., Debtor: Alan J. Kornfeld, Pachulski Stang Ziehl & Jones LLP, Los Angeles, CA; Curtis A. Hehn, Pachulski Stang Ziehl Young Jones & Wein, Wilmington, DE; Curtis A. Hehn, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE; David Bertenthal, Maxim B. Litvak, Pachulski Stang Ziehl & Jones LLP, San Francisco, CA; Gillian N. Brown, Pachulski Stang Ziehl & Jones, LP, Los Angeles, CA; James E. O'Neill, Laura Davis Jones, Laura Davis Jones, Peter J. Keane, Timothy P. Cairns, Timothy P. Cairns, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE; Karen B. Dine, Richard L. Epling, Pillsbury Winthrop Shaw Pittman LLP, New York, NY.

JUDGES: Honorable Peter J. Walsh, United States Bankruptcy Judge.

OPINION BY: Peter J. Walsh

OPINION

Re: #23

FINAL ORDER PURSUANT TO 11 U.S.C. SECTIONS 105, 361, 362, 363 AND 364, RULES 2002, 4001 AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND LOCAL BANKRUPTCY RULES 2002-1 AND 4001-2: (1) AUTHORIZING INCURRENCE BY THE DEBTORS OF POST-PETITION SECURED INDEBTEDNESS WITH PRIORITY OVER ALL OVER SECURED INDEBTEDNESS AND WITH ADMINISTRATIVE SUPERPRIORITY, (2) GRANTING LIENS, (3) AUTHORIZING USE OF CASH COLLATERAL AND PROVIDING ADEQUATE [*2] PROTECTION, AND (4) MODIFYING THE AUTOMATIC STAY

THIS MATTER having come before this Court upon the motion dated April 14, 2010 (the **"DIP Motion"**) filed by Point Blank Solutions, Inc., Protective Apparel Corporation of America, Point Blank Body Armor, Inc., and PBSS, LLC (each, a **"Debtor"** and collectively, the **"Debtors"**), as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the **"Cases"**) seeking, among other things, the entry of a final order (this **"Final Order"**) authorizing the Debtors to:

(i)(a) Obtain credit under that financing arrangement (the **"DIP Facility"**) in the aggregate committed amount of up to $20,000,000 pursuant to (I) that certain *Debtor-In-Possession Financing Agreement* dated April 12, 2010 (the **"DIP Credit Agreement"**), substantially in the form filed of record in the Cases, by and among Protective Apparel Corporation of America (**"PACA"**), Point Blank Body Armor, Inc. (**"Point Blank"**), PBSS, LLC (**"PBSS"**) and Point Blank Solutions, Inc. (**"Parent"** and together with PACA, Point Blank, and PBSS, collectively, the **"Borrowers"**), and Steel Partners II, L.P., a Delaware limited partnership (the **"DIP Lender"**) and the administrative agent named [*3] therein (the **"Administrative Agent"**), and (II) all other agreements, documents, notes, certificates, and instruments executed and/or delivered with, to, or in favor of the DIP Lender, its affiliates and the Administrative Agent, including, without limitation, security agree-

ments, pledge agreements, guaranties, notes, and Uniform Commercial Code ("UCC") financing statements (collectively, as may be amended, modified or supplemented and in effect from time to time, the **"DIP Financing Agreements"**) [2]; and (b) incur the "Obligations" under and as defined in the DIP Credit Agreement (collectively, the **"DIP Obligations"**);

2 Capitalized terms used in this Final Order but not defined herein shall have the meanings ascribed to such terms in the DIP Financing Agreements.

(ii) Obtain and incur debt, pursuant to Sections 364(c) and 364(d) of the Bankruptcy Code, on terms and conditions described in the DIP Financing Agreements and this Final Order, secured by first priority, valid, priming, perfected and enforceable liens (as defined in Section 101(37) of chapter 11 of title 11 of the United States Code, as amended (the **"Bankruptcy Code"**)) on property of the Debtors' estates pursuant to Sections 364(c)(2), **[*4]** 364(c)(3) and 364(d) of the Bankruptcy Code, and with priority, as to administrative expenses, as provided in Section 364(c)(1) of the Bankruptcy Code, subject to the terms and conditions contained herein;

(iii) Use the proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Financing Agreements) in each case in a manner consistent with the terms and conditions of the DIP Financing Agreements, and in accordance with the Budget (as defined below) solely for (a) working capital and general corporate purposes, (b) payment of costs of administration of the Cases, to the extent set forth in the Budget, and (c) pursuant to the Interim Order, payment in full of the Pre-Petition Debt (as defined below);

(iv) Grant, pursuant to Sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, the DIP Lender first-priority priming, valid, perfected and enforceable liens, subject only to the Carve Out (as defined below) and the Permitted Prior Liens (as defined below), upon all of the Debtors' real and personal property as provided in and as contemplated by this Final Order and the DIP Financing Agreements;

(v) Grant, pursuant to Section 364(c)(1) of the Bankruptcy Code, **[*5]** the DIP Lender superpriority administrative claim status in respect of all DIP Obligations, subject to the Carve Out as provided herein;

(vi) Authorize the use of "cash collateral" as such term is defined in Section 363 of the Bankruptcy Code (the **"Cash Collateral"**) in which DuPont (as defined below) has an interest;

(vii) Grant DuPont (a) the DuPont Protections with respect to the Reimbursement Obligations (each as defined below), and (b) the DuPont Replacement Liens and the DuPont 507(b) Claim (each as defined below) to the extent of any diminution in the value of DuPont's interest in the Pre-Petition DuPont Collateral (as defined below), as adequate protection for the granting of the DIP Liens (as defined below) to the DIP Lender, the subordination to the Carve Out, the use of Cash Collateral, and the imposition of the automatic stay;

(viii) Request this Court to vacate and modify the automatic stay imposed by Section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Financing Agreements and this Final Order; and

(ix) Request this Court to waive any applicable stay (including under Federal Rule of Bankruptcy Procedure 6004(h)) **[*6]** and provide for the immediate effectiveness of this Final Order.

The Court having held an emergency interim hearing on April 16, 2010 (the **"Interim Hearing"**) to consider entry of an interim order and, after considering the Motion and the arguments and evidence presented at the Interim Hearing, the Court having entered its interim order on April 16, 2010 (Docket No. 48, the **"Interim Order"**).

The Court having found that, under the circumstances, due and sufficient notice of the Motion and the final hearing thereon (the **"Final Hearing,"** and together with the Interim Hearing, the **"Hearings"**) was provided by the Debtors in accordance with the Bankruptcy Rules, the Local Rules and the Interim Order; and having held the Final Hearing on May 12, 2010; and after considering the DIP Motion, the Declaration of Scott Avila in Support of First Day Motions, the exhibits attached thereto, the DIP Financing Agreements, the evidence submitted at the Final Hearing and the full record of all prior proceedings in these cases; and it appearing that approval of the relief requested in the DIP Motion is fair and reasonable and in the best interests of the Debtors, their creditors, their estates and their equity **[*7]** holders, and is essential for the continued operation of the Debtors' business; and all objections, if any, to the entry of this Final Order having been withdrawn, resolved or overruled by this Court; and after due deliberation and consideration, and for good and sufficient cause appearing:

BASED UPON THE RECORD ESTABLISHED AT THE FINAL HEARING, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. **Petition Date**. On April 14, 2010 (the **"Petition Date"**), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware. The Debtors have continued in the management and operation of their business and property as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Cases.

B. **Jurisdiction and Venue**. This Court has jurisdiction over these proceedings, pursuant to 28 U.S.C. §§ 157(b) and 1334, and over the persons and property affected hereby. Consideration of the DIP Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue for the Cases and proceedings on the DIP Motion is proper in this district **[*8]** pursuant to 28 U.S.C. §§ 1408 and 1409.

C. **Committee Formation**. A statutory committee of unsecured creditors ("the **"Creditors' Committee"**) was appointed on April 26, 2010.

D. **Notice**. The Final Hearing is being held pursuant to the authorization of Rule 4001 of the Federal Rules of Bankruptcy Procedure (the **"Bankruptcy Rules"**) and Local Rule 4001-2. Notice of the Final Hearing has been provided by the Debtors, whether by telecopy, email, overnight courier or hand delivery on April 19, 2010, to certain parties in interest, including: (i) the Office of the United States Trustee, (ii) the Debtors' thirty-five (35) largest unsecured creditors on a consolidated basis, (iii) counsel to the Pre-Petition Agent (as defined below), (iv) the Pre-Petition Agent, (v) counsel to the DIP Lender, (vi) counsel to DuPont and (vii) all secured creditors of record. Under the circumstances, such notice of the Final Hearing and the relief requested in the DIP Motion is due and sufficient notice and complies with Sections 102(1), 364(c) and 364(d) of the Bankruptcy Code, Bankruptcy Rules 2002, 4001(c), 4001(d) and the local rules of the Court.

E. **Debtors' Acknowledgements and Agreements**. Without prejudice to [*9] the rights of parties in interest to the extent set forth in Paragraph 7 below, the Debtors admit, stipulate, acknowledge and agree (collectively, Paragraphs E (i) through E (vi) hereof shall be referred to herein as the **"Debtors' Stipulations"**) as follows:

(i) Pre-Petition Financing Agreements. Prior to the commencement of the Cases, the Debtors (other than PBSS) were party to that certain Amended and Restated Loan and Security Agreement, dated as of April 3, 2007 (as amended, restated, supplemented or otherwise modified from time to time, the **"Pre-Petition Loan Agreement"**), by and among the Borrowers, Bank of America, N.A., as successor by merger to LaSalle Business Credit, LLC, as administrative agent and collateral agent (in such capacities, the **"Pre-Petition Agent"**), and the lenders party thereto (the **"Pre-Petition Lenders"**, collectively with the Pre-Petition Agent, the **"Pre-Petition Secured Parties"**) (the Pre-Petition Loan Agreement and all other agreements, documents, security agreements, guaranties, and instruments executed and/or delivered with, to, or in favor of any or all of the Pre-Petition Secured Parties, including, without limitation, notes, UCC financing statements [*10] and all other related agreements, documents, notes, certificates, and instruments executed and/or delivered in connection therewith or related thereto, as may be amended, modified or supplemented and in effect from time to time, collectively, the **"Pre-Petition Financing Agreements"**).

(ii) Pre-Petition Debt. As of the Petition Date, the Debtors were indebted to the Pre-Petition Secured Parties under the Pre-Petition Financing Agreements in the principal amount of $10,000,000, plus letters of credit in the stated amount of $525,654 (the **"Pre-Petition Letters of Credit"**), plus interest accrued and accruing at the default rate (including post-petition interest), plus costs, expenses, fees and other amounts (including post-petition fees, costs and other amounts) of whatever nature arising under the Pre-Petition Financing Agreements, including attorneys' fees and legal expenses (all "Liabilities" under the Pre-Petition Financing Agreements, including those described in this subsection (ii), collectively, the **"Pre-Petition Debt"**). The Pre-Petition Letters of Credit have been cash-collateralized in an amount equal to 105% of the face amount thereof (the **"Pre-Petition L/C Cash Collateral"**), [*11] which Pre-Petition L/C Cash Collateral is maintained in the Pre-Petition Indemnity Account (as defined below).

(iii) Pre-Petition First Lien Collateral. The Pre-Petition Debt is secured by security interests and liens granted to, and for the benefit of, the Pre-Petition Secured Parties (the **"Pre-Petition First Liens"**) on substantially all of the personal property of the Debtors (other than PBSS) as further described in the Pre-Petition Financing Agreements, including, without limitation, accounts, inventory, general intangibles, equipment, goods, deposit accounts, investment property, and the proceeds and products, whether tangible or intangible, of any of the foregoing (collectively, the **"Pre-Petition First Lien Collateral"**). As of the Petition Date, (a) the Pre-Petition First Liens (I) are valid, binding, enforceable and properly perfected, (II) were granted to, and for the benefit of, the Pre-Petition Secured Parties for fair consideration and reasonably equivalent value, and were granted contemporaneously with the making of the loans and other financial accommodations secured thereby, (III) are not subject to avoidance, recharacterization, subordination or other challenge of any [*12] kind pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and (IV) are first priority security interests and liens on the Pre-Petition First Lien Collateral with priority over all other liens, security interests and other encumbrances except any valid, enforceable, properly perfected and non-avoidable liens permitted under the Pre-Petition Financing Agreements to be senior or pari passu with the Pre-Petition First Liens (such permitted senior liens are referred to herein as the **"Permitted Prior Liens"**); and (b) (I) the Pre-Petition Debt constitutes the legal, valid, binding obligations of the Debtors (other than PBSS), enforceable in accordance with the terms of the applicable Pre-Petition Financing Agreements (other than in respect of the stay of enforcement arising under section 362 of the Bankruptcy Code), (II) no setoffs, recoupments, offsets, defenses or counterclaims to any of the Pre-Petition Debt exist, and (III) no portion of the Pre-Petition Debt or any payments made to or for the benefit of any or all of the Pre-Petition Secured Parties (including, without limitation, the Pre-Petition Debt Payoff Amount (as defined below) made in accordance with the terms of [*13] the Interim Order) is subject to avoidance, recharacterization, recovery, subordination, offset, counterclaim, defense or other "claim" (as defined in the Bankruptcy Code) of any kind pursuant to the Bankruptcy Code or applicable non-bankruptcy law. To avoid any doubt, the term "Permitted Prior Liens" does not include, and specifically excludes, the Pre-Petition DuPont Liens (as defined below), which pre-petition liens are to be subordinated to, and junior to, the liens and claims of the DIP Lender. The Pre-Petition First Liens encumber, and the Pre-Petition First Lien Collateral includes, one or more deposit accounts under the control of the Pre-Petition Agent (such account(s), the **"Pre-Petition Indemnity Account"**) and the funds deposited therein. As of the Petition Date, the Pre-Petition Indemnity Account had a balance of $1,125,154.24.

(iv) Release of Claims Against Pre-Petition Secured Parties. Effective upon entry of the Interim Order, each Debtor and its estate shall be deemed to have waived, discharged and released the Pre-Petition Secured Parties, together with their respective affiliates, agents, attorneys, financial advisors, consultants, officers, directors and employees [*14] (all of the foregoing, the **"Pre-Petition Secured Party Releasees"**), of any and all "claims" (as defined in the Bankruptcy Code), counterclaims, causes of action, defenses, setoff, recoupment or other offset rights against any and all of the Pre-Petition Secured Party Releasees, whether arising at law or in equity, including, without limitation, (a) any recharacterization, subordination, avoidance or other claim arising under or pursuant to section 105 or chapter 5 of the Bankruptcy Code or under any other similar provisions of applicable state or federal law, and (b) any right or basis to challenge or object to any of the amount, validity or enforceability of the Pre-Petition Debt, or the validity, enforceability, priority or non-avoidability of the Pre-Petition First Liens, *provided that*, the foregoing waiver and release shall not extend to the Debtors' and the Prepetition Secured Parties' respective rights and obligations relating to the Pre-Petition Indemnity Account and the Pre-Petition L/C Cash Collateral.

(v) Priming of DIP Liens. In entering into the DIP Financing Agreements, and as consideration therefor, the Debtors hereby agree that until such time as (A) all DIP Obligations [*15] have been irrevocably paid in full in cash, (B) all commitments to lend have terminated, (collectively, (A) and (B) constitute the **"Full Payment of Senior Obligations"**), the Debtors shall not in any way prime or seek to prime the security interests and DIP Liens provided to the DIP Lender under the Interim Order and this Final Or-

der, by offering a subsequent lender or a party in interest a superior or pari passu lien or claim pursuant to Section 364(d) of the Bankruptcy Code or otherwise.

(vi) Arm's Length Commercial Transaction. (i) James Henderson, who is the president, chief executive officer and chairman of the board of directors of Parent, is affiliated with the DIP Lender, as was SP Corporate Services LLC, which was party to a Management Services Agreement with the Parent dated September 1, 2009, and which was terminated pre-petition; (ii) the DIP Financing Agreements have been negotiated by the Debtors with independent legal counsel and with the assistance of CRG Partners Group, LLC, and not as a result of any involvement by said James Henderson (or any other member (if any) of the board of directors of Parent who is affiliated with the DIP Lender) or SP Corporate Services, LLC; **[*16]** (iii) the DIP Financing Agreements evidence an arm's-length commercial transaction between the Debtors, on the one hand, and the DIP Lender, on the other hand, and the Debtors are capable of evaluating and understanding, and do understand and accept, the terms, risks and conditions of the transactions contemplated thereby; (iv) in connection with the transactions contemplated by the DIP Financing Agreements and the process leading to such transactions, the DIP Lender is and has been acting solely as a principal, and is not acting as an agent or fiduciary for the Debtors, stockholders, creditors or employees or any other party; and (v) the DIP Lender has not assumed and will not assume an advisory, agency or fiduciary responsibility to the Debtors with respect to any of the transactions contemplated hereby or the process leading thereto. Pursuant to the Interim Order, the Debtors have waived and released, to the fullest extent permitted by law, any claims that the Debtors may have against the DIP Lender (in such capacity) with respect to any breach or alleged breach of agency or fiduciary duty or as a result of the relationship between the parties with, or acts or omissions of, said **[*17]** James Henderson (or any other member (if any) of the board of directors of Parent who is affiliated with the DIP Lender) and/or SP Corporate Services LLC.

F. Description of Pre-Petition DuPont Financing Documents.

(i) Pre-Petition DuPont Guaranty. Pursuant to that certain Amended and Restated Corporate Guarantee dated October 29, 2009, executed and delivered by E. I. du Pont de Nemours and Company (**"DuPont"**) in favor of the Pre-Petition Agent (for the benefit of the Pre-Petition Secured Parties), DuPont guaranteed up to $10,000,000 of the principal amount of the Pre-Petition Debt constituting the Term Loan under (and as defined in) the Pre-Petition Loan Agreement, plus reasonable collection and enforcement costs (including reasonable attorney fees) plus accrued interest thereon at the rate permitted to be charged under the Pre-Petition Loan Agreement (as may be amended, modified or supplemented and in effect from time to time, the **"Pre-Petition DuPont Guaranty"**).

(ii) Pre-Petition DuPont Agreements. Prior to the commencement of the Cases, as consideration for DuPont's providing the Pre-Petition DuPont Guaranty, the Debtors (other than PBSS) were party to that certain Subordinated Note **[*18]** dated October 29, 2009, in favor of DuPont, in an amount equal to the lesser of (a) $10,000,000 (plus reasonable collection and enforcement costs (including reasonable attorney fees) plus accrued interest thereon at the rate permitted to be charged under the Pre-Petition Loan Agreement) and (b) such amount as may be advanced by DuPont pursuant to the terms of the Pre-Petition DuPont Guaranty (together with all other agreements, documents, security agreements, guaranties, and instruments executed and/or delivered with, to, or in favor of DuPont, including, without limitation, notes, and UCC financing statements and all other related agreements, documents, notes, certificates, and instruments executed and/or delivered in connection therewith or related thereto, as may be amended, modified or supplemented and in effect from time to time, collectively, the **"Pre-Petition DuPont Agreements"**).

(iii) Pre-Petition DuPont Collateral. To secure the indebtedness under the Pre-Petition DuPont Agreements (the **"Pre-Petition DuPont Debt"**), the Debtors (other than PBSS) granted security interests and liens (the **"Pre-Petition DuPont Liens"**) to DuPont upon substantially all of their personal property, **[*19]** including, without limitation, accounts, inventory, general intangibles, equipment, goods, deposit accounts, investment property, and the proceeds and products, whether tangible or intangible, of any of the foregoing, (collectively, the **"Pre-Petition DuPont Collateral"**), with priority over all other liens other than the Pre-Petition First Liens and any Permitted Prior Liens.

G. Findings Regarding the Post-Petition Financing.

(i) **Need for Post-Petition Financing and Use of Cash Collateral**. A critical need exists for the Debtors to obtain funds from the DIP Facility and have the use of Cash Collateral in order to continue operations and to administer and preserve the value of their estates. The ability of the Debtors to finance their operations, to preserve and maintain the value of the Debtors' assets and maximize a return for all creditors requires the availability of working capital from the DIP Facility and permission to use Cash Collateral, the absence of which would harm the Debtors, their estates, their creditors and their equity holders and the possibility for a successful reorganization or sale of the Debtors' assets as a going concern or otherwise.

(ii) **No Credit Available on [*20] More Favorable Terms**. The Debtors have been unable to obtain (A) unsecured credit allowable under Bankruptcy Code Section 503(b)(1) as an administrative expense, (B) credit for money borrowed with priority over any or all administrative expenses of the kind specified in Bankruptcy Code Sections 503(b) or 507(b), (C) credit for money borrowed secured solely by a lien on property of the estate that is not otherwise subject to a lien, or (D) credit for money borrowed secured by a junior lien on property of the estate which is subject to a lien, in each case, on more favorable terms and conditions than those provided in the DIP Credit Agreement and this Final Order. The Debtors are unable to obtain credit for borrowed money without granting to the DIP Lender the DIP Protections (as defined below).

(iii) **Pre-Petition First Liens**. To the extent set forth in Paragraph 7 of this Final Order, nothing herein shall prejudice the rights of any Creditors' Committee, or any other party in interest with requisite standing, to challenge the validity, priority, perfection or extent of the Pre-Petition Debt or the Pre-Petition First Liens in accordance with this Final Order.

(iv) **Permitted Prior Liens**. **[*21]** Nothing herein shall constitute a finding or ruling by this Court that any Permitted Prior Lien is valid, senior, perfected or unavoidable. Moreover, nothing shall prejudice the rights of any party in interest, including but not limited to the Debtors, the DIP Lender, the Pre-Petition Secured Parties, DuPont, or any Creditors' Committee, to challenge the validity, priority, perfection or extent of any such Permitted Prior Lien.

H. **Section 506(c) Waiver**. As a further condition of the DIP Facility and any obligation of the DIP Lender to make credit extensions pursuant to the DIP Financing Agreements, upon entry of this Final Order, the Debtors (and any successors thereto or any representatives thereof, including any trustees appointed in these Cases or any Successor Cases (as defined below)), shall be deemed to have waived any rights or benefits of Section 506(c) of the Bankruptcy Code in connection with the DIP Collateral (as defined below).

I. **Use of Proceeds of the DIP Facility**. Proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Financing Agreements) shall be used, in each case in a manner consistent with the terms and conditions of the **[*22]** DIP Credit Agreement, and in accordance with the Budget, solely for (i) working capital and general corporate purposes and (ii) payment of costs of administration of the Cases, to the extent set forth in the Budget. Pursuant to the Interim Order, the initial proceeds of the DIP Facility were used for payment in full of the Pre-Petition Debt.

J. **Section 552**. In light of DIP Lender's agreement to subordinate the DIP Liens and DIP Superpriority Claim to the Carve Out, the DIP Lender is entitled to all of the rights and benefits of Section 552(b) of the Bankruptcy Code and the "equities of the case" exception shall not apply.

K. **Adequate Protection for DuPont**. Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code, DuPont is entitled to receive adequate protection for any decrease in the value of its interest in the Pre-Petition DuPont Collateral (including Cash Collateral) on account of the grant of the DIP Liens, the subordination of the Pre-Petition DuPont Liens to the Carve Out, the Debtor's use, sale or lease of the Pre-Petition DuPont Collateral (including Cash Collateral) during this Case, and the imposition of the automatic stay (in each case, a **"Diminution in Value"**). **[*23]** As adequate protection for any Diminution in Value, DuPont will receive: (1) the DuPont Replacement Liens and (2) the DuPont 507(b) Claim.

L. **Extension of Financing**. The DIP Lender has indicated a willingness to provide financing to the Debtors in accordance with the DIP Financing Agreements and subject to (i) the entry of the Interim Order and this Final Order, and (ii) findings by the Court that such financing is essential to the Debtors' estate, that the DIP Lender is extending the financing in good faith, and that the DIP Lender's claims, superpriority claim, security interests and liens and other protections granted pursuant to the Interim Order and this Final Order will not be affected by any subsequent reversal, modification, vacatur or amendment of the Interim Order or this Final Order or any other order, as provided in Section 364(e) of the Bankruptcy Code.

M. **Business Judgment and Good Faith Pursuant to Section 364(e)**. The terms and conditions of the DIP Financing Agreements and this Final Order, and the fees paid and to be paid thereunder, are fair, reasonable, and the best available under the circumstances, have been fully disclosed, reflect the Debtors' exercise of prudent **[*24]** business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and consideration. Moreover, the (i) DIP Financing Agreements and this Final Order were negotiated in good faith and at arms' length between the Debtors, the DIP Lender and DuPont, and (ii) use of the proceeds to be extended under the DIP Facility will be so extended in good faith, and for valid business purposes and uses, as a consequence of which the DIP Lender and DuPont are entitled to the protection and benefits of Section 364(e) of the Bankruptcy Code.

N. **Relief Essential; Best Interest**. The relief requested in the DIP Motion is necessary, essential, and appropriate for the continued operation of the Debtors' business and the management and preservation of the Debtors' assets and personal property. It is in the best interest of Debtors' estates to be allowed to obtain credit under the DIP Facility.

NOW, THEREFORE, on the DIP Motion of the Debtors and the record before this Court with respect to the DIP Motion, and with the consent of the Debtors, the Pre-Petition Secured Parties, DuPont and the DIP Lender to the form and entry of this Final Order, and good and sufficient cause **[*25]** appearing therefor,

IT IS ORDERED that:

1. **Motion Granted**. The DIP Motion is granted on a final basis in accordance with the terms and conditions set forth in this Final Order and the DIP Credit Agreement.

2. DIP Financing Agreements.

(a) **Approval of DIP Financing Agreements**. Pursuant to the Interim Order, the Borrowers were authorized to incur the DIP Obligations in accordance with, and subject to, the terms of the Interim Order and the DIP Financing Agreements and to execute and deliver all instruments, certificates, agreements and documents which were required or necessary for the performance by the Debtors under the DIP Facility and the creation and perfection of the DIP Liens described in and provided for by the Interim Order and the DIP Financing Agreements. Pursuant to this Final Order, the DIP Financing Agreements are approved on a final basis and the Debtors are hereby authorized to borrow the balance of the financing available under the DIP Facility and perform all acts, pay the principal, interest, fees, costs, expenses and other amounts due to the DIP Lender, any affiliate of the DIP Lender and the Administrative Agent set forth in the DIP Financing Agreements and this Final **[*26]** Order, as applicable, as such become due, including, without limitation, closing fees, administrative fees, commitment fees, termination fees, and attorneys', financial advisors' and accountants'

fees and disbursements as provided for in the DIP Financing Agreements and this Final Order, which amounts shall not otherwise be subject to approval of this Court, provided that, the DIP Lender shall provide the invoices for fees and expenses incurred for professionals retained by the DIP Lender (redacted for privileged or confidential information) to the U.S. Trustee and counsel to the Creditors' Committee; provided further, that the Court shall have jurisdiction to determine any dispute concerning such invoices. Under no circumstances shall professionals for the DIP Lender be required to comply with the U.S. Trustee fee guidelines.

(b) **Authorization to Borrow**. The Debtors are hereby authorized under the DIP Facility to borrow up to a total committed amount of $20,000,000.

(c) **Application of DIP Proceeds**. The proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Credit Agreement) shall be used, in each case in a manner consistent with the terms **[*27]** and conditions of the DIP Financing Agreements and in accordance with the Budget, solely for items contained in the Budget for (i) working capital and general corporate purposes and (ii) payment of costs of administration of the Cases. Pursuant to the Interim Order, the first advance under the DIP Facility was used to repay in full the Pre-Petition Debt as set forth in the payoff letter from the Pre-Petition Agent to the Debtors (the **"Pre-Petition Debt Payoff Amount"**); provided, however, the Pre-Petition Debt Payoff Amount was net of the amounts deposited in the Pre-Petition Indemnity Account in excess of the Pre-Petition L/C Cash Collateral and $250,000 (such $250,000 is referred to herein as the **"Post-Petition Expense Reserve Amount"**), which excess funds deposited in the Pre-Petition Indemnity Account other than the Pre-Petition L/C Cash Collateral and Post-Petition Expense Reserve Amount were applied to reduce the outstanding amount of the Pre-Petition Debt in connection with the repayment of the Pre-Petition Debt authorized by the Interim Order.

(d) **Conditions Precedent**. The DIP Lender shall have no obligation to make any loan or advance under the DIP Credit Agreement unless the **[*28]** conditions precedent to making such loan under the DIP Credit Agreement have been satisfied in full or waived in accordance with the DIP Credit Agreement.

(e) **Post-Petition Liens**. Effective immediately upon the execution of the Interim Order, and on a final basis pursuant to this Final Order, the DIP Lender is hereby granted pursuant to Sections 361, 362, 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code, priming first-priority, continuing, valid, binding, enforceable, non-avoidable and automatically perfected post-petition security interests and liens (collectively, the **"DIP Liens"**), senior and superior in priority to all other secured and unsecured creditors of the Debtors' estate except as otherwise provided in the Interim Order and this Final Order, upon and to all presently owned and hereafter acquired assets and real and personal property of the Debtors, including, without limitation, the following (collectively, the **"DIP Collateral"**):

(a) Accounts;

(b) Equipment;

(c) General Intangibles, including, without limitation, excess retainers of Case Professionals [3] Payment Intangibles and Intellectual Property;

(d) Inventory;

(e) Commercial Tort Claims;

(f) Deposit Accounts (including, **[*29]** without limitation, the Carve Out Account (as defined below), but subject to the payment of the Carve Out);

(g) Fixtures;

(h) Real Property;

(i) All proceeds from leases of real property;

(j) Goods;

(k) Supporting Obligations and Letter of Credit Rights;

(l) Documents (including, if applicable, electronic documents);

(m) Chattel Paper;

(n) Instruments;

(o) Investment Property including, without limitation, all ownership or membership interests in any subsidiaries or affiliates, including Lifestone Materials, LLC (whether or not controlled by any Debtor, but only to the extent that the grant of such lien would not, in and of itself, otherwise violate the terms of any applicable agreement relating to such interest; provided that, in all events, the DIP Collateral shall include all proceeds of any of the foregoing, including proceeds of ownership or membership interests in Lifestone Materials, LLC, regardless of whether the grant of a lien on such interest would violate the terms of any applicable agreement relating thereto);

(p) the Pre-Petition Indemnity Account, to the extent of any balance released by the Pre-Petition Secured Parties in accordance with Paragraph 2(g) below;

(q) the proceeds **[*30]** of any avoidance actions brought pursuant to Section 549 of the Bankruptcy Code;

(r) any recoveries under Section 506(c) of the Bankruptcy Code (other than any such recoveries from the DIP Collateral);

(s) any money, policies and certificates of insurance, deposits, cash or other assets;

(t) all of Debtors' books, records and information relating to any of the foregoing ((a) through (s)) and/or to the operation of any Debtor's business, and all rights of access to such Debtor's books, records and information and all property in which such Debtor's books, records and information are stored, recorded and maintained;

(u) all insurance proceeds, refunds, and premium rebates, including, without limitation, proceeds of fire and credit insurance, whether any of such proceeds, refunds, and premium rebates arise out of any of the foregoing ((a) through (t)) or otherwise;

(v) all liens, guaranties, rights, remedies, and privileges pertaining to any of the foregoing ((a) through (u)), including the right of stoppage in transit; and

(w) any of the foregoing, and all products, Proceeds (cash and non-cash), substitutions, Accessions and/or replacements of or to any of the foregoing;

provided, however, **[*31]** that the DIP Collateral (i) shall not include any avoidance action under Chapter 5 of the Bankruptcy Code or the proceeds thereof (including such proceeds, the **"Avoidance Actions"**), other than (x) any Avoidance Action or other claims, and the proceeds thereof, not to exceed the aggregate amount of $10,000,000, brought against any of the Pre-Petition Secured Parties, to the extent such action or claims result in (and limited to the amount of) actual payment under the Pre-Petition DuPont Guaranty (such Avoidance Actions or other claims and the proceeds thereof, the **"Specified Avoidance Actions"**), provided that, the Pre-Petition Agent shall provide prior written notice to the Debtors at least seven (7) Business Days before making a formal demand under the Pre-Petition DuPont Guaranty, (y) proceeds of any avoidance action brought pursuant to Section 549 of the Bankruptcy Code, and (z) proceeds of any other avoidance actions under Chapter 5 of the Bankruptcy Code to the extent that any Carve Out funded the Debtors' or the Creditors' Committee's expenses in investigating such actions, commencing such actions, and conducting the litigation and/or settlement discussions that resulted in the **[*32]** receipt of such proceeds, but only to the extent necessary to reimburse the DIP Lender for the amount of the Carve Out used for those purposes, (ii) shall not include the Debtors' interests in leaseholds, but only the proceeds thereof, and (iii) shall be subject to the payment of the Carve Out.

3 DIP Lender acknowledges and agrees that its lien in excess retainers of Case Professionals shall attach solely to such excess retainers as are returned to Debtors in accordance with any applicable engagement letters or agreements.

(f) **DIP Lien Priority**. The DIP Liens granted to the DIP Lender, as provided herein, (a) are created pursuant to Sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, (b) are first, valid, prior, perfected, unavoidable, and superior to any security, mortgage, or collateral interest or lien or claim to any of the DIP Collateral, and are subject only to: (x) the Carve Out, and (y) any Permitted Prior Liens. The DIP Liens shall secure all DIP Obligations. The DIP Liens shall not be made subject to or *pari passu* with any lien or security interest by any court order heretofore or hereafter entered in the Cases and shall be valid and enforceable against any trustee **[*33]** appointed in the Cases, upon the conversion of any of the Cases to a case under Chapter 7 of the Bankruptcy Code or in any other proceedings related to any of the foregoing (any **"Successor Cases"**), and/or upon the dismissal of any of the Cases. The DIP Liens shall not be subject to Sections 506(c), 510, 549, 550 or 551 of the Bankruptcy Code. Without in any manner limiting the priority of the DIP Liens set forth above, and notwithstanding any other term of this Final Order to the contrary, the Pre-Petition DuPont Liens, the DuPont Replacement Liens (as defined below) and the DuPont Post-Petition Liens, and any and all other liens, mortgages, security interests and encumbrances of any kind granted by any Debtor in favor of DuPont, whether existing pre-petition or arising post-petition, are hereby made expressly subject and subordinate in all respects to the DIP Liens and, without limiting the foregoing, until Full Payment of Senior Obligations, DuPont shall have no enforcement rights with respect to such liens and security interests. If in connection with (i) any enforcement action by the DIP Lender against the DIP Collateral, or (ii) any sale or other disposition of any DIP Collateral **[*34]** by the Debtors outside the ordinary course of business which has been consented to by the DIP Lender, the DIP Liens in such assets are being released; then, in each case, the liens and security interests of DuPont on such assets (if any) shall be automatically, unconditionally and simultaneously released and DuPont shall promptly execute and deliver to the DIP Lender such termination statements, releases and other documents as the DIP Lender may request to effectively confirm such release, and DuPont shall be deemed to have provided its consent to such sale or disposition.

(g) **Termination of Pre-Petition First Liens; Continuing Rights of Pre-Petition Secured Parties**. Pursuant to the Interim Order, upon the Pre-Petition Agent's receipt of the Pre-Petition Debt Payoff Amount, the Pre-Petition First Liens and all other security interests and other liens in favor of the Pre-Petition Secured Parties on the assets of the Debtors were automatically terminated and released without any further action. Notwithstanding any provision in this Final Order, any DIP Financing Agreements or otherwise: (i) the Pre-Petition Agent shall continue to maintain, and hold a first priority, perfected lien and **[*35]** security interest in, the Pre-Petition Indemnity Account and the Post-Petition Expense Reserve Amount deposited therein, until the earliest to occur (such earliest date, the **"Post-Petition Expense Reserve Release Date"**) of (I) if no party (including any Creditors' Committee) asserts a Challenge (as defined below) in accordance with Paragraph 7 of this Final Order during the Challenge Period (as defined below), the Challenge Period Termination Date (as defined below), or (II) if any party, including any Creditors' Committee, asserts a Challenge (as defined below) in accordance with Paragraph 7 of this Final Order, the first business day immediately following entry of a final, non-appealable order by this Court, or if applicable another court of competent jurisdiction over the Challenge (as defined below), finally resolving all Challenges (as defined below) (or if applicable, approving the settlement of all Challenges); (ii) the Pre-Petition

Secured Parties shall continue to have the right to use the Post-Petition Expense Reserve Amount as and when necessary to pay for fees, costs and expenses of the Pre-Petition Secured Parties (including attorney fees and costs) incurred in connection **[*36]** with these Cases and/or any Challenge, and any other fees, costs and expenses (including attorney fees and costs) that would have been reimbursable under, and subject to any restrictions to such reimbursement set forth in, the Pre-Petition Financing Agreements if incurred prior to the Petition Date; (iii) the Pre-Petition Secured Parties (and to the extent applicable, any issuer of a Pre-Petition Letter of Credit) shall continue to hold a first priority perfected lien and security interest in the Pre-Petition L/C Cash Collateral, and shall be entitled to apply Pre-Petition L/C Cash Collateral to outstanding obligations in respect of the Pre-Petition Letters of Credit as and when they become payable under the applicable Pre-Petition Financing Agreements; (iv) the Pre-Petition Secured Parties (and any letter of credit issuer to the extent applicable) shall have the right not to renew any and all Pre-Petition Letters of Credit at the end of their respective current terms (without taking into account any evergreen or other renewal provision) but the Debtors shall be permitted to keep the Pre-Petition Letters of Credit outstanding solely during such respective current terms for so long **[*37]** as the Pre-Petition L/C Cash Collateral fully secures the Pre-Petition Secured Parties' (and any letter of credit issuer's) obligations in respect of the Pre-Petition Letters of Credit; and (v) the automatic stay shall be deemed modified by this Final Order to the extent necessary to permit the Pre-Petition Secured Parties to exercise their rights under this Paragraph 2(g) without any further order of this Court or notice to any party. Within two (2) Business Days immediately following the Post-Petition Expense Reserve Release Date, the Pre-Petition Secured Parties shall remit the entire unused balance of the Post-Petition Expense Reserve Amount, if any, to the Debtors, and such remittance shall constitute DIP Collateral and will be applied in reduction of the DIP Obligations in accordance with the DIP Financing Agreements. In addition, within two (2) Business Days immediately following the date on which all obligations of the Pre-Petition Secured Parties (and any corresponding letter of creditor issuer) in respect of each Pre-Petition Letter of Credit, including, without limitation, all then accrued unpaid fees, costs and charges related thereto (all such obligations, the **"Pre-Petition [*38] L/C Obligations"**), are fully and finally satisfied, the Pre-Petition Agent shall remit to the Debtors Pre-Petition L/C Cash Collateral equal to the difference between (a) 105% of the stated amount of such Pre-Petition Letter of Credit, minus (b) the aggregate amount of all Pre-Petition L/C Obligations in respect of such Pre-Petition Letter of Credit, and such remittance shall constitute DIP Collateral and will be applied in reduction of the DIP Obligations in accordance with the DIP Financing Agreements. For the avoidance of doubt, upon the repayment of the Pre-Petition Debt in accordance with the terms of this Final Order and so long as the Debtors comply with the terms of this Final Order benefitting the Pre-Petition Secured Parties, the Pre-Petition Secured Parties shall not be entitled to any adequate protection in these Cases; provided, however, that solely in the event that the Pre-Petition Debt is not fully repaid, the rights of the Pre-Petition Secured Parties to seek and obtain adequate protection in respect of their interests in the Pre-Petition First Lien Collateral are hereby fully preserved. Nothing in this Final Order, the DIP Financing Agreements or otherwise shall in **[*39]** any way prejudice, affect or otherwise impair any of the rights of the Pre-Petition Secured Parties under the Pre-Petition DuPont Guaranty.

(h) **Enforceable Obligations**. The DIP Financing Agreements shall constitute and evidence the valid and binding obligations of the Debtors, which obligations shall be enforceable against the Debtors, their estates and any successor thereto and their creditors, in accordance with their terms.

(i) **Protection of DIP Lender and Other Rights**. From and after the Petition Date, the Debtors shall use the proceeds of the extensions of credit under the DIP Facility only for the purposes specifically set forth in the DIP Financing Agreements and this Final Order and in strict compliance with the Budget (subject to any variances thereto permitted by the DIP Financing Agreements).

(j) **Superpriority Administrative Claim Status**. Subject to the payment of the Carve Out, and other than with respect to Avoidance Actions and the proceeds thereof not constituting Specified Avoidance Actions, all DIP Obligations shall be an allowed superpriority administrative expense claim under Section 364(c)(1) of the Bankruptcy Code (the **"DIP Superpriority Claim"** and, together with **[*40]** the DIP Liens, the **"DIP Protections"**). The DIP Superpriority Claim shall have, in these Cases and any Successor Cases, priority over all administrative expense claims and unsecured claims against the Debtors or their estates, now existing or hereafter arising, of any kind or nature whatsoever including, without limitation, administrative expenses of the kinds specified in, arising, or ordered pursuant to Sections 105, 326, 328, 330, 331, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d), 726, 1113, and 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment. Other than the Carve Out, no costs or expenses of administration, including, without limitation, professional fees allowed and payable under Bankruptcy Code Sections 328, 330, or 331, or otherwise, that have been or may be incurred in these proceedings, or in any Successor Cases, and no priority claims are, or will be, senior to, prior to or on a parity with the DIP Protections or the DIP Obligations, or with any other claims of the DIP Lender arising hereunder.

3. **Authorization to Use Cash Collateral and Proceeds of DIP Financing [*41] Agreements**. Pursuant to the terms and conditions of this Final Order, the DIP Financing Agreements, and in accordance with the budget (as the same may be modified from time to time consistent with the terms of the DIP Financing Agreements (the **"Budget"**), filed on record in the Cases and attached to the DIP Motion, the Debtors are authorized to use Cash Collateral and the advances under the DIP Financing Agreements during the period commencing immediately after the entry of the Interim Order and terminating upon the Commitment Termination Date (as defined below). The Budget may be updated (with the consent and/or at the request of the DIP Lender from time to time), provided that such updated Budget shall be in form and substance acceptable to the DIP Lender, in its sole discretion, and the Debtors shall be required always to comply with the Budget pursuant to the terms of the DIP Financing Agreements.

4. **Adequate Protection for DuPont**. As adequate protection for any Diminution in Value of its interest in the Pre-Petition DuPont Collateral (including Cash Collateral), DuPont shall receive adequate protection as follows:

(a) **Pre-Petition Replacement Liens**. To the extent of the Diminution **[*42]** in Value of the Pre-Petition DuPont Collateral, DuPont shall have, subject to the terms and conditions set forth below, pursuant to sections 361, 363(e) and 364(d) of the Bankruptcy Code, additional and replacement security interests and liens in the DIP Collateral (the **"DuPont Replacement Liens"**). The DuPont Replacement Liens shall be junior only to the DIP Liens, Permitted Prior Liens, the DuPont Post-Petition Liens and the Carve Out as provided herein and otherwise shall not be made subject to or pari passu with any lien or security interest by any court order heretofore or hereafter entered in the Cases. The DuPont Replacement Liens shall be valid and enforceable in any Successor Case, against any trustee appointed in the Cases or any Successor Case, and/or upon the dismissal of any of the Cases or any Successor Case. The DuPont Replacement Liens shall not be subject to Sections

510, 549, 550 or 551 of the Bankruptcy Code, or if approved in the Final Order, Section 506(c) of the Bankruptcy Code.

(b) **DuPont 507(b) Claim**. In the event that the adequate protection provided to DuPont hereunder is insufficient to compensate for the Diminution in Value of the interest of DuPont in the **[*43]** Pre-Petition DuPont Collateral during the Cases or any Successor Case, to the extent of the Diminution in Value of the Pre-Petition DuPont Collateral, DuPont shall have an allowed claim (the **"DuPont 507(b) Claim"**) under section 507(b) of the Bankruptcy Code in these Cases and any Successor Case, provided that, the DuPont 507(b) Claim shall be junior in right of payment to all DIP Obligations and the Reimbursement Obligations (as defined below), and subject to the Carve Out and shall not extend to Avoidance Actions and the proceeds thereof (other than Specified Avoidance Actions).

5. Protection of DuPont Reimbursement Obligations

(a) Effective immediately upon the execution of the Interim Order, and on a final basis under this Final Order, DuPont is hereby granted pursuant to Sections 361, 362, 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code, continuing, valid, binding, enforceable, non-avoidable and automatically perfected post-petition security interests and liens (collectively, the **"DuPont Post-Petition Liens"**) upon and to all DIP Collateral, to secure the reimbursement obligations (the **"Reimbursement Obligations"**) of the Debtors with respect to the Corporate Guaranty, executed **[*44]** by DuPont in favor of the DIP Lender, securing up to $10,000,000 in principal amount of the obligations of the Debtors under the DIP Credit Agreement (the **"DuPont Post-Petition Guaranty"**). The DuPont Post-Petition Liens shall be superior to any security, mortgage, or collateral interest or lien or claim to any of the DIP Collateral other than: (w) the DIP Liens, (x) the Carve Out, and (y) any Permitted Prior Liens.

(b) If and to the extent DuPont makes an actual payment to the DIP Lender under the DIP Guaranty, DuPont shall be correspondingly subrogated to the DIP Superpriority Claim in the amount of such payment.

(c) Subject and subordinate to the DIP Protections, DuPont shall have, with respect to the DuPont Post-Petition Liens and its subrogation rights under the DIP Superpriority Claim (the **"DuPont Protections"**), all of the rights, remedies, protections and limitations afforded the DIP Lender with respect to the DIP Protections under the DIP Credit Agreement (excluding, however, for the avoidance of doubt, any rights as a lender under the DIP Credit Agreement), the Interim Order, and this Final Order, including, without limitation, the prohibition of granting senior or parity liens **[*45]** or administrative expenses (pending full payment of the Reimbursement Obligations), the exclusion from the Carve Out of certain fees, and the protections afforded by 11 U.S.C. § 364(e); provided that, until Full Payment of Senior Obligations, DuPont shall have no enforcement rights with respect to the DuPont Protections.

(d) The DuPont Protections are in addition to, and not in replacement or diminution of or substitution for, DuPont's rights of subrogation with respect to the DIP Protections as a result of payments made under or with respect to the DuPont Post-Petition Guaranty, all of which rights of subrogation, subject to the terms of the DuPont Post-Petition Guaranty, are hereby expressly preserved and confirmed.

6. **Post-Petition Lien Perfection**. This Final Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of the DIP Liens, the DuPont Post-Petition Liens and the DuPont Replacement Liens without the necessity of filing or recording any financing statement, deed of trust, mortgage, or other instrument or document which may otherwise be required under the law of any jurisdiction or the taking of any other action (including, for the avoidance **[*46]** of doubt, entering into any deposit account control agreement or securities account control agreement) to validate or perfect the DIP Liens, the DuPont Post-Petition Liens and the DuPont Replacement Liens or to entitle the DIP Liens, the DuPont Post-Petition Liens and the DuPont Replacement Liens to the priorities granted herein. Notwithstanding the foregoing, the DIP Lender may, in its sole discretion, file such financing statements, mortgages, notices of liens and other similar documents, and is hereby granted relief from the automatic stay of Section 362 of the Bankruptcy Code in order to do so, and all such financing statements, mortgages, security agreements, notices and other agreements or documents shall be deemed to have been filed or recorded at the time and on the date of the commencement of the Cases. The Debtors shall execute and deliver to the DIP Lender all such financing statements, mortgages, notices and other documents as the DIP Lender may request in its sole discretion to evidence, confirm, validate or perfect, or to insure the contemplated priority of, the DIP Liens granted pursuant hereto. The DIP Lender, in its sole discretion, may file a photocopy of this Final **[*47]** Order as a financing statement with any recording officer designated to file financing statements or with any registry of deeds or similar office in any jurisdiction in which any Debtor has real or personal property, and in such event, the subject filing or recording officer shall be authorized to file or record such copy of this Final Order.

7. **Reservation of Certain Third Party Rights and Bar of Challenges and Claims**. The Debtors' Stipulations shall be binding on the Debtors, and the Debtors shall be deemed to have irrevocably waived and relinquished any and all Challenges (as defined below), as of the Petition Date upon the entry of the Interim Order. Without limiting the foregoing, the Debtors' Stipulations shall also be forever binding upon all of the Debtors' estates and all official and unofficial committees, creditors, interest holders, and other parties in interest in these Cases and any Successor Cases, in each case unless (i) such party in interest commences, by the earlier of (x) July 28, 2010, or (y) the date an order is entered confirming a Plan (as defined below) (such time period established by the earlier of clauses (x) and (y), as the same may be extended in accordance **[*48]** with this Paragraph 7, is referred to herein as the **"Challenge Period,"** and the date that is the next calendar day after the termination of the Challenge Period, in the event that no Challenge (as defined below) is raised during the Challenge Period, is referred to as the **"Challenge Period Termination Date"**), (A) a contested matter or adversary proceeding challenging or otherwise objecting to the admissions, stipulations, findings or releases included in the Debtors' Stipulations, or (B) a contested matter or adversary proceeding against any or all of the Pre-Petition Secured Parties in connection with or related to the Pre-Petition Debt, or the actions or inactions of any of the Pre-Petition Secured Parties arising out of or related to the Pre-Petition Debt or otherwise, including, without limitation, any claim against any or all of the Pre-Petition Secured Parties in the nature of a "lender liability" cause of action, setoff, counterclaim or defense to the Pre-Petition Debt (including but not limited to those under sections 506, 544, 547, 548, 549, 550 and/or 552 of the Bankruptcy Code or by way of suit against any of the Pre-Petition Secured Parties) (the objections, challenges, **[*49]** actions and claims referenced in clauses (i)(A) and (B), collectively, the **"Challenges,"** and each individually, a **"Challenge"**), and (ii) there is a final, non-appealable order in favor of such party in interest sustaining any such Challenges in any such timely filed contested matter or adversary proceeding; provided, however, that in no event shall any objection or challenge by any party in interest (including any Creditors'

Committee) to the procedures established in this Paragraph 7 constitute a "Challenge" hereunder. If no Challenges have been timely asserted in any such adversary proceeding or contested matter, then, upon the Challenge Period Termination Date, and for all purposes in these Cases and any Successor Case, (i) all payments made to or for the benefit of the Pre-Petition Secured Parties pursuant to the Interim Order, this Final Order or otherwise (whether made prior to, on or after the Petition Date) shall be indefeasible and not be subject to counterclaim, set-off, subordination, recharacterization, defense or avoidance, (ii) any and all such Challenges by any party in interest shall be deemed to be forever released, waived and barred, (iii) the Pre-Petition Debt shall **[*50]** be deemed to be a fully allowed secured claim within the meaning of section 506 of the Bankruptcy Code (which claim and liens shall have been deemed satisfied in full by the repayment of the Pre-Petition Debt as provided herein), and (iv) the Debtors' Stipulations, including the release provisions therein, shall be binding on all parties in interest, including any Creditors' Committee. Notwithstanding the foregoing, to the extent any Challenges are timely asserted in any such adversary proceeding or contested matter, the Debtors' Stipulations and the other provisions in clauses (i) through (iv) in the immediately preceding sentence shall nonetheless remain binding and preclusive on any Committee and on any other party in interest from and after the Challenge Period Termination Date, except to the extent that such Debtors' Stipulations or the other provisions in clauses (i) through (iv) of the immediately preceding sentence were expressly challenged in such adversary proceeding or contested matter. The Challenge Period may only be extended with the written consent of the Pre-Petition Agent.

8. **Carve Out**. Subject to the terms and conditions contained in this Paragraph 8, (x) the DIP Protections **[*51]** are subordinate to the Carve Out (as defined below), (y) the DuPont Protections are subordinate to the DIP Protections and the Carve Out, and (z) the DuPont Replacement Liens, the DuPont 507(b) Claim and the DuPont Pre-Petition Liens are subordinate to the DIP Protections, the DuPont Protections and the Carve Out. As used herein, the term **"Carve Out"** shall mean amounts: (a) payable pursuant to 28 U.S.C. Section 1930(a)(6) and fees payable to the clerk of the Court and (b) for allowed (or authorized to be paid by the Court) reasonable fees and expenses of attorneys and financial advisors employed by the Debtors and the Creditors' Committee (including expenses of the members of the Creditors' Committee) pursuant to Sections 327 and 1103 of the Bankruptcy Code (the **"Case Professionals"**), and, as to amounts described in clause (b), not to exceed the sum of (x) $550,000 (allocated $400,000 towards the Debtors' Case Professionals and $150,000 towards the Creditors' Committee's Case Professionals (including members of the Creditors' Committee)), which amount shall be funded by Debtors into a segregated account under the control of Debtors' counsel (the **"Carve Out Account"**), plus (y) such **[*52]** amounts which are accrued but unpaid in the Case as of the Commitment Termination Date, provided that, such amounts under clause (y) are consistent with the Budget, which unpaid amounts shall be funded into the Carve Out Account commencing upon the Commitment Termination Date through collection of proceeds of the DIP Collateral (except as agreed in the following sentence upon a sale of the Debtors' assets). The DIP Lender acknowledges and agrees that (i) upon a sale of all or substantially all of the Debtors' assets for cash, the net cash proceeds of such sale shall be first applied to fund the Carve Out Account required by this Order, and (ii) upon a sale of all or substantially all of the Debtors' assets pursuant to a credit bid with no (or insufficient) net cash proceeds, the DIP Lender shall fund the Carve Out Account as required by this Order. In no event, however, shall any proceeds or other payments (including but not limited to, settlement payments) resulting from any Challenge that results in (and is limited to the amount of) actual payment under the Pre-Petition DuPont Guaranty be used to fund the Carve-Out Account. For purposes of this Final Order, references to the Carve **[*53]** Out shall

include the Carve Out Account and funds therein. As provided in the DIP Credit Agreement, the Borrowing Base (as defined therein) shall be reduced by a reserve in the amount of the Carve Out. The Carve Out shall exclude any fees and expenses (x) which are incurred in connection with the assertion or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defenses or other contested matter, the purpose of which is to seek any order, judgment, determination or similar relief (A) invalidating, setting aside, avoiding, or subordinating, in whole or in part, (i) the DIP Obligations or (ii) the DIP Lender's Liens in the DIP Collateral, or (B) preventing, hindering or delaying, whether directly or indirectly, the DIP Lender's assertion or enforcement of the DIP Liens, security interests or realization upon any DIP Collateral; (y) which are incurred incidental to the use of cash collateral of the DIP Lender in connection with either (1) the sale or other disposition of any other DIP Collateral which is not permitted under the DIP Credit Agreement, or (2) the incurrence of any indebtedness which is not permitted under the DIP Credit Agreement, in each **[*54]** case, to the extent the DIP Lender has not provided its express written consent; or (z) arising after the conversion of any of the Cases to a case under chapter 7 of the Bankruptcy Code. Except as otherwise provided in this Paragraph 8, nothing contained in this Final Order shall be deemed a consent by the DIP Lender to any charge, lien, assessment or claim against the DIP Collateral under Section 506(c) of the Bankruptcy Code or otherwise. Nothing herein shall be construed to obligate the DIP Lender itself, in any way, to pay any professional fees of any Case Professional or expenses of any members of the Creditors' Committee (except, for the avoidance of doubt, through proceeds of the DIP Facility or proceeds of the DIP Collateral, and as contemplated by the Budget), or to assure that the Debtors have sufficient funds on hand to pay any of the foregoing or to advance funds to establish the Carve Out (except, for the avoidance of doubt, as contemplated by this Order to establish the initial $500,000 of the Carve Out with proceeds of the DIP Facility, and to fund the Carve Out in the event that the DIP Facility is used in part to credit bid as the successful bid in a sale of all or **[*55]** substantially all of the Debtors' assets and insufficient cash proceeds are otherwise unavailable). Subject to Paragraph 9 hereof, for so long as a DIP Order Event of Default shall not have occurred and be continuing, the Debtors shall be permitted to pay compensation and reimbursement of expenses allowed and payable under Sections 330 and 331 of the Bankruptcy Code and in accordance with the Budget, as the same may be due and payable, without reducing the Carve Out. The payment of the Carve Out shall not reduce the amount of the DIP Obligations.

9. **Payment of Compensation**. Nothing herein shall be construed as consent to the allowance of any professional fees or expenses of any of the Debtors, any Creditors' Committee or of any person or shall affect the rights of the DIP Lender or DuPont to object to the allowance and payment of such fees and expenses or to permit the Debtors to pay any such amounts not set forth in the Budget.

10. **[Reserved]**.

11. **Collateral Rights**. Unless the DIP Lender has provided its prior written consent, there shall not be entered in these proceedings, or in any Successor Cases, any order which authorizes any of the following:

(a) except as permitted under the DIP **[*56]** Credit Agreement or in conjunction with the Full Payment of Senior Obligations, the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, or collateral interest or other lien on all or any portion of the DIP Collateral and/or entitled to priority administrative status which is equal or senior to those granted to the DIP Lender; or

(b) the Debtors' return of goods constituting DIP Collateral pursuant to Section 546(h) of the Bankruptcy Code, except as expressly permitted by the DIP Credit Agreement.

12. **Proceeds of Subsequent Financing**. Without limiting the provisions and protections of Paragraph 11 above, if at any time prior to the Full Payment of Senior Obligations, the Debtors, their estates, any trustee, any examiner with enlarged powers or any responsible officer subsequently appointed, shall obtain credit or incur debt pursuant to Bankruptcy Code Sections 364(b), 364(c) or 364(d) in violation of the DIP Credit Agreement, then all of the cash proceeds derived from such credit or debt and all cash collateral shall immediately be applied solely to reduce the DIP Obligations until the Full Payment of Senior Obligations.

13. **Commitment Termination [*57] Date**. All (a) DIP Obligations shall be immediately due and payable, and (b) authority to use the proceeds of the DIP Financing Agreements shall cease, both on the date that is the earliest to occur of (the **"Commitment Termination Date"**): (i) September 30, 2010, (ii) date on which the maturity of the DIP Obligations is accelerated and the commitments of the DIP Lender are irrevocably terminated in accordance with the DIP Financing Agreements following a DIP Order Event of Default, (iii) the failure of the Debtors to obtain the entry of this Final Order on or before the date which is thirty (30) days after the date of the entry of the Interim Order, (iv) the closing date of a sale of all or substantially all of the Debtors' assets under Section 363 of the Bankruptcy Code or (iv) the effective date of a confirmed plan of reorganization.

14. Payment from Proceeds of Collateral.

(a) All products and proceeds of the DIP Collateral and the Pre-Petition DuPont Collateral (including, for the avoidance of doubt, proceeds from receivables and sales in the ordinary course of business, insurance proceeds, and proceeds of all dispositions thereof, whether or not in the ordinary course) regardless **[*58]** of whether such collateral came into existence prior to the Petition Date, shall be remitted in the manner set forth in Paragraph 12.

(b) Without limiting the foregoing clause (a), with respect to any recovery (a "Recovery") from any of the Pre-Petition Secured Parties on account of the Specified Avoidance Actions, to the extent such Recovery results in an actual payment under the Pre-Petition DuPont Guaranty (a "Guaranty Payment"), the Recovery shall be remitted by the Pre-Petition Secured Parties as follows: (i) for any Recovery in connection with a Specified Avoidance Action that is a Chapter 5 avoidance action: (x) if DuPont has not made payment under the DuPont Post-Petition Guaranty, directly to the DIP Lender in the amount of the Guaranty Payment, for application to the DIP Obligations; (y) if DuPont has made payment under the DuPont Post-Petition Guaranty, directly to DuPont in the amount of the Guaranty Payment, for application to the Reimbursement Obligations, and (z) in either case, to the extent of any such Recovery in excess of the Guaranty Payment, directly to the Debtors; and (ii) for any Recovery in connection with a Specified Avoidance Action that is not a Chapter 5 **[*59]** avoidance action: (x) if DuPont has not made payment under the DuPont Post-Petition Guaranty, directly to the DIP Lender for application to the DIP Obligations until the Full Payment of Senior Obligations; and (y) if DuPont has made payment under the DuPont Post-Petition Guaranty, directly to DuPont in the amount of the Guaranty Payment, for application to the Reimbursement Obligations, and then to the DIP Lender for application to the DIP Obligations until the Full Payment of Senior Obligations. If at the time a Recovery is remitted to the DIP Lender under the foregoing sub-clauses the Guaranty Payment is in excess of the then outstanding

DIP Obligations, any such excess shall be held by the DIP Lender as DIP Collateral pending agreement of the DIP Lender and the Borrower or order of the Court.

15. **Disposition of Collateral**. The Debtors shall not (a) sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, without the prior written consent of the DIP Lender (and no such consent shall be implied, from any other action, inaction or acquiescence by the DIP Lender or an order of this Court), except for sales of the Debtors' inventory in the ordinary course **[*60]** of business or except as otherwise provided for in the DIP Credit Agreement, the Interim Order and this Final Order or as approved by the Court, or (b) assume, reject or assign any leasehold interest without prior consultation with the DIP Lender, except as otherwise provided for in the DIP Credit Agreement or as approved by the Court.

16. **Events of Default**. The occurrence of any of the following events shall constitute an event of default under this Final Order (a **"DIP Order Event of Default"**):

(a) Failure by any of the Debtors to comply with any term of this Final Order;

(b) An Event of Default (as defined in the DIP Credit Agreement); or

(c) The Commitment Termination Date.

17. **Rights and Remedies Upon DIP Order Event of Default**.

(a) Any automatic stay otherwise applicable to the DIP Lender is hereby modified so that after the occurrence of any DIP Order Event of Default and at any time thereafter upon five (5) business days prior written notice of such occurrence, in each case given to each of counsel for the Debtors, counsel for the Creditors' Committee, if any, the Debtors' twenty (20) largest creditors if no Creditors' Committee has been appointed, and the U.S. Trustee, the DIP Lender **[*61]** shall be entitled to exercise its rights and remedies in accordance with the DIP Financing Agreements. Immediately following the giving of notice by the DIP Lender of the occurrence of a DIP Order Event of Default: (i) the Debtors shall continue to deliver and cause the delivery of the proceeds of DIP Collateral to the DIP Lender as provided in the DIP Credit Agreement and this Final Order; (ii) the DIP Lender shall continue to apply such proceeds in accordance with the provisions of this Final Order and the DIP Credit Agreement; (iii) the Debtors shall have no right to use any of such proceeds, nor any other Cash Collateral other than towards the satisfaction of the DIP Obligations and the Carve Out; and (iv) any obligation otherwise imposed on the DIP Lender to provide any loan or advance to the Debtors pursuant to the DIP Facility shall be suspended. Following the giving of notice by the DIP Lender of the occurrence of a DIP Order Event of Default, the Debtors shall be entitled to an emergency hearing before this Court solely for the purpose of contesting whether a DIP Order Event of Default has occurred. If the Debtors do not contest the right of the DIP Lender to exercise its **[*62]** remedies based upon whether a DIP Order Event of Default has occurred within such time period, or if the Debtors do timely contest the occurrence of a DIP Order Event of Default and the Court after notice and hearing declines to stay the enforcement thereof, the automatic stay, as to the DIP Lender, shall automatically terminate at the end of such notice period.

(b) In any exercise of their rights and remedies upon a DIP Order Event of Default under the DIP Financing Agreements, as applicable, the DIP Lender is authorized to proceed under or pursuant to the DIP Financing Agreements.

(c) The automatic stay imposed under Bankruptcy Code Section 362(a) is hereby modified pursuant to the terms of this Final Order as necessary to (1) permit the Debtors to grant the DuPont Replacement Liens, the DuPont Post-Petition Liens and the DIP Liens, and to incur all liabilities and obligations to (x) DuPont under this Final Order and with respect to the Reimbursement Obligations and (y) the DIP Lender under the DIP Financing Agreements and this Final Order, as applicable, and (2) authorize the DIP Lender and the Pre-Petition Secured Parties to retain and apply payments hereunder.

(e) Nothing included **[*63]** herein shall prejudice, impair, or otherwise affect the DIP Lender's rights to seek any other or supplemental relief in respect of the Debtors, or the DIP Lender's rights, as provided in the DIP Financing Agreements, to suspend or terminate the making of loans under the DIP Financing Agreements.

(f) Notwithstanding anything in this Final Order to the contrary, in the event that the DIP Lender exercises its rights and remedies upon a default and seeks to take possession of any premises where any DIP Collateral is located, its rights and remedies with respect to taking possession of such premises shall be limited to (i) relief provided by further order of this Court; (ii) any agreement with the applicable landlord; (iii) the terms of any applicable lease; and (iv) applicable non-bankruptcy law.

18. **Proofs of Claim**. Neither the DIP Lender nor any Pre-Petition Secured Party shall be required to file a proof of claim in these Cases.

19. Other Rights and Obligations.

(a) Good Faith Under Section 364(e) of the Bankruptcy Code. No Modification or Stay of This Final Order. Based on the findings set forth in this Final Order and in accordance with Section 364(e) of the Bankruptcy Code, which is **[*64]** applicable to the DIP Facility contemplated by this Final Order, in the event any or all of the provisions of this Final Order are hereafter modified, amended or vacated by a subsequent order of this or any other Court, the DIP Lender and DuPont are entitled to the protections provided in Section 364(e) of the Bankruptcy Code and no such modification, amendment or vacation shall affect the validity and enforceability of any advances made hereunder or the liens or priority authorized or created hereby. Notwithstanding any such modification, amendment or vacation, any claim granted to the DIP Lender or DuPont hereunder arising prior to the effective date of such modification, amendment or vacation of any DIP Protections or DuPont Protections granted to the DIP Lender or DuPont shall be governed in all respects by the original provisions of this Final Order, and the DIP Lender and DuPont shall be entitled to all of the rights, remedies, privileges and benefits, including the DIP Protections and the DuPont Protections granted herein, with respect to any such claim. Since the loans made pursuant to the DIP Credit Agreement are made in reliance on this Final Order, the obligations owed to **[*65]** the DIP Lender or to DuPont prior to the effective date of any stay, modification or vacation of this Final Order shall not, as a result of any subsequent order in the Cases or in any Successor Cases, be subordinated, lose their lien priority or superpriority administrative expense claim status, or be deprived of the benefit of the status of the liens and claims granted to the DIP Lender or DuPont under this Final Order and/or the DIP Financing Agreements.

(b) **Expenses**. As provided in the DIP Financing Agreements, all costs and expenses of the DIP Lender and all fees and charges of the Administrative Agent in connection with the DIP Financing Agreements, including, without limitation, legal, accounting, collateral examination, monitoring and

appraisal fees, financial advisory fees, fees and expenses of other consultants, indemnification and reimbursement of fees and expenses, and other out of pocket expenses will be paid by the Debtors as and when required by the terms of the DIP Financing Agreements. Payment of such fees and expenses shall not be subject to allowance by the Court. The DIP Lender shall provide to the U.S. Trustee and counsel to any Creditors' Committee, the invoices **[*66]** for fees and expenses incurred for professionals retained by the DIP Lender (redacted for privileged or confidential information). Under no circumstances shall professionals for the DIP Lender be required to comply with the U.S. Trustee fee guidelines.

(c) **Binding Effect**. The provisions of this Final Order shall be binding upon and inure to the benefit of the DIP Lender, the Pre-Petition Secured Parties, DuPont, and the Debtors. Any successors or assigns of the Debtors (including any trustee or other fiduciary hereinafter appointed as a legal representative of the Debtors or with respect to the property of the estates of the Debtors) whether in the Cases, in any Successor Cases, or upon dismissal of any such chapter 11 or chapter 7 case shall be bound by the provisions of this Final Order.

(d) **No Waiver**. The failure of the DIP Lender to seek relief or otherwise exercise its rights and remedies under the DIP Financing Agreements, the DIP Facility, this Final Order or otherwise, as applicable, shall not constitute a waiver of any of the DIP Lender's rights hereunder, thereunder, or otherwise. Notwithstanding anything herein to the contrary, the entry of this Final Order is without prejudice **[*67]** to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair the rights and remedies of the DIP Lender or, except as otherwise expressly provided herein or in the DuPont Post-Petition Guaranty, of DuPont, under the Bankruptcy Code or under non-bankruptcy law, including without limitation, the rights of the DIP Lender or DuPont to (i) request conversion of the Cases to cases under Chapter 7, dismissal of the Cases, or the appointment of a trustee in the Cases, (ii) propose, subject to the provisions of Section 1121 of the Bankruptcy Code, a plan of reorganization or plan of liquidation for the Debtors (a **"Plan"**), or (iii) exercise any of the rights, claims or privileges (whether legal, equitable or otherwise) of the DIP Lender or DuPont.

(e) **No Third Party Rights**. Except as explicitly provided for herein, this Final Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect, or incidental beneficiary.

(f) **No Marshaling**. The DIP Lender shall not be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to any of the DIP Collateral.

(g) **Section 552(b)**. The DIP Lender shall **[*68]** be entitled to all of the rights and benefits of Section 552(b) of the Bankruptcy Code and the "equities of the case" exception under Section 552(b) of the Bankruptcy Code shall not apply to the DIP Lender with respect to proceeds, product, offspring or profits of any of the DIP Collateral.

(h) **Amendment**. The Debtors and the DIP Lender may enter into waivers, consents and amendments with respect the DIP Financing Agreements (a) without the need for further Court approval provided that (i) notice is given to the Office of the United States Trustee and any Creditors' Committee appointed in these Cases, and (ii) such amendment, consent or waiver, in the reasonable judgment of the Debtors and the DIP Lender, after consultation with any Committee, is both non-prejudicial to the rights of third parties and is not material, or (b) with Court approval, upon ten (10) days prior notice of such amendment, consent or waiver to the Office of the United States

Trustee and any Creditors' Committee appointed in these Cases. Except as otherwise provided herein, no waiver, consent, modification or amendment of any of the provisions of this Final Order or the DIP Financing Agreements shall be effective **[*69]** unless set forth in writing, signed by or on behalf of all of the Debtors, and the DIP Lender, and without limiting the foregoing, no waiver, consent, modification or amendment to any of the provisions of this Final Order that could affect the rights, remedies and other protections of any of the Pre-Petition Secured Parties shall be effective unless set forth in writing signed by the Pre-Petition Agent, and, to the extent the rights and remedies of DuPont under this Final Order would be affected thereby, DuPont.

(i) **Survival of Final Order**. The provisions of this Final Order and any actions taken pursuant hereto shall survive entry of any order which may be entered (i) confirming any Plan in the Cases, (ii) converting any of the Cases to a case(s) under chapter 7 of the Bankruptcy Code, or (iii) dismissing any of the Cases, (iv) withdrawing of the reference of any of the Cases from this Court, or (v) providing for abstention from handling or retaining of jurisdiction of any of the Cases in this Court. The terms and provisions of this Final Order including the DIP Protections granted pursuant to this Final Order and the DIP Financing Agreements, shall continue in full force and effect **[*70]** notwithstanding the entry of such order, and such DIP Protections and protections for the Pre-Petition Secured Parties shall maintain their priority as provided by this Final Order until all the obligations of the Debtors to the DIP Lender pursuant to the DIP Financing Agreements have been indefeasibly paid in full and discharged (such payment being without prejudice to any terms or provisions contained in the DIP Facility which survive such discharge by their terms). The Debtors shall not propose or support any Plan that is not conditioned upon the payment in full in cash of all of the DIP Obligations on or prior to the earlier to occur of (i) the effective date of such Plan and (ii) the Commitment Termination Date.

(j) **Inconsistency**. In the event of any inconsistency between the terms and conditions of the DIP Financing Agreements and of this Final Order, the provisions of this Final Order shall govern and control.

(k) **Enforceability**. This Final Order shall constitute findings of fact and conclusions of law pursuant to the Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon execution hereof.

(l) **Objections Overruled**. **[*71]** All objections to the DIP Motion to the extent not withdrawn or resolved, are hereby overruled.

(m) **No Waivers or Modification of Final Order**. The Debtors irrevocably waive any right to seek any modification or extension of this Final Order without the prior written consent of the DIP Lender, and, to the extent the rights and remedies of DuPont under this Final Order would be affected thereby, DuPont, and no such consent shall be implied by any other action, inaction or acquiescence of the DIP Lender or DuPont. The Debtors further irrevocably waive any right to seek any waiver, consent, modification or amendment to any of the provisions of this Final Order that could affect the rights, remedies and other protections of any of the Pre-Petition Secured Parties without the prior written consent of the Pre-Petition Agent, and no such consent shall be implied by any other action, inaction or acquiescence of the Pre-Petition Agent.

(n) **Waiver of any Applicable Stay**. Any applicable stay (including, without limitation, under Bankruptcy Rule 6004(h)) is hereby waived and shall not apply to this Final Order.

20. **Survival of Protections**. Unless and until the Full Payment of Senior Obligations and **[*72]** the discharge of the Reimbursement Obligations, the protections afforded to the DIP Lender, DuPont and the Pre-Petition Secured Parties pursuant to this Final Order and, where applicable, under the DIP Financing Agreements, and any actions taken pursuant thereto, shall survive the entry of any order confirming a Plan or converting the Cases to a case(s) under Chapter 7 of the Bankruptcy Code, and the DIP Protections, the DuPont Protections and the protections granted to the Pre-Petition Secured Parties hereunder shall continue in these proceedings and in any Successor Cases, and such protections shall maintain their respective priorities as provided by this Final Order.

21. **Retention of Jurisdiction**. The Court has and will retain jurisdiction to enforce this Final Order according to its terms.

SO ORDERED by the Court this 12th day of May, 2010.

/s/ Peter J. Walsh

The Honorable Peter J. Walsh

United States Bankruptcy Judge

TAB 11

DaimlerChrysler Services Canada Inc. *Appellant*

v.

Jean-François Lebel *Respondent*

and between

GMAC Leaseco Limited *Appellant*

v.

Raymond Chabot Inc. *Respondent*

INDEXED AS: LEFEBVRE (TRUSTEE OF); TREMBLAY (TRUSTEE OF)

Neutral citation: 2004 SCC 63.

File Nos.: 29770, 29780.

2004: April 20; 2004: October 28.

Present: McLachlin C.J. and Major, Bastarache, Binnie and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Long-term lease — Setting up of lessor's right of ownership against lessee's trustee in bankruptcy — Failure to publish rights resulting from lease within legislated time limit — Whether long-term lessor of automobile may set up right of ownership against lessee's trustee in bankruptcy even though lessor failed to publish rights within time prescribed in art. 1852 C.C.Q. — Whether lessor's right of ownership equivalent to simple security — Whether trustee may be considered third person for purposes of art. 1852 C.C.Q. — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 71, 81.

Two debtors leased motor vehicles for 36-month terms under leases of movables, and the related rights were assigned to the appellants. Before the leases had terminated, the debtors made assignments in bankruptcy that included the vehicles, and the respondents were appointed trustees in bankruptcy. The appellants sent the trustees proofs of claim so as to be put in possession of the vehicles, of which they were the owners. The trustees disputed the claims because the leases had not been

Services DaimlerChrysler Canada Inc. *Appelante*

c.

Jean-François Lebel *Intimé*

et entre

GMAC Location Limitée *Appelante*

c.

Raymond Chabot Inc. *Intimée*

RÉPERTORIÉ : LEFEBVRE (SYNDIC DE); TREMBLAY (SYNDIC DE)

Référence neutre : 2004 CSC 63.

N^{os} du greffe : 29770, 29780.

2004 : 20 avril; 2004 : 28 octobre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Bail à long terme — Opposabilité du droit de propriété du locateur au syndic à la faillite du locataire — Défaut de publication des droits résultant du bail dans le délai prévu par la loi — Le locateur à long terme d'un véhicule automobile peut-il opposer son droit de propriété au syndic à la faillite du locataire, malgré son défaut de publier ses droits dans le délai prescrit par l'art. 1852 C.c.Q.? — Le droit de propriété du locateur est-il assimilable à une simple sûreté? — Le syndic peut-il être considéré comme un tiers au sens de l'art. 1852 C.c.Q.? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, 71, 81.

Deux débiteurs louent pour un terme de 36 mois des véhicules automobiles en vertu de baux mobiliers, dont les droits sont cédés aux appelantes. Avant la fin des baux, les débiteurs font cession des véhicules et les intimés sont nommés syndics à la faillite. Les appelantes transmettent aux syndics une preuve de réclamation afin d'être mises en possession des véhicules dont elles sont propriétaires. Les syndics refusent les réclamations parce que la publication des baux au registre des droits

published in the register of personal and movable real rights within the time limit provided for in art. 1852 C.C.Q. The Superior Court and Court of Appeal agreed with the trustees. They felt that the appellants' rights of ownership could not be set up against the trustees because of the late publication thereof.

Held: The appeals should be allowed.

A lease contract does not effect a conveyance of ownership between the lessee and the lessor. The leased property remains in the lessor's patrimony. The lessee has only the status of a holder, which means that the property must be surrendered upon termination of the lease. Although the lessor's right of ownership does not arise out of the lease, the rules respecting the publication of rights alter its effects in relation to third persons, since it cannot be set up against third persons unless it is published. However, the publication requirement does not transform the right of ownership into a simple security. Nothing in the *Civil Code of Québec* or the *Bankruptcy and Insolvency Act* alters the nature of the lessor's right of ownership in the leased property or the resulting rights in relation to the lessee.

The status and duties attributed to the trustee following the initial bankruptcy event do not mean that he or she can be regarded as a third person against whom the lessor of the motor vehicle may not set up his or her rights owing to the failure to satisfy the publication requirement. The nature and legal characterization of the trustee's role vary depending on the nature of his or her actions. On the one hand, the trustee is subrogated to the bankrupt's rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin; on the other hand, the law treats the trustee as the creditors' legal mandatary who will liquidate the property entrusted to him or her for the creditors' benefit. This dual nature does not give the trustee the status of a third person in relation to the bankrupt, especially given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor's property. When the trustee takes control of the property, his or her seisin is limited to the property in the debtor's patrimony and, apart from special powers, the trustee has no more rights with respect to the property than did the debtor.

In the case at bar, the appellants' rights of ownership can accordingly be set up against the trustees and their claims should have been admitted. The leased vehicles were never part of the debtors' patrimonies. The trustees, in refusing to deliver possession of the property, intended to dispose of property that was not included in their seisin.

personnels et réels mobiliers n'a pas été faite dans le délai prévu à l'art. 1852 C.c.Q. La Cour supérieure et la Cour d'appel donnent raison aux syndics. Elles estiment que la publication tardive du droit de propriété des appelantes le rend inopposable aux syndics.

Arrêt : Les pourvois sont accueillis.

Un contrat de bail n'est pas translatif de propriété entre le locataire et le locateur. Le bien loué demeure dans le patrimoine du locateur. Le locataire n'a qu'un statut de détenteur en vertu duquel il doit remettre le bien à la fin du bail. Bien que le droit de propriété du locateur ne découle pas du bail, les règles relatives à la publicité des droits en modulent les effets à l'égard des tiers puisque son opposabilité dépend de sa publication. L'obligation de publication n'a toutefois pas pour effet de transformer le droit de propriété en une simple sûreté. Rien dans le *Code civil du Québec* ou dans la *Loi sur la faillite et l'insolvabilité* ne modifie la nature du droit de propriété du locateur sur la chose louée et les droits qui en découlent vis-à-vis le locataire.

Le statut et les fonctions attribuées au syndic à la suite de l'ouverture d'une faillite ne permettent pas de le considérer comme un tiers habilité à soulever l'inopposabilité des droits du locateur du véhicule automobile, en raison de la violation de l'obligation de publication. La nature du rôle du syndic et sa qualification juridique varient selon la nature de ses interventions. D'une part, le syndic se trouve subrogé au failli dans l'exercice de ses pouvoirs de détention et de disposition des biens dont la saisine lui est attribuée; d'autre part, la loi fait de lui le mandataire légal des créanciers qui liquidera à leur profit les biens qui lui ont été confiés. Ce double aspect ne lui reconnaît pas le statut de tiers par rapport au failli, particulièrement à l'égard de l'ensemble des pouvoirs que lui confère la loi pour préserver et liquider les biens du débiteur. Lors de la prise de contrôle des biens, le syndic n'est saisi que des biens qui se trouvaient dans le patrimoine du débiteur et, sous réserve de pouvoirs spéciaux, il ne possède pas plus de droits à l'égard de ces biens que n'en possédait le débiteur.

En l'espèce, le droit de propriété des appelantes est donc opposable aux syndics et leurs réclamations auraient dû être admises. Les véhicules loués n'ont jamais fait partie des patrimoines des débiteurs. Le syndic, en refusant de remettre les biens, prétendait disposer d'un bien que sa saisine n'incluait pas.

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APPEAL from a judgment of the Quebec Court of Appeal, [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, [2003] Q.J. No. 2304 (QL), affirming a decision of the Superior Court, [2001] R.J.Q. 2679, [2001] Q.J. No. 5074 (QL). Appeal allowed.

APPEAL from a judgment of the Quebec Court of Appeal, [2003] Q.J. No. 2305 (QL), affirming a decision of the Superior Court, [2001] Q.J. No. 3446 (QL). Appeal allowed.

Yves Lacroix and *Gary Makila*, for the appellant DaimlerChrysler Services Canada Inc.

Hugues La Rue, for the appellant GMAC Leaseco Limited.

Martin P. Jutras, for the respondent Jean-François Lebel.

No one appeared for the respondent Raymond Chabot Inc.

English version of the judgment of the Court delivered by

LeBel J. —

I. Introduction

These two appeals raise a similar issue: whether a long-term lessor of an automobile may set up his or her right of ownership against the lessee's trustee in bankruptcy even though the lessor failed to publish his or her rights in the Register of personal and movable real rights ("RPMRR") within the time prescribed in the *Civil Code of Québec*, S.Q. 1991, c. 64. The appeals were heard at the same time as a third case, which concerned an instalment sale contract and in which the issue was whether the seller's reservation of ownership had effect against the buyer's trustee in bankruptcy (*Ouellet (Trustee of)*, [2004] 3 S.C.R. 348, 2004 SCC 64). Separate reasons for judgment were handed down in that case.

In both of these cases, the Quebec Superior Court and Court of Appeal held that the lessor's right of ownership could not be set up against the trustee unless it was published in a timely manner. For the

POURVOI contre un arrêt de la Cour d'appel du Québec, [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, [2003] J.Q. nº 2304 (QL), qui a confirmé un jugement de la Cour supérieure, [2001] R.J.Q. 2679, [2001] J.Q. nº 5074 (QL). Pourvoi accueilli.

POURVOI contre un arrêt de la Cour d'appel du Québec, [2003] J.Q. nº 2305 (QL), qui a confirmé un jugement de la Cour supérieure, [2001] J.Q. nº 3446 (QL). Pourvoi accueilli.

Yves Lacroix et *Gary Makila*, pour l'appelante Services DaimlerChrysler Canada Inc.

Hugues La Rue, pour l'appelante GMAC Location Limitée.

Martin P. Jutras, pour l'intimé Jean-François Lebel.

Personne n'a comparu pour l'intimée Raymond Chabot Inc.

Le jugement de la Cour a été rendu par

Le juge LeBel —

I. Introduction

Les deux pourvois soulèvent un problème semblable : le locateur à long terme d'un véhicule automobile peut-il opposer son droit de propriété au syndic à la faillite du locataire, malgré son défaut de publier ses droits au Registre des droits personnels et réels mobiliers (« RDPRM ») dans le délai prescrit par le *Code civil du Québec*, L.Q. 1991, ch. 64? Ces appels ont été entendus en même temps qu'une troisième affaire qui porte sur un contrat de vente à tempérament et qui soulève la question de l'opposabilité de la réserve de propriété du vendeur au syndic à la faillite de l'acquéreur (*Ouellet (Syndic de)*, [2004] 3 R.C.S. 348, 2004 CSC 64). Des motifs distincts sont déposés dans ce dossier. 1

Dans les deux cas qui nous intéressent, la Cour supérieure et la Cour d'appel du Québec ont conclu que le droit de propriété du locateur n'était pas opposable au syndic, faute de publication en temps utile. 2

reasons that follow, I am of the opinion that the right of ownership justified the claim for the property in the trustee's hands and could be set up against the trustee. In my view, in light of the facts of these cases, the trustee cannot be considered a third party in relation to the appellants, who may lawfully exercise their rights to follow and rights of revendication as owners of the leased property. Consequently, I would allow both appeals and admit the appellants' claims.

II. Origin of the Cases

A. *DaimlerChrysler Services Canada Inc.*

3 In this case, Alfred Lefebvre leased a Dodge Dakota vehicle from an automobile dealership, Jules Baillot et Fils Ltée. The lease of a movable for a 36-month term was signed on April 19, 1999. On that same date, the dealer assigned the lease contract to the appellant, which now operates as DaimlerChrysler Services Canada Inc. ("DaimlerChrysler"). At the time the lease was signed, art. 1852 C.C.Q. had required since 1998 that rights arising out of leases of movables be published in the RPMRR. In this case, the rights were not published until November 24, 2000. That delay gave rise to this litigation.

4 Alfred Lefebvre made an assignment in bankruptcy on November 1, 2000, at a time when he was still the lessee of the Dodge Dakota, and the respondent Jean-François Lebel was appointed trustee. On November 24, 2000, in accordance with s. 81 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("B.I.A."), DaimlerChrysler sent the trustee a proof of claim so as to be put in possession of the vehicle, of which it was still the owner. As has been mentioned, DaimlerChrysler published its rights in the RPMRR that same day.

5 On December 5, 2000, the trustee notified DaimlerChrysler that he disputed its claim. According to him, the contract could not be set up against him because it had been published late. For that reason, he refused to deliver possession of the vehicle to DaimlerChrysler, which then filed a motion for appeal against this decision in the Quebec

Pour les raisons que j'expose plus loin, je suis d'opinion que ce droit de propriété justifie la revendication entre les mains du syndic et lui est opposable. À mon avis, dans le contexte des faits de ces affaires, le syndic ne peut être considéré comme un tiers à l'égard des appelantes, qui peuvent exercer valablement les droits de suite et de revendication que leur confère leur qualité de propriétaires des biens loués. J'accueillerais en conséquence ces deux pourvois, afin de faire droit aux conclusions en revendication des appelantes.

II. L'origine des litiges

A. *Services DaimlerChrysler Canada Inc.*

Dans ce dossier, Alfred Lefebvre a loué un véhicule Dodge Dakota d'un concessionnaire automobile, la compagnie Jules Baillot et Fils Ltée. Le bail mobilier d'une durée de 36 mois est intervenu le 19 avril 1999. À la même date, le concessionnaire a cédé le contrat de bail à l'appelante qui est maintenant connue sous le nom de Services DaimlerChrysler Canada Inc. (« DaimlerChrysler »). Au moment de la conclusion du bail, l'art. 1852 C.c.Q. exigeait depuis 1998 la publication au RDPRM des droits résultant des baux mobiliers. Cette publication n'a été faite que le 24 novembre 2000. Ce retard se trouve à l'origine du présent litige.

En effet, Alfred Lefebvre fait cession de ses biens le 1er novembre 2000, alors qu'il est toujours locataire du véhicule Dodge Dakota et l'intimé, Jean-François Lebel, est nommé syndic. Le 24 novembre 2000, DaimlerChrysler lui transmet une preuve de réclamation, selon l'art. 81 de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« L.F.I. »), afin d'être mise en possession du véhicule dont elle demeure propriétaire. Le même jour, elle publie ses droits au RDPRM, tel qu'indiqué plus haut.

Le 5 décembre 2000, le syndic informe DaimlerChrysler qu'il conteste sa réclamation. Selon lui, le contrat lui est inopposable, parce que publié tardivement. En conséquence, il refuse de remettre le véhicule à DaimlerChrysler. Celle-ci dépose alors devant la Cour supérieure du Québec une requête en appel de cette décision. Dans cette procédure,

Superior Court. In that proceeding, DaimlerChrysler asked the court to recognize that its right of ownership was valid and could be set up against the trustee.

B. *GMAC Leaseco Limited*

In this case, Martin Tremblay leased a Chevrolet Cavalier automobile from an automobile dealership, Marlin Chevrolet-Oldsmobile Inc., for a 36-month term on September 28, 1998. That same day, the dealer assigned the contract to the appellant, GMAC Leaseco Limited ("GMAC"). The rights arising out of the lease were not published until January 9, 2001. On December 13, 2000, the lessee received a notice of repossession pursuant to s. 150.14 of the *Consumer Protection Act*, R.S.Q., c. P-40.1. On December 14, 2000, Mr. Tremblay went bankrupt. The respondent, Raymond Chabot Inc., was appointed trustee in bankruptcy. On December 15, 2000, GMAC sent the trustee a proof of claim pursuant to s. 81 B.I.A. and requested that it be put in possession of the vehicle.

The trustee responded by giving notice that it disputed the claim on the ground that GMAC's rights could not be set up against it because they had not been published in the RPMRR in a timely manner. On January 17, 2001, GMAC filed a motion for appeal in the Superior Court with a view to having its rights of ownership in the vehicle recognized and to repossessing it. During the course of this appeal, the parties agreed to sell the vehicle and place the proceeds in escrow.

III. Judicial History

A. *Superior Court*

(1) *DaimlerChrysler*

Trudel J. heard DaimlerChrysler's motion for appeal. She first conceded DaimlerChrysler's point that a lessor's right of ownership is not, strictly speaking, a right resulting from the lease. The principal rights are the lessor's right to receive lease payments and the lessee's right to use the vehicle. However, relying on *Giffen (Re)*, [1998] 1 S.C.R. 91, a case whose principles she felt were applicable

elle demande que soient reconnues la validité de son droit de propriété et son opposabilité au syndic.

B. *GMAC Location Limitée*

Dans cette affaire, le 28 septembre 1998, Martin Tremblay loue une automobile de marque Cavalier d'un concessionnaire automobile, Marlin Chevrolet-Oldsmobile Inc., pour un terme de 36 mois. Le même jour, le concessionnaire cède le contrat à l'appelante, GMAC Location Limitée (« GMAC »). La publication des droits créés par ce bail n'a lieu que le 9 janvier 2001. Le 13 décembre 2000, le locataire reçoit un avis de reprise de possession suivant l'art. 150.14 de la *Loi sur la protection du consommateur*, L.R.Q., ch. P-40.1. Le 14 décembre 2000, M. Tremblay fait faillite. L'intimée, Raymond Chabot Inc., est nommée syndic. Le 15 décembre 2000, GMAC lui transmet une preuve de réclamation suivant l'art. 81 L.F.I. et demande à être mise en possession du véhicule. 6

Invoquant le défaut de publication en temps utile au RDPRM, le syndic réplique par un avis de contestation de la preuve de réclamation, dans lequel il prétend que les droits de GMAC ne lui sont pas opposables. Le 17 janvier 2001, GMAC signifie une requête en appel devant la Cour supérieure, en vue de faire reconnaître ses droits de propriétaire du véhicule et d'en reprendre possession. Pendant le cours de cet appel, les parties s'entendent pour faire vendre le véhicule et entiercer le produit de la vente. 7

III. Historique judiciaire

A. *Cour supérieure*

(1) *DaimlerChrysler*

La juge Trudel entend la requête en appel de DaimlerChrysler. Au départ, elle concède à celle-ci que le droit de propriété du locateur ne constitue pas à proprement parler un droit résultant du bail. Les principaux droits créés sont le droit du locateur de recevoir le loyer et celui du locataire d'utiliser le véhicule. Toutefois, s'appuyant sur l'arrêt *Giffen (Re)*, [1998] 1 R.C.S. 91, dont elle estime les 8

in Quebec law, she expressed the opinion that, as a result of the rules respecting the publication of rights in Quebec and of the requirement now imposed on lessors to publish rights arising out of a long-term lease of a motor vehicle published in the RPMRR, an unpublished lease cannot be set up against the lessee's trustee in bankruptcy. The right to repossess the property in the event of bankruptcy — which is defined as a default under the lease — must be treated as a right resulting from the contract of lease. This right is governed by art. 1852 C.C.Q. A failure to publish it therefore permits the trustee both to refuse to deliver possession of the property to its owner and to dispose of it for the benefit of the estate of the bankrupt. Trudel J. accordingly dismissed the appellant's motion: [2001] R.J.Q. 2679.

(2) *GMAC*

9 GMAC was no more successful in the Superior Court than DaimlerChrysler had been. Boisvert J. did recognize that GMAC's right of ownership did not arise out of the contract of lease. However, relying on *Giffen*, he held that, since the coming into force of art. 1852 C.C.Q., a right of revendication can no longer be set up against a trustee in bankruptcy where rights resulting from a lease have not been published within the prescribed time limits. Boisvert J. therefore dismissed GMAC's motion for appeal, as GMAC had not published its rights in a timely manner: [2001] Q.J. No. 3446 (QL).

B. *Quebec Court of Appeal (Beauregard, Dussault and Thibault JJ.A.)*

10 The appeals of DaimlerChrysler and GMAC were heard by the same panel of the Quebec Court of Appeal. The Court of Appeal delivered common reasons for judgment in the two cases; the majority rejected the arguments of the property owners, holding that their rights could not be set up against the trustees in bankruptcy: [2003] R.J.Q. 819, 229 D.L.R. (4th) 697, and [2003] Q.J. No. 2305 (QL). Thibault J.A. wrote the principal opinion, and Dussault J.A. concurred in it in separate reasons. Both of them held that the appellants' appeals should be dismissed. Beauregard J.A. wrote dissenting reasons in which he held that the lessors' rights of ownership could be set up against the trustees even though

principes applicables en droit québécois, elle exprime l'opinion que les règles relatives à la publicité des droits au Québec et l'obligation désormais faite au locateur de publier au RDPRM les droits résultant du bail à long terme d'un véhicule automobile rendent le bail non publié inopposable au syndic à la faillite du locataire. En effet, le droit à la reprise de possession en cas de faillite — définie comme une situation de défaut au bail — doit être traité comme un droit résultant du contrat de location. Ce droit est visé par l'art. 1852 C.c.Q. Le défaut de publication permet donc au syndic de refuser de remettre le bien à son propriétaire et lui permet d'en disposer au profit de la faillite. La juge Trudel rejette donc la requête de l'appelante : [2001] R.J.Q. 2679.

(2) *GMAC*

GMAC ne réussit pas mieux que DaimlerChrysler devant la Cour supérieure. Le juge Boisvert reconnaît certes que le droit de propriété de GMAC ne résulte pas du contrat de location. Cependant, s'appuyant sur l'arrêt *Giffen*, il conclut que, depuis l'entrée en vigueur de l'art. 1852 C.c.Q., le droit de revendication ne peut plus être opposé au syndic de faillite lorsque la publication des droits résultant du bail n'a pas été faite dans les délais prévus. Le juge Boisvert rejette donc la requête en appel de GMAC, puisqu'elle n'a pas publié ses droits en temps utile : [2001] J.Q. nº 3446 (QL).

B. *Cour d'appel du Québec (les juges Beauregard, Dussault et Thibault)*

Une même formation de la Cour d'appel du Québec a entendu les appels de DaimlerChrysler et de GMAC. Dans ces deux dossiers, la Cour d'appel a déposé des motifs communs et conclu, à la majorité, au rejet des prétentions des propriétaires des biens, déclarant leurs droits inopposables au syndic de faillite : [2003] R.J.Q. 819 et [2003] J.Q. nº 2305 (QL). La juge Thibault a rédigé l'opinion principale, à laquelle le juge Dussault a concouru dans des motifs distincts. Ils ont tous deux conclu au rejet des pourvois des appelantes. Le juge Beauregard a rédigé des motifs dissidents qui reconnaissent l'opposabilité du droit de propriété du locateur au syndic, en dépit du défaut de

the rights resulting from the leases of movables in issue had not been published.

The majority opinions endorsed a line of authority established by the Quebec Court of Appeal in *Massouris (Syndic de)*, [2002] R.J.Q. 901, and *Mervis (Syndic de)*, [2002] R.J.Q. 2268, which addressed the effect of the failure to publish a contract of lease or a contract of sale with a reservation of ownership in respect of movable property on the possibility of setting up a right of ownership against a trustee. These cases decided that trustees had the status of third persons in relation to property owners.

Thibault J.A. conceded that the classic principles of civil law recognize the right of the owner of a movable to revendicate it against its possessor without further formalities. However, she relied on *Massouris* and *Mervis* to conclude that, where long-term leases and instalment sales involving motor vehicles are concerned, the Quebec legislature intended to change these traditional rules. In these situations, to prevent the creation of hidden securities, the legislature imposed a publication requirement and it intended to treat as a security the reservation of ownership that was in its opinion provided for in the lease. In the case of long-term leases of motor vehicles, art. 1852 C.C.Q. clearly entrenches this new principle, which the courts must apply. The trustee, who stands in the legal position of a third person for the purposes of art. 1852 C.C.Q., may therefore, on behalf of all the creditors, challenge the security the owner-creditor attempted to create for him or herself. Consequently, in Thibault J.A.'s opinion, the appellants could not exercise their rights of revendication against the trustees in bankruptcy of their lessees. Dussault J.A. reached the same conclusion. In his view, the legislature had implicitly equated a reservation of ownership under a lease or an instalment sale contract with a security.

Beauregard J.A. found himself in fundamental disagreement with his learned colleagues' reasons. He began by asserting the view that the cases at bar could be distinguished from *Giffen*. Unlike the *Civil Code of Québec*, the British Columbia

publication des droits résultant des baux mobiliers en cause.

11 Les opinions des juges majoritaires confirment un courant de jurisprudence qui s'est établi à la Cour d'appel du Québec, depuis les arrêts *Massouris (Syndic de)*, [2002] R.J.Q. 901, et *Mervis (Syndic de)*, [2002] R.J.Q. 2268, qui traitent de l'effet du défaut de publication des contrats de location ou des contrats de vente avec réserve de propriété relatifs à des biens mobiliers sur l'opposabilité du droit de propriété au syndic et qui lui reconnaissent le statut de tiers à l'égard du propriétaire des biens.

12 La juge Thibault admet que les règles classiques du droit civil reconnaissent le droit du propriétaire d'un bien meuble de le revendiquer à son possesseur, sans plus de formalités. Toutefois, dans le cas de la location à long terme ou des ventes à tempérament de véhicules routiers, elle s'appuie sur les arrêts *Massouris* et *Mervis*, pour conclure que le législateur québécois a voulu modifier ces règles traditionnelles. Dans ces cas, pour éviter la constitution de sûretés occultes, il a imposé une obligation de publication et il a voulu traiter la réserve de propriété stipulée, à son avis, dans le bail comme une sûreté. Quant aux baux de véhicules à long terme, le texte de l'art. 1852 C.c.Q. édicte clairement ce nouveau principe auquel les tribunaux doivent donner effet. Le syndic, placé dans la position juridique d'un tiers pour l'application de l'art. 1852 C.c.Q., peut donc contester, au nom de l'ensemble des créanciers, la garantie que voulait se réserver le créancier propriétaire. En conséquence, à son avis, les appelantes ne peuvent exercer leur droit de revendication auprès des syndics à la faillite de leurs locataires. Le juge Dussault conclut de la même façon. Selon lui, la réserve de propriété, en vertu d'un bail ou d'un contrat de vente à tempérament, aurait été assimilée implicitement à une sûreté par le législateur.

13 L'opinion du juge Beauregard exprime un désaccord fondamental avec les motifs de ses collègues. À son avis, d'abord, des distinctions s'imposent avec l'arrêt *Giffen*. Contrairement au *Code civil du Québec*, la législation de la Colombie-Britannique

legislation provided that the lease of a vehicle for a term of over one year was equivalent to a security interest and that if it were not published, it had to be treated as an unperfected security interest. In Beauregard J.A.'s opinion, the provisions relating to the publication of long-term leases and instalment sales have not changed the basic principles of civil law or, more specifically, the essential difference between a right of ownership and a security. A right of ownership need not be published. Although a right of ownership cannot be set up against certain subsequent acquirers identified in the *Civil Code of Québec*, the trustee in bankruptcy is not one of them. Bankruptcy does not confer any more rights on the trustee against the owner of the property than the bankrupt had, and the trustee cannot contest the appellants' claim. Beauregard J.A. would have allowed the appeals and recognized the appellants' rights.

prévoyait en effet que le bail d'un véhicule d'une durée de plus d'un an était assimilé à une sûreté et, qu'en cas de non-publication, il devait être traité comme une sûreté imparfaite. D'après lui, les dispositions relatives à la publication des baux à long terme et des ventes à tempérament ne modifient pas les principes fondamentaux du droit civil et, en particulier, la distinction essentielle entre le droit de propriété, d'une part, et les sûretés, d'autre part. Le droit de propriété n'a pas à être publié. S'il n'est pas opposable à certains tiers acquéreurs identifiés par le *Code civil du Québec*, le syndic de faillite n'est pas l'un d'eux. La faillite ne lui confère pas plus de droits à l'égard du propriétaire du bien que le failli n'en possédait et il ne peut s'opposer à la revendication par les appelantes, donc le juge Beauregard aurait accueilli les pourvois et reconnu les droits.

14 The appellants were then given leave to appeal to this Court. In the case of *GMAC*, the respondent trustee did not take part in the proceedings in this Court but left the matter up to the Court. In the case of *DaimlerChrysler*, the respondent actively contested the appeal in all respects.

Par la suite, les appelantes ont été autorisées à se pourvoir devant notre Cour. Dans l'affaire *GMAC*, le syndic intimé n'a pas participé au débat devant notre Cour, s'en remettant à la justice. Dans le dossier *DaimlerChrysler*, l'intimé a contesté activement l'appel sous tous ses aspects.

IV. Relevant Legislative Provisions

IV. Dispositions législatives pertinentes

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

1852. The rights resulting from the lease may be published.

Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property determined by regulation, or of any movable property required for the service or operation of an enterprise, subject, in the latter case, to regulatory exclusions; effect of such rights against third persons operates from the date of the lease provided they are published within fifteen days. A lease with a term of one year or less is deemed to have a term of more than one year if, by the operation of a renewal clause or other covenant to the same effect, the term of the lease may be increased to more than one year.

The transfer of rights under a lease requires or is open to publication, according to whether the rights themselves require or are open to publication.

Code civil du Québec, L.Q. 1991, ch. 64

1852. Les droits résultant du bail peuvent être publiés.

Sont toutefois soumis à la publicité les droits résultant du bail d'une durée de plus d'un an portant sur un véhicule routier ou un autre bien meuble déterminés par règlement, ou sur tout bien meuble requis pour le service ou l'exploitation d'une entreprise, sous réserve, en ce dernier cas, des exclusions prévues par règlement; l'opposabilité de ces droits est acquise à compter du bail s'ils sont publiés dans les quinze jours. Le bail qui prévoit une période de location d'un an ou moins est réputé d'une durée de plus d'un an lorsque, par l'effet d'une clause de renouvellement, de reconduction ou d'une autre convention de même effet, cette période peut être portée à plus d'un an.

La cession des droits résultant du bail est admise ou soumise à la publicité, selon que ces droits sont eux-mêmes admis ou soumis à la publicité.

2941. Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.

Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

V. Analysis

A. *Issues*

These cases raise issues relating to the interplay between Quebec civil law and federal bankruptcy and insolvency legislation. It will be necessary to review the legal characterization of certain movable real rights created under the *Civil Code of Québec* and the role and powers of trustees in bankruptcy in the exercise of those rights. This part of the analysis requires that we revisit the interpretation of the provisions of the *Civil Code of Québec*, art. 1852 C.C.Q. in particular, to determine whether the trustee may be considered a third person in relation to the lessor for the purposes of that provision. To do this, we will first consider the nature of the rights in issue and the scope and effect of the requirement to publish them in the RPMRR. Next, we will review the status of the trustee to determine whether the trustee may set up the failure to publish the rights against the lessor of the movable property. In short, it must be asked whether a long-term lessor of a motor vehicle has rights equivalent to a security and whether those rights must be published. It must then be asked whether the trustee is in the position of a third person and whether he or she may rely on the failure to publish the rights to defeat the claim for the property.

B. *Submissions of the Parties*

The appellants adopted a common position in these appeals. Their arguments can be summed up in a few basic propositions. The first is that the signing of a long-term lease does not reduce the lessor's right of ownership to a simple security. The lessor's right remains one of ownership, not one resulting from the lease within the meaning of art. 1852 C.C.Q. This right is therefore not subject to the publication requirement, as only rights resulting from the lease must be published. A failure to

2941. La publicité des droits les rend opposables aux tiers, établit leur rang et, lorsque la loi le prévoit, leur donne effet.

Entre les parties, les droits produisent leurs effets, encore qu'ils ne soient pas publiés, sauf disposition expresse de la loi.

V. Analyse

A. *Les questions en litige*

Les dossiers que nous étudions soulèvent des problèmes d'interaction entre le droit civil québécois et la législation fédérale sur la faillite et l'insolvabilité. Il nous faut examiner la qualification juridique de certains droits réels mobiliers créés en vertu du *Code civil du Québec* ainsi que le rôle et les pouvoirs du syndic de faillite à l'égard de leur exercice. Cette partie de l'analyse nous oblige à revenir sur l'interprétation des dispositions du *Code civil du Québec*, notamment de l'art. 1852 C.c.Q., pour déterminer si le syndic peut être considéré comme un tiers à l'égard du locateur pour l'application de cette disposition. Dans ce contexte, on examinera d'abord la nature des droits en cause ainsi que l'étendue et l'effet de l'obligation de publication au RDPRM. Ensuite, on passera à l'étude de la position du syndic, pour déterminer s'il peut opposer le défaut de publication des droits au locateur des biens mobiliers. En somme, le locateur à long terme de véhicules automobiles détient-il des droits assimilables à une sûreté? Ceux-ci doivent-ils être publiés? Le syndic se trouve-t-il dans la situation d'un tiers et peut-il lui opposer le défaut de publication de ses droits pour faire échec à la revendication du bien? 16

B. *Les prétentions des parties*

Les appelantes défendent une position commune dans ces pourvois. Leurs moyens se résument en quelques propositions. Tout d'abord, la conclusion d'un contrat de location à long terme ne réduit pas le droit de propriété du locateur à une simple sûreté. Le droit du locateur demeure un droit de propriété, qui ne résulte pas du bail, au sens de l'art. 1852 C.c.Q. Ce droit de propriété n'est donc pas assujetti à l'obligation de publication, puisque seuls les droits résultant du bail doivent être publiés. Le défaut de 17

publish bars claims against third persons only. Owing to the nature of their role with respect to the property of bankrupts and the nature of their seisin under the *Bankruptcy and Insolvency Act*, trustees cannot be considered third persons in relation to lessors. A trustee has no more rights in the leased property than the bankrupt did, and this would also be true under art. 1749 C.C.Q. of property subject to a reservation of ownership as a result of an instalment sale. The failure to publish the lease does not effect a transfer of ownership, and the trustee cannot set up the failure to publish against the lessor's claim. In this context, *Giffen* cannot be said to apply. In that case, the British Columbia legislation provided that an unpublished automobile lease was not effective against a trustee or against creditors, as it treated the lease as a security interest, whereas Quebec's civil law does not attach such consequences to a failure to publish in relation to trustees in bankruptcy.

publication ne rend la revendication impossible qu'à l'égard des tiers. En raison de la nature de son rôle à l'égard des biens du failli et de la nature de sa saisine en vertu de la *Loi sur la faillite et l'insolvabilité*, le syndic ne peut être considéré comme un tiers vis-à-vis le bailleur. Il n'a pas plus de droits que le failli sur le bien loué, comme il n'en aurait d'ailleurs pas plus en vertu de l'art. 1749 C.c.Q. sur le bien qui fait l'objet d'une réserve de propriété, à la suite d'une vente à tempérament. Le défaut de publication du bail n'opère pas un transfert de propriété et le syndic ne peut opposer le défaut de publication à la revendication du locateur. Dans ce contexte, on ne peut considérer que l'arrêt *Giffen* trouve application. En effet, dans cette affaire, la législation de la Colombie-Britannique prévoyait l'inopposabilité au syndic ou aux créanciers du bail de véhicule automobile non publié, en traitant ce bail comme une sûreté, alors que le droit civil du Québec n'attache pas de telles conséquences au défaut de publication à l'égard du syndic de faillite.

18 According to the respondent in the *Daimler-Chrysler* appeal, the principles in *Giffen* do in fact apply. As was the case in British Columbia, the Quebec legislature has imposed publication as a necessary condition for setting up rights against third persons, including trustees in bankruptcy of lessees. In the respondent's opinion, the Court of Appeal's decision to equate a lease and the rights it recognizes or establishes with a security subject to publication is in keeping with the requirements of commercial life and with the legislature's intent. The legislature has made it clear that publication is required to set up a lease against third parties.

Selon l'intimé dans le dossier *Daimler-Chrysler*, les principes qui se dégagent de l'arrêt *Giffen* s'appliquent. Comme en Colombie-Britannique, le législateur québécois a imposé la publication comme une condition nécessaire de l'opposabilité des droits aux tiers, parmi lesquels se trouve le syndic à la faillite du locataire. À son avis, la décision prise par la Cour d'appel d'assimiler le bail et les droits qu'il reconnaît ou crée à une sûreté assujettie à la publication correspond aux exigences de la vie commerciale et à l'intention du législateur. Celui-ci édicte clairement l'obligation de publication comme condition de l'opposabilité du bail aux tiers.

C. *The Legislative Context: Reform of the Law of Security at the Time of the Coming into Force of the Civil Code of Québec*

C. *Le contexte législatif : la réforme du droit des sûretés lors de l'entrée en vigueur du Code civil du Québec*

19 Before discussing the arguments advanced by the parties, we must make a few brief comments on the structure of the law of security in Quebec civil law following the coming into force of the *Civil Code of Québec* in 1994. At the same time, a review of some of the fundamental concepts of property law might be useful for the purposes of defining the nature of

La discussion des thèses défendues par les parties exige au préalable de brèves remarques sur l'aménagement du droit des sûretés en droit civil québécois, à la suite de l'entrée en vigueur du *Code civil du Québec*, en 1994. En parallèle, un rappel de quelques notions fondamentales de droit des biens paraît utile pour définir la nature des problèmes en cause,

the issues, correctly characterizing the parties' rights and assessing the validity of the solutions proposed for resolving the difficulties these cases raise.

The coming into force of the *Civil Code of Québec* marked an important step in the evolution of the Quebec law of real security (L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2nd ed. 2001)). The legislature reorganized this field of civil law, structuring it primarily around a single type of security, the hypothec, which applies to both movable and immovable property, although it also recognized, in art. 2647 C.C.Q., another type of right, the prior claim, which protects certain kinds of claims. (See Payette, *supra*, at pp. 2-3 and 59.) This solution was adopted in preference to the presumption of hypothec recommended by the Civil Code Revision Office, which would have grouped all forms of security, including "ownership securities" (*sûretés-propriétés*), under a single concept: the hypothec (*Report on the Québec Civil Code* (1978), vol. II, t. 1, at pp. 427-31). That proposal had attracted strong objections from many critics. (See Payette, *supra*, at pp. 60-64; R. A. Macdonald, "Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, 'la présomption d'hypothèque' et le principe de 'l'essence de l'opération'", in *Mélanges Germain Brière* (1993), 527; see also *Commentaires du ministre de la Justice* (1993), t. II, at p. 1654.) Thus, instead of agreeing to organize the law of real security around the concept of presumption of hypothec, the Quebec legislature set up a simplified, unified security system that nevertheless maintained the fundamental distinction between the legal concepts of security and ownership in relation to the creation and exercise of real securities.

This distinction between security and rights of ownership remains a fundamental element of the classification of real rights in property law in the *Civil Code of Québec*. The right of ownership, which is the fundamental real right that theoretically confers full legal control over property, can be distinguished from a security such as a hypothec, which is an incidental real right. One author characterizes incidental real rights as "real rights of security"

qualifier correctement les droits des parties et apprécier la validité des solutions proposées pour résoudre les difficultés que posent ces dossiers.

L'entrée en vigueur du *Code civil du Québec* a marqué une étape importante dans l'évolution du droit des sûretés réelles du Québec (L. Payette, *Les sûretés réelles dans le Code civil du Québec* (2e éd. 2001)). Le législateur a alors réorganisé cette partie du droit civil. Il l'a désormais structurée principalement autour d'un type de sûreté, l'hypothèque, applicable aux biens mobiliers ou immobiliers, bien qu'il ait aussi reconnu un autre type de droit, la priorité, pour protéger certains types de créances, comme le prévoit l'art. 2647 C.c.Q. (Voir Payette, *op. cit.*, p. 2-3 et 59.) Cette solution écartait la présomption d'hypothèque recommandée par l'Office de révision du Code civil qui aurait englobé toutes les formes de sûretés, y compris les « sûretés-propriétés » dans le seul concept d'hypothèque (*Rapport sur le Code civil du Québec* (1978), vol. II, t. 1, p. 431-435). Cette proposition avait en effet soulevé de fortes objections et de nombreuses critiques. (Voir Payette, *op. cit.*, p. 60-64; R. A. Macdonald, « Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, "la présomption d'hypothèque" et le principe de "l'essence de l'opération" », dans *Mélanges Germain Brière* (1993), 527; voir aussi *Commentaires du ministre de la Justice* (1993), t. II, p. 1654.) Ainsi, au lieu d'accepter d'organiser le droit des sûretés réelles autour de ce concept de présomption d'hypothèque, le législateur québécois a mis en place un régime simplifié et unifié de sûretés, qui maintenait toutefois la distinction fondamentale entre les notions de sûreté et de propriété dans le domaine de la constitution et de la mise en œuvre des garanties réelles.

Cette distinction entre sûreté et droit de propriété constitue d'ailleurs toujours un élément fondamental de la classification des droits réels en droit des biens dans le *Code civil du Québec*. Droit réel fondamental, conférant en principe la maîtrise juridique complète d'un bien, le droit de propriété se distingue des droits réels accessoires que sont les sûretés telles que l'hypothèque. Un auteur qualifie ces dernières de « droits réels de garantie », portant sur la valeur

(*droits réels de garantie*) that relate to the monetary value of a thing rather than to the thing itself and are designed to complement another right by securing it or guaranteeing the payment of a claim (P.-C. Lafond, *Précis de droit des biens* (1999), at p. 192).

22 Together with the reform of the law of security, the codification of 1994 brought significant changes to the system for publishing rights. At the same time as it substantially revised the rules governing land registration, the legislation provided for the creation of the RPMRR. This register was established to remedy some serious flaws in the former system, which had to deal with a wide variety of types of security whose true nature was often not readily apparent because of the absence of a general publication mechanism. This meant that transactions involving many classes of movable property were risky from a legal standpoint. A fundamental goal in setting up this institution was to make public the types of security in respect of movable property that were created under the rules of the new *Civil Code of Québec*. (See D.-C. Lamontagne, in collaboration with P. Duchaine, *La publicité des droits* (3rd ed. 2001), at p. 301.) As in the case of land registration, the purpose of publication, as provided for in art. 2941 C.C.Q., is not to effect transfers of ownership but, generally speaking, to allow rights that may or must be published to be set up against third persons. (See Lamontagne and Duchaine, *supra*, at pp. 31-32.)

23 When the *Civil Code of Québec* came into force in 1994, it did not yet require that rights resulting from long-term leases of road vehicles be published in the RPMRR. This requirement was not introduced until 1998, when art. 1852 C.C.Q. was amended by s. 8 of the *Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery*, S.Q. 1998, c. 5. This new provision required that such rights be published from then on as a condition for setting them up against third persons so as to facilitate trading in movable property. It applied to leases already in existence when it came into force. Sections 6 and 7 of this amending Act also established publication requirements in respect of leasing and of

pécuniaire plus que sur la matérialité d'une chose, destinés à compléter un autre droit, en le garantissant ou en assurant le paiement d'une créance (P.-C. Lafond, *Précis de droit des biens* (1999), p. 192).

Dans ce contexte, parallèlement à la réforme du droit des sûretés, la codification de 1994 apportait des modifications importantes au régime de la publicité des droits. Tout en révisant substantiellement les règles gouvernant la publicité foncière, le législateur prévoyait la création du RDPRM. L'établissement de ce registre voulait porter remède à des vices sérieux du régime antérieur, marqué par la diversité et le caractère souvent occulte des sûretés, à cause de l'absence d'un mécanisme général de publication, qui le rendait dangereux pour la sécurité juridique des transactions relatives à de nombreuses catégories de biens meubles. Un objectif fondamental de la mise sur pied de cette institution était de rendre publiques les sûretés créées sur des biens meubles selon les règles du nouveau *Code civil du Québec*. (Voir D.-C. Lamontagne, avec la collaboration de P. Duchaine, *La publicité des droits* (3e éd. 2001), p. 301.) Comme dans le cas de la publicité foncière, ainsi que le prévoit l'art. 2941 C.c.Q., la publication ne vise pas à effectuer des transferts de propriété, mais, en règle générale, à rendre les droits visés par la faculté ou l'obligation de publication opposables aux tiers. (Voir Lamontagne et Duchaine, *op. cit.*, p. 31-32.)

Lors de son entrée en vigueur en 1994, le *Code civil du Québec* n'imposait pas encore l'obligation de publier au RDPRM les droits découlant des baux à long terme de véhicules routiers. Cette obligation n'a été introduite qu'en 1998, par une modification apportée à l'art. 1852 C.c.Q., par l'art. 8 de la *Loi modifiant le Code civil et d'autres dispositions législatives relativement à la publicité des droits personnels et réels mobiliers et à la constitution d'hypothèques mobilières sans dépossession*, L.Q. 1998, ch. 5. Cette nouvelle disposition exigeait désormais la publication de ces droits comme condition de leur opposabilité aux tiers, afin de faciliter le commerce des biens meubles. Elle s'appliquait à l'égard des baux en cours lors de son entrée en vigueur. Les articles 6 et 7 de la même loi instituaient aussi des

reservations of ownership under instalment sale contracts by amending arts. 1752 and 1847 C.C.Q. A transitional provision, s. 24 of the Act, provided for a time limit of one year from its coming into force for publication of the rights in question.

obligations de publication à l'égard du crédit-bail et des réserves de propriété prévues par les contrats de vente à tempérament, en modifiant les art. 1752 et 1847 C.c.Q. Une disposition transitoire, à l'art. 24 de la loi, accordait un délai d'un an à partir de son entrée en vigueur, pour la publication des droits visés.

D. *The Legal Position of Lessees in Relation to Lessors*

The contract in issue in the case at bar is a lease. According to the fundamental rules applicable to leases, such a contract does not effect a conveyance of ownership between the lessee and the lessor. It merely gives the lessee the status of a holder and user by precarious title, which means that the property must be surrendered upon termination of the lease, as provided for in art. 1890 C.C.Q. The contracts in issue remain, by their very terms, leases, albeit long-term ones. Regardless of the nature of the legal relationships as described in these contracts, it must be determined whether they should be recharacterized in light of the wording of art. 1852 C.C.Q. and the requirement to publish imposed by it since 1998, to ensure that the rights arising out of them can be set up against third persons.

D. *La situation juridique du locataire à l'égard du locateur*

Le contrat examiné en l'espèce demeure un contrat de bail. Selon ses règles fondamentales, ce contrat n'est pas translatif de propriété entre le locataire et le locateur. Il ne laisse au preneur qu'un statut de détenteur et d'utilisateur à titre précaire, en vertu duquel il doit remettre le bien à la fin du bail, comme le prévoit l'art. 1890 C.c.Q. Les contrats sous étude, par leurs termes mêmes, demeurent des baux, bien qu'ils soient conclus à long terme. En dépit de la nature des rapports juridiques que ces contrats énoncent, faut-il les requalifier, en raison du libellé de l'art. 1852 C.c.Q. et de l'obligation de publication qu'il édicte depuis 1998, pour assurer que les droits qu'ils établissent soient opposables aux tiers? 24

The majority of the Court of Appeal held that a recharacterization was necessary and, consequently, that the failure to publish could be relied on by the trustee, who had to be considered a third person for the purposes of art. 1852 C.C.Q. However, as Beauregard J.A. noted in his dissenting opinion, this position tends to confuse the concepts of ownership and security. This problem lies at the very heart of the solutions adopted by the Quebec Court of Appeal since *Massouris* to resolve conflicts that have arisen in the decisions of Quebec's trial courts with respect to long-term leases, leasing or instalment sales of vehicles, the related publication requirements and the rights of trustees in bankruptcy. In line with the very clear positions that were adopted in *Massouris*, the decisions of the Court of Appeal have presumed that all legal transactions by means of which an automobile is placed at the disposal of a user are secured credit transactions. This analysis and this characterization have made it possible subsequently to treat

La majorité de la Cour d'appel a conclu que cette requalification s'imposait et qu'en conséquence, le défaut de publication pouvait être soulevé par le syndic, qui devait être considéré comme un tiers pour l'application de l'art. 1852 C.c.Q. Toutefois, comme l'a souligné le juge Beauregard dans sa dissidence, cette position tend à confondre les concepts de propriété et de sûreté. Cette difficulté se situe à la base même des solutions choisies par la Cour d'appel du Québec, depuis l'arrêt *Massouris*, pour régler les conflits survenus dans la jurisprudence des tribunaux de première instance au Québec au sujet des baux à long terme, du crédit-bail ou des ventes à tempérament de véhicules, des obligations de publication qui s'y rattachent et des droits des syndics de faillite. Conformément à des orientations adoptées très clairement dans l'arrêt *Massouris*, la jurisprudence de la Cour d'appel présume que toutes les opérations juridiques par lesquelles un véhicule automobile est mis à la disposition d'un utilisateur constituent des 25

the owner's rights as the rights of the holder of a simple security. When this security has not been perfected because of a failure to publish it in a timely manner, it cannot be set up against a trustee in bankruptcy, who is regarded as a third party in his or her capacity as the creditors' representative.

26 This interpretation seems to reintroduce into Quebec's law of real security a concept that was rejected by the legislature in the 1994 codification, namely the presumption of hypothec. It might also be thought that this approach stems from a desire to identify the essence of the transaction and recharacterize the transaction accordingly. From an economic standpoint, it is quite likely that the various methods used by automobile dealers — long-term leases, leasing and instalment sales — all have the same objective: finding a customer, obtaining for the customer the credit needed to complete the transaction and placing the vehicle at the customer's disposal while protecting the interests of the credit provider. However, before dismissing all the applicable legal categories, it is necessary to consider the content of the contracts and where they fit in the classes of contracts established by the *Civil Code of Québec* and used by the parties.

27 In the context of these transactions, we must be careful to disregard neither the fundamental categories of property law nor the nature of the rights arising out of the framework of the type of nominate contract entered into in respect of the property in issue, namely, in the case at bar, a lease. Contrary to the proposals of the Civil Code Revision Office, no provisions of the *Civil Code of Québec* transform the lessor's right of ownership into a hypothec or bar the lessor from trading in automobiles by means of the legal instrument of a lease under which he or she retains ownership of the property. Under such an agreement, the automobile remains in the lessor's patrimony and the lessee has only a right to use it in accordance with the lease and the applicable legislation. It is therefore necessary to analyse the legal situation based on the fact that

opérations de crédit assorties d'une sûreté. Cette analyse et cette qualification permettent par la suite de traiter les droits du propriétaire comme ceux du titulaire d'une simple sûreté. Lorsque celle-ci n'a pas été parfaite en raison de l'absence de publication en temps utile, ce vice la rend inopposable au syndic de faillite, considéré comme un tiers, en sa qualité de représentant des créanciers.

Cette interprétation tend à réintroduire dans le droit des sûretés réelles du Québec un concept rejeté par le législateur au moment de la codification de 1994, celui de la présomption d'hypothèque. On peut aussi penser que cette approche correspond à une volonté d'identifier l'essence de l'opération réalisée et de requalifier l'opération en conséquence. Au point de vue économique, il est fort probable que les différentes méthodes employées par les commerçants de véhicules moteurs — location à long terme, crédit-bail ou vente à tempérament — représentent toutes des techniques destinées à atteindre un même objectif : trouver un client, lui obtenir le crédit nécessaire à l'opération, mettre le véhicule à sa disposition, tout en protégeant l'intérêt du fournisseur de crédit. Cependant, avant de mettre de côté toutes les catégories juridiques pertinentes, encore faut-il s'arrêter à la teneur des contrats intervenus et à leur situation dans les classifications des contrats établies par le *Code civil du Québec* et utilisées par les parties.

Dans le contexte de ces transactions, il faut se garder de mettre de côté les catégories fondamentales du droit des biens et de négliger la nature des droits créés par le régime établi par le type de contrat nommé intervenu à l'égard des biens en question, en l'occurrence, le louage. Contrairement aux propositions de l'Office de révision du Code civil, aucune disposition du *Code civil du Québec* ne transforme le droit de propriété du bailleur en une hypothèque ni ne lui interdit de mettre un véhicule automobile dans le commerce, en employant l'instrument juridique du bail, qui lui laisse la propriété du bien. En vertu d'une telle convention, l'automobile demeure dans le patrimoine du locateur, le locataire n'ayant que le droit de l'utiliser conformément aux dispositions du bail et des lois applicables. Il faut alors analyser la situation juridique à partir du constat que

the lessor retains a right of ownership in the instant case, although the legislature may choose to adjust its effects in relation to third persons and trustees in bankruptcy. This raises the issue of the scope of the requirement to publish rights resulting from a lease on the right of ownership and the effectiveness of the right of ownership.

le bailleur conserve toujours en l'espèce un droit de propriété, dont le législateur peut toutefois choisir de moduler les effets à l'égard des tiers et des syndics de faillite. Cela soulève le problème de la portée de l'obligation de publier les droits résultant du bail sur le droit de propriété et l'efficacité de ce dernier.

E. *The Requirement to Publish Rights*

E. *L'obligation de publication des droits*

When considering the publication requirement, it is important to first take into account the basic principle underlying Quebec's system for publishing rights. As stated in art. 2941 C.C.Q., be it for security on movables or immovables, publication is not a mechanism for transferring rights of ownership. Even if they are not published, the rights subject to the publication requirement retain their effects between the parties unless the law specifically provides otherwise. The function of the requirement is to allow these rights to be set up against third persons and to establish their rank or give them effect as provided by law:

28 Dans l'étude de l'obligation de publication, il importe de tenir compte au départ du principe fondamental du régime de publicité des droits du Québec. Tel que l'énonce l'art. 2941 C.c.Q., dans le cas des sûretés mobilières aussi bien qu'immobilières, la publicité n'est pas une technique de transfert des droits de propriété. Même en l'absence de publication, les droits soumis à l'obligation de publication conservent leurs effets entre les parties, sauf disposition expresse de la loi. Sa fonction est de rendre ces droits opposables aux tiers et de déterminer leur rang ou de leur donner effet suivant les dispositions de la loi :

2941. Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.

Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise.

2941. La publicité des droits les rend opposables aux tiers, établit leur rang et, lorsque la loi le prévoit, leur donne effet.

Entre les parties, les droits produisent leurs effets, encore qu'ils ne soient pas publiés, sauf disposition expresse de la loi.

The lessor's right of ownership does not arise out of the lease. It could be said that the right of ownership is pre-existing in relation to the lease. However, the rules respecting the publication of rights alter its effects in relation to third persons. Publication of these rights is now mandatory if they are to be set up against third persons. A failure to satisfy the publication requirement may therefore result in effective transfers of ownership based on the legal appearance created by possession, making it impossible to claim property in the hands of third persons. It does not follow from these possible consequences of implementing the rights publication system that publication creates the lessor's right of ownership or that publication is necessary for this right to exist. Publication is needed only to protect the right as against third persons, which is the essence of the concept of setting up rights.

29 Le droit de propriété du locateur ne découle pas du bail. Il préexiste en quelque sorte à celui-ci. Cependant, les règles relatives à la publicité des droits modulent ses effets à l'égard des tiers. L'opposabilité de ces droits aux tiers dépend de leur publication, qui est devenue obligatoire. L'inexécution de l'obligation de publication peut alors entraîner effectivement des transferts de propriété fondés sur l'apparence juridique créée par la détention, en rendant impossible la revendication du bien entre les mains des tiers. De ces conséquences possibles de la mise en œuvre du régime de publicité des droits, on ne saurait déduire le principe que la publicité crée le droit de propriété du bailleur ni qu'elle soit nécessaire à son existence. Elle n'est requise que pour protéger ce droit à l'égard des tiers, ce qui est le propre de la notion d'opposabilité.

30 Of course, the legislature may play a more active role in the legal relationships of the parties or other interested persons by recharacterizing the rights established by contracts or giving a more radical scope to the consequences of the failure to publish. An example of legislative action of this sort is found in art. 1756 C.C.Q., which governs sales with a right of redemption. In this provision of the *Civil Code of Québec*, a right of redemption used to secure a loan is equated with a hypothec. The seller is deemed to be a borrower, and the acquirer, a hypothecary creditor. The acquirer exercises his or her rights in accordance with the rules respecting hypothecs. Another example of this can be found in the law of bankruptcy and insolvency. In amendments made to the *Bankruptcy and Insolvency Act*'s definition of "secured creditor" by the *Federal Law — Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, Parliament equated the rights of a seller under a conditional or instalment sale, or of an acquirer under a sale with a right of redemption, with the rights of a secured creditor (ss. 25 and 28). Thus, as a result of this Act, the rights in question are subject to the publication requirement. The right of ownership accordingly becomes a debt relationship protected by a security that must be published.

31 In the case of a long-term lease, nothing in the *Civil Code of Québec* or the *Bankruptcy and Insolvency Act* alters the nature of the lessor's right of ownership in the leased property or the resulting rights in relation to the lessee. The lessor retains his or her status and rights of ownership in relation to the lessee. The lessee remains a holder by precarious title against whom the lessor may exercise, *inter alia*, the right to take back the property upon termination of the lease, upon resiliation of the lease or in cases provided for in the contract or by law. It is now necessary to consider whether, in light of the status and duties attributed to the trustee following the initial bankruptcy event, the trustee can be regarded as a third person against whom the lessor of the motor vehicle may not set up his or her rights because of the failure to satisfy the publication requirement. This question once again raises the difficulties resulting from the ambiguities inherent in the trustee's status in the law of bankruptcy and insolvency and from the need to adapt federal insolvency law to

Certes, le législateur peut intervenir plus profondément dans les rapports juridiques des parties ou des intéressés, pour requalifier les droits établis par les contrats ou pour donner une portée plus radicale aux conséquences du défaut de publication. Un exemple d'une intervention législative de ce type se trouve à l'art. 1756 C.c.Q., sur les ventes à réméré. Dans cette disposition, le *Code civil du Québec* assimile la faculté de rachat destinée à garantir un prêt à une hypothèque. Le vendeur est ainsi réputé emprunteur et l'acquéreur, créancier hypothécaire. Celui-ci exerce ses droits en suivant les règles relatives aux hypothèques. On en trouve un autre exemple dans le droit de la faillite et de l'insolvabilité. Dans des modifications apportées à la définition du « créancier garanti » dans la *Loi sur la faillite et l'insolvabilité*, édictées par la *Loi d'harmonisation n° 1 du droit fédéral avec le droit civil*, L.C. 2001, ch. 4, le Parlement fédéral a assimilé les droits d'un vendeur en vertu d'un contrat de vente conditionnelle ou à tempérament, ou d'un acquéreur à réméré, à ceux d'un créancier garanti (art. 25 et 28). Cette loi les assujettit ainsi à l'obligation de publication. Le droit de propriété devient alors un rapport de créance, protégé par une sûreté assujettie à une obligation de publication.

Dans le cas du bail à long terme, on ne retrouve rien dans le *Code civil du Québec* ni dans la *Loi sur la faillite et l'insolvabilité* qui modifie la nature du droit de propriété du locateur sur la chose louée et les droits qui en découlent vis-à-vis le locataire. Il conserve son statut et ses droits de propriétaire à l'égard du locataire. Celui-ci reste un détenteur à titre précaire, à l'égard duquel le bailleur peut exercer, entre autres, son droit de reprendre le bien à la fin du bail, lors de sa résiliation ou dans les cas prévus par le contrat ou par la loi. Il faut maintenant examiner si le statut et les fonctions attribuées au syndic à la suite de l'ouverture d'une faillite permettent de le considérer comme un tiers habilité à soulever l'inopposabilité des droits du locateur du véhicule automobile, en raison de la violation de l'obligation de publication. Cette question soulève encore une fois les difficultés causées par les ambiguïtés du statut du syndic en droit de la faillite et de l'insolvabilité et par la nécessité d'adapter le droit fédéral de l'insolvabilité à deux systèmes juridiques

two modern legal systems that differ in their methods, their terminology and, in some instances, their basic classifications.

F. *The Position of the Trustee in Bankruptcy*

Following the logic of its characterization of the lessor's rights, the Quebec Court of Appeal equated trustees in bankruptcy with third persons and allowed the trustee to retain the property and dispose of it for the benefit of the bankrupt's creditors on the basis that the lessor's rights could not be set up against the trustee. This conclusion is based on an oversimplification of the multifaceted role of the trustee and the dual nature of his or her status at the time of the initial bankruptcy event, as well as of the nature of the assignment to the trustee of the bankrupt's property and the seisin the trustee consequently has of the property.

The terminology used in the *Bankruptcy and Insolvency Act* could lead a legal professional trained in the civil law to conclude too hastily that the assignment of property resulting from the bankruptcy constitutes a transfer of ownership to a third person. Section 71(2) B.I.A. provides that the bankrupt's property "shall . . . pass to and vest in the trustee". It would as a result be easy to believe that this is a case of alienation of property that, in a bankruptcy situation, would put the trustee in the position of a third person.

The legal content of the trustee's function is not easily defined. I am aware that the assignee concept was employed in judgments on which the Quebec courts have based their decisions for some time now, including the decision of Bernier J., as he then was, in *Civano Construction Inc. v. Crédit M.-G. Inc.*, [1962] C.S. 45. (See also *Kowalski v. Trust Général du Canada*, [1976] C.A. 93; *Poliquin v. Banque de Montréal*, [1998] R.L. 560 (C.A.), at p. 566; see also the comments of professors J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003), 37 *R.J.T.* 57.) Defining the precise nature of the seisin vested in the trustee has proven to be extremely difficult. Can it be regarded as a *sui generis* right of ownership, as fiduciary ownership or even as a case of administration of the property of others within the meaning of Title Seven

modernes, mais différents par leurs méthodes, leur vocabulaire et, parfois, leurs classifications fondamentales.

F. *La position du syndic de faillite*

32 Dans la logique de sa qualification des droits du locateur, la Cour d'appel du Québec a assimilé le syndic de faillite à un tiers et lui a permis de soulever une défense d'inopposabilité pour conserver le bien et en disposer au bénéfice des créanciers du débiteur. Cette conclusion repose sur une conception trop réductrice du rôle diversifié du syndic, de la dualité de ses statuts lors de l'ouverture de la faillite, ainsi que de la nature de la cession des biens du failli qui lui est faite et de la saisine qu'il en détient en conséquence.

33 Le vocabulaire utilisé par la *Loi sur la faillite et l'insolvabilité* invite un juriste de formation civiliste à conclure trop vite et à voir dans la cession que provoque la mise en faillite un transfert de propriété à un tiers. Le paragraphe 71(2) L.F.I. prévoit en effet que les biens du failli « doivent [. . .] passer et être dévolus au syndic ». On croit ainsi aisément se trouver devant un concept d'aliénation qui, dans le contexte d'une faillite, placerait le syndic dans la position d'un tiers.

34 Le contenu juridique de la fonction du syndic ne se laisse pas définir aisément. Je reconnais que le concept de cessionnaire a été employé dans des jugements qui inspirent depuis longtemps la jurisprudence des cours du Québec, notamment celui du juge Bernier, alors de la Cour supérieure, dans l'affaire *Civano Construction Inc. c. Crédit M.-G. Inc.*, [1962] C.S. 45. (Voir aussi *Kowalski c. Trust Général du Canada*, [1976] C.A. 93; *Poliquin c. Banque de Montréal*, [1998] R.L. 560 (C.A.), p. 566; voir également les commentaires des professeurs J. Auger et A. Bohémier, « Le statut du syndic » (2003), 37 *R.J.T.* 59.) On éprouve beaucoup de difficulté à qualifier exactement la nature de cette saisine dévolue au syndic. Se définit-elle comme un droit de propriété *sui generis*, une propriété fiduciaire, sinon un cas d'administration du bien d'autrui, au sens du

of Book Four of the *Civil Code of Québec*? (Auger and Bohémier, *supra*, at pp. 67 and 102-06)

35 The strict concept of ownership accounts poorly for the nature of the trustee's duties and the rights a trustee exercises over the bankrupt's property following the initial bankruptcy event. The trustee's rights are exercised only in relation to a patrimony whose content is legally defined in s. 67 B.I.A. This patrimony consists of only the property that could be liquidated for the benefit of the creditors. The trustee exercises certain statutory rights over this property that are in part similar to the rights of an owner. The trustee may dispose of the property of which he or she has seisin, but for a specific purpose, namely to pay the claims of the bankrupt's creditors rateably following the order of priority provided for in the *Bankruptcy and Insolvency Act*. In any cases, which are actually quite rare, in which there is a surplus following liquidation, the trustee may not retain the surplus but must return it to the bankrupt. The attribution and exercise of such powers do not correspond perfectly to alienation, so much so that some authors have expressed very strong criticism of the use of the assignee concept to describe the function of the trustee in bankruptcy (M. Cantin Cumyn, *Traité de droit civil: L'administration du bien d'autrui* (2000), at pp. 110-12).

36 At any rate, the use of the concept of *dévolution* (vesting) in the French version of s. 71(2) B.I.A. does not eliminate the distinction between the two aspects of the trustee's role following the initial bankruptcy event. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547, this Court clearly noted this distinction, which serves as a basis for characterizing the legal position of the trustee when exercising the powers and performing the obligations the law ascribes to trustees. Referring to the concept of representation to explain the trustee's twofold responsibility, de Grandpré J. stated that in his view the trustee is a representative of both the debtor and the creditors (p. 553). In order to liquidate the bankrupt's property as directed by the *Bankruptcy and Insolvency Act*, the trustee must take control of it. At this stage, the trustee is the bankrupt's successor or, in a broad sense, his or her representative. However, the trustee's juridical personality is not to be

titre septième du livre IV du *Code civil du Québec*? (Auger et Bohémier, *loc. cit.*, p. 69 et 102-107)

Le concept strict de propriété rend mal compte de la nature des fonctions du syndic et des droits qu'il exerce sur les biens à la suite de l'ouverture de la faillite. D'abord, ses droits ne s'exercent que par rapport à un patrimoine dont le contenu est défini légalement par l'art. 67 L.F.I. Il ne s'agit là que d'un ensemble de biens susceptibles de liquidation pour le bénéfice des créanciers. Sur ces biens, le syndic exerce des droits précisés par la loi, qui s'apparentent pour partie à ceux d'un propriétaire. En effet, il peut disposer des biens dont il a la saisine, mais pour une fin déterminée, c'est-à-dire acquitter les créances des créanciers du failli, au prorata, tout en respectant l'ordre des priorités reconnues par la *Loi sur la faillite et l'insolvabilité*. Enfin, dans l'hypothèse assez rare d'un surplus de liquidation, le syndic ne peut conserver celui-ci, mais doit le remettre au failli. L'attribution et l'exercice de tels pouvoirs ne correspondent pas complètement à un acte d'aliénation, à tel point d'ailleurs qu'on a pu voir apparaître dans la doctrine de fort vives critiques de l'utilisation de ce concept de cessionnaire pour décrire la fonction du syndic de faillite (M. Cantin Cumyn, *Traité de droit civil : L'administration du bien d'autrui* (2000), p. 110-112).

De toute manière, le recours à la notion de dévolution dans la version française du par. 71(2) L.F.I. n'élimine pas la distinction entre les deux aspects du rôle du syndic, à la suite de l'ouverture d'une faillite. Dans l'arrêt *Mercure c. A. Marquette & Fils Inc.*, [1977] 1 R.C.S. 547, notre Cour a clairement rappelé cette distinction, à partir de laquelle doit être qualifiée la position juridique du syndic dans l'exercice des pouvoirs que la loi lui accorde et l'exécution des obligations qu'elle lui impose. Faisant alors appel à la notion de représentation pour faire comprendre le double visage du rôle du syndic, le juge de Grandpré affirmait voir en lui à la fois le représentant du débiteur et celui des créanciers (p. 553). Pour liquider les biens du failli, comme le veut la *Loi sur la faillite et l'insolvabilité*, le syndic doit en prendre le contrôle. À cette étape, il succède au failli ou, en un sens large, le représente. Toutefois, sa personnalité juridique ne se confond pas avec celle du

confused with that of the debtor. In fact, as de Grandpré J. noted, the law recognizes that the trustee has the right to sue the debtor if necessary (p. 553). This power illustrates the importance of the other aspect of the trustee's functions, that of representing the creditors in the management and liquidation of the bankrupt's property. The trustee's legal position is therefore more akin to that of a third person in relation to the debtor. On the one hand, the trustee is subrogated to the bankrupt's rights in the exercise of his or her powers to hold and dispose of property of which he or she has been granted seisin. On the other hand, the law treats the trustee as the creditors' legal mandatary who will liquidate the property entrusted to him or her for the creditors' benefit. The dual nature of the trustee's duties does not therefore make it possible to regard the trustee as a third person in relation to the bankrupt, given all the powers conferred upon the trustee by law in order to preserve and liquidate the debtor's property. The nature and legal characterization of the trustee's role will vary depending on the nature of the duties that the trustee's actions will entail.

When the trustee takes control or becomes seised of the universality of property defined in s. 67 B.I.A., his or her seisin is limited to the property in the debtor's patrimony. Apart from the special powers accorded by law to the trustee, as representative of the creditors, to restore the patrimony to be liquidated in its entirety, the trustee has no more rights with respect to the debtor's property than did the debtor, of whom the trustee remains the successor in this regard. This principle is well established in relation to the application of s. 67 B.I.A. It was laid down by Judson J. in *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631, at p. 634. More recently, Iacobucci J. confirmed the validity of the principle in *Giffen*. In my view, the trustee has no greater interest in the property under his or her responsibility than that of the bankrupt, unless otherwise provided for by legislation (*Giffen*, at para. 50).

This being said, under the *Bankruptcy and Insolvency Act*, and often under various provincial statutes, the trustee has special powers allowing him or her to restore the debtor's patrimony to its former state or to the state it should have been in, or to

débiteur. Ainsi que le souligne le juge de Grandpré, la loi lui reconnaît d'ailleurs le droit de poursuivre ce débiteur, le cas échéant (p. 553). Ce pouvoir témoigne de l'importance de l'autre aspect de ses fonctions, celui de la représentation des créanciers, pour la gestion et la liquidation des biens du failli. Sa situation juridique correspond alors davantage à celle d'un tiers par rapport au débiteur. D'une part, le syndic se trouve subrogé au failli dans l'exercice de ses pouvoirs de détention et de disposition des biens dont la saisine lui est attribuée. D'autre part, la loi fait de lui le mandataire légal des créanciers, qui liquidera à leur profit les biens qui lui ont été confiés. Le double aspect de ses fonctions ne permet donc pas de lui reconnaître le statut de tiers par rapport au failli, à l'égard de l'ensemble des pouvoirs que lui confère la loi pour préserver et liquider les biens du débiteur. La nature de son rôle et la qualification juridique de celui-ci varieront selon la nature des fonctions que ses interventions mettront en jeu.

37 Lors de la prise de contrôle ou saisine de l'universalité de biens définie par l'art. 67 L.F.I., le syndic n'est saisi que des biens qui se trouvaient dans le patrimoine du débiteur. Sous réserve des pouvoirs spéciaux que la loi lui accorde à titre de représentant des créanciers pour rétablir le patrimoine à liquider dans son intégrité, le syndic ne possède pas plus de droits à l'égard des biens que n'en possédait le débiteur, dont il demeure le continuateur à cet égard. Ce principe est bien établi dans l'application de l'art. 67 L.F.I. Dans l'arrêt *Flintoft c. Royal Bank of Canada*, [1964] R.C.S. 631, p. 634, le juge Judson avait rappelé cette règle. Plus récemment, le juge Iacobucci a confirmé la validité de ce principe dans l'arrêt *Giffen*. À mon avis, le syndic ne détient pas un intérêt supérieur à celui du failli sur les biens visés par son intervention, sauf disposition législative à l'effet contraire (*Giffen*, par. 50).

38 Toutefois, sous le régime de la *Loi sur la faillite et l'insolvabilité* et, souvent, en vertu de lois provinciales diverses, le syndic se voit confier des pouvoirs spéciaux qui lui permettent d'intervenir pour reconstituer le patrimoine du débiteur tel qu'il était

protect the estate of the bankrupt against rights unduly claimed or exercised against it. Such a situation may occur in cases where action must be taken to cancel preferential payments or improper transfers of the bankrupt's property or to contest a security that has been granted illegally or has not been perfected in accordance with the law.

39 However, these powers and the status they confer upon the trustee do not give the trustee the authority to liquidate property that was not in the bankrupt's patrimony, which is similar to the situation that has arisen in this appeal. The vehicles leased by the appellants were never part of the debtors' patrimonies. Since the lessors' rights cannot be considered simple claims guaranteed by real securities, the trustees, in refusing to deliver possession of the property, intended to dispose of property that was not included in their seisin.

40 At this stage of my analysis of these cases, I believe a few comments about *Giffen* are necessary. The Court of Appeal considered the principles in that case to be determinative in the case at bar. However, that interpretation gave *Giffen* a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. In *Giffen*, s. 20(b)(i) of the *Personal Property Security Act*, S.B.C. 1989, c. 36, provided that a lease in respect of an automobile was not effective against a trustee if the lease were not published as required by the *Personal Property Security Act*. Thus, the provincial legislation itself defined the nature of the respective rights of lessors and trustees. It allowed trustees to contest a lessor's claim and liquidate property for the benefit of creditors. As Iacobucci J. observed, s. 20(b)(i) of the *Personal Property Security Act* therefore gave the trustee an interest greater than that of the bankrupt, and this allowed the trustee to dispose of the property (para. 50). As has already been mentioned, the *Civil Code of Québec* does not provide for a similar consequence for failure to publish the rights arising

ou tel qu'il aurait dû être ou pour protéger l'actif de la faillite contre des droits indûment réclamés ou exercés à son endroit. Une telle situation se présente dans le cas des recours en annulation de paiements préférentiels ou de transferts irréguliers de biens du failli ou dans la contestation de sûretés illégalement accordées ou qui n'ont pas été parfaites conformément à la loi.

Cependant, l'existence de ces pouvoirs et la nature du statut qu'elle confère au syndic ne l'autorisent pas à liquider un bien qui ne se trouvait pas dans le patrimoine du failli. Dans le présent appel, une situation de cette nature s'est créée. Les véhicules loués par les appelantes n'ont jamais fait partie des patrimoines des débiteurs. Puisque les droits des locateurs ne peuvent être considérés comme de simples droits de créance, garantis par des sûretés réelles, le syndic, en refusant de remettre les biens, prétendait disposer d'un bien que sa saisine n'incluait pas.

À cette étape de l'étude des dossiers, quelques commentaires apparaissent nécessaires à propos de l'arrêt *Giffen* dont la Cour d'appel estimait les principes déterminants en l'espèce. En l'interprétant ainsi, elle a donné à cet arrêt une portée qu'il n'avait pas, car elle a omis de prendre en compte le contexte législatif établi par la législation provinciale de la Colombie-Britannique, qui définissait les droits respectifs du locateur à long terme d'un véhicule automobile et du syndic à la faillite du locataire. En effet, dans l'affaire *Giffen*, la *Personal Property Security Act*, S.B.C. 1989, ch. 36, prévoyait au sous-al. 20b)(i) que le bail d'automobile non publié conformément aux exigences de la loi n'était pas opposable au syndic. La loi provinciale définissait elle-même alors la nature des droits respectifs du locateur et du syndic. Elle permettait à ce dernier de s'opposer à la revendication du bailleur et de liquider le bien pour le bénéfice des créanciers. Ainsi que le faisait observer le juge Iacobucci, le sous-al. 20b)(i) de la *Personal Property Security Act* conférait alors au syndic un intérêt supérieur à celui du failli, qui lui permettait de disposer du bien (par. 50). Comme on l'a vu plus haut, le *Code civil du Québec* n'a pas donné un effet semblable au défaut de publication des droits résultant du bail. Dans ce

out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal. On the contrary, *Giffen* confirmed the rules governing the composition of the bankrupt's patrimony. The appellants' claims should have been admitted. Their appeals therefore appear to be well founded.

G. *Costs*

The circumstances of these cases warrant a departure from the usual rules on the awarding of costs. In the appeal of GMAC, I would make no order as to costs, as the respondent did not participate in the appeal. In the appeal of DaimlerChrysler, it would be appropriate to award costs to the respondent on a solicitor-client basis. The appellant brought before this Court an issue of particular interest that it was more concerned about than the actual outcome of the case. The participation of the respondent and his counsel was helpful to the analysis of the issues raised by this case, and it would be unfair to make the respondent bear all the costs incurred in the general interest of the development of the law, which went beyond his narrow interest in the management of a relatively modest bankruptcy.

VI. Conclusion

For these reasons, I would allow the appeals and admit the appellants' claims. As the vehicle in *GMAC* has been sold, the appellant is entitled to the proceeds of the sale. The appeals should be allowed without costs in the case of *GMAC* and with costs to the respondent on a solicitor-client basis in the case of *DaimlerChrysler*.

Appeals allowed.

Solicitors for the appellant DaimlerChrysler Services Canada Inc.: Fasken Martineau DuMoulin, Québec.

Solicitors for the appellant GMAC Leaseco Limited: Pothier Delisle, Sainte-Foy, Québec.

Solicitor for the respondent Jean-François Lebel: Martin P. Jutras, Westmount, Québec.

contexte, l'arrêt *Giffen* ne justifiait pas la solution retenue par la Cour d'appel. Au contraire, cet arrêt confirmait les règles établies au sujet de la composition du patrimoine du failli. La réclamation des appelantes aurait dû être admise. Leur appel paraît en conséquence bien fondé.

G. *Les dépens*

41 Les circonstances de ces affaires justifient une dérogation aux règles usuelles sur l'attribution de dépens. Dans le pourvoi de GMAC, je n'accorderais pas de dépens, l'intimée n'ayant pas participé à l'appel. Dans le pourvoi de DaimlerChrysler, il y aurait lieu d'accorder les dépens à l'intimé sur la base avocat-client. En effet, l'appelante a porté devant notre Cour une question d'intérêt qui la préoccupait davantage que le sort particulier de ce dossier. Par ailleurs, la participation de l'intimé et de ses avocats a été utile à l'examen des problèmes soulevés par cette affaire et il serait injuste de faire supporter à l'intimé la totalité des dépenses engagées dans l'intérêt général du développement du droit, au-delà de son intérêt restreint dans la gestion d'une faillite d'importance modeste.

VI. Conclusion

42 Pour ces motifs, j'accueillerais les pourvois et je ferais droit à la réclamation des appelantes. Puisque dans *GMAC*, la voiture a été vendue, l'appelante a droit au produit de la vente. Les pourvois devraient être accueillis sans dépens dans le dossier *GMAC* et avec dépens sur la base avocat-client en faveur de l'intimé dans le dossier *DaimlerChrysler*.

Pourvois accueillis.

Procureurs de l'appelante Services Daimler-Chrysler Canada Inc. : Fasken Martineau DuMoulin, Québec.

Procureurs de l'appelante GMAC Location Limitée : Pothier Delisle, Sainte-Foy, Québec.

Procureur de l'intimé Jean-François Lebel : Martin P. Jutras, Westmount, Québec.

TAB 12

Indexed as:

R. v. Wilson

James Stephen Wilson, appellant;
and
Her Majesty The Queen, respondent.

[1983] 2 S.C.R. 594

File No.: 16931.

Supreme Court of Canada

1983: March 14 / 1983: December 15.

Present: Laskin C.J. and Dickson, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts -- Collateral proceedings -- Superior court wiretap authorizations -- Evidence obtained pursuant to authorizations found inadmissible by inferior court -- Whether or not superior court can be collaterally attacked in any court and in particular by an inferior court -- Criminal Code, R.S.C. 1970, c. C-34, 55. 178.12(1)(b),(g), 178.13(1)(b), 178.14, 178.16(1)(a), 178.16(3)(b).

Appellant was acquitted in provincial court on the collapse of the Crown's case following the judge's ruling that the Crown's wiretap evidence was inadmissible as illegally obtained. The ruling was based on the information obtained from the cross-examination of the deponent of the affidavits that were made in support of the applications for authorization to wiretap in the Court of Queen's Bench. The authorizations were valid on their face and the trial judge did not open the sealed packets. The Manitoba Court of Appeal allowed an appeal from the acquittals and ordered a new trial. At issue here is whether or not a judge of an inferior court can look behind the apparently valid order of a superior court and rule the evidence obtained under that order inadmissible.

Held: The appeal should be dismissed.

Per Laskin C.J. and Estey and McIntyre JJ.: A court order that has not been varied or set aside on appeal cannot be collaterally attacked and must receive full effect according to its terms. This rule has not been altered with respect to wiretap authorizations by Part IV.1 of the Code except to the extent that a trial judge must consider the admissibility of wiretap evidence, but without going beyond the face of the authorization. In the absence of the right of appeal from an authorization, and given the inapplicability of certiorari, any application for review of an authorization must be made to the court that made it. As it is not always practical or possible to apply for review to the same judge who made the order, another judge of the same court can review an ex parte order if: 1) he has the power to discharge the order, 2) he acts with the consent of, or in the event of the unavailability of, the judge who made the order, and 3) he hears the motion de facto as to both the facts and the law involved. A judge reviewing a wiretap authorization must, in addition, not substitute his discretion for that of the authorizing judge.

Per Dickson and Chouinard JJ.: Subsections 178.16(1) and 176.16(3) in combination require a trial judge to go behind an apparently valid authorization to consider its validity and therefore have modified the rule that a court order not be impeached except by appeal, by action to set aside or by prerogative writ. These subsections make no distinction between information on the face of the record and information dehors the record, and to restrict a trial judge to considering only the former as a matter of statutory interpretation would unnecessarily fetter his ability to determine admissibility. Section 178.16, too, makes no suggestion as to review of an authorization by anyone but the trial judge and s. 178.14 contemplates that the packet be opened by any judge of a superior court of criminal jurisdiction or by a judge as defined by s. 482. The common law doctrine that the authorization could only be reviewed by the Court making it, and preferably by the actual judge, was therefore overridden. Further, it was implicit in the language of ss. 176.16(1) and (3)(b) that an inferior court judge could attack a superior court's authorization.

Prima facie evidence of fraud, non-disclosure or misleading disclosure are valid reasons for opening the sealed packet. Once a foundation for opening the packet is established, a trial judge within the contemplation of s. 178.14 can open the packet and make a full review for compliance with Part IV.I. Section 178.16(3)(b) grants a discretion to cure non-substantive defects, but substantive defects in the application render the evidence inadmissible. The trial judge cannot decide that he would have exercised his discretion differently from the authorizing judge.

The deponent of an affidavit supporting an authorization request can be cross-examined to determine if the pre-conditions of s. 178.13(b) have been met. The questions can be put so as not to disclose information considered confidential by the judge and yet uncover any basis on which to argue invalidity.

The trial judge here was not authorized to order the opening of the sealed packet. The trial should have been adjourned to allow an application under s. 178.14 for an order to open the packet and the judge acting under that section would determine if the packet should be opened. The trial judge, however, would examine the packet's contents and decide if the authorization was valid. The ruling

by the trial judge that admitting evidence obtained from unlawful wiretaps would bring the administration of justice into disrepute was irrelevant here. Section 178.16(2) does not deal with primary evidence of this kind but rather with derivative evidence.

Cases Cited

Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, affirming sub nom. Canadian Transport (U.K.) Ltd. v. Alsbury, [1953] 1 D.L.R. 385; Royal Trust Co. v. Jones, [1962] S.C.R. 132; Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58, considered; Pashko v. Canadian Acceptance Corp. Ltd. (1957), 12 D.L.R. (2d) 380; Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690; Clark v. Phinney (1896), 25 S.C.R. 633; Maynard v. Maynard, [1951] S.C.R. 346; Badar Bee v. Habib Merican Noordin, [1909] A.C. 615; R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363; R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506; Charette v. The Queen, [1980] 1 S.C.R. 785, affirming R. v. Parsons (1977), 37 C.C.C. (2d) 497; Dickie v. Woodworth (1883), 8 S.C.R. 192; Stewart v. Braun, [1924] 3 D.L.R. 941; Re Stewart and The Queen (1976), 30 C.C.C. (2d) 391, affirming (1975), 23 C.C.C. (2d) 306; Re Turangan and Chui and The Queen (1976), 32 C.C.C. (2d) 254, affirming (1976), 32 C.C.C. (2d) 249; Bidder v. Bridges (1884), 26 Ch. D. 1; Boyle v. Sacker (1888), 39 Ch. D. 249; Gulf Islands Navigation Ltd. v. Seafarers' International Union (1959), 18 D.L.R. (2d) 625; R. v. Dass (1979), 47 C.C.C. (2d) 194; R. v. Gill (1980), 56 C.C.C. (2d) 169; R. v. Ho (1976), 32 C.C.C. (2d) 339; Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257; Goldman v. The Queen, [1980] 1 S.C.R. 976; R. v. Miller and Thomas (No. 4) (1975), 28 C.C.C. (2d) 128; R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431; R. v. Johnny and Billy (1981), 62 C.C.C. (2d) 33; R. v. Bradley (1980), 19 C.R. (3d) 336; Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3) (1978), 40 C.C.C. (2d) 212; Re Zaduk and The Queen (1977), 37 C.C.C. (2d) 1; R. v. Haslam (1977), 36 C.C.C. (2d) 250; Re Regina and Kozak (1976), 32 C.C.C. (2d) 235; R. v. Kalo. Kalo and Vonschober (1975), 28 C.C.C. (2d) 1; R. v. Blacquiere (1980), 57 C.C.C. (2d) 330; Re Regina and Collos (1977), 37 C.C.C. (2d) 405, reversing on other grounds (1977), 34 C.C.C. (2d) 313; R. v. Robinson (1977), 39 C.R.N.S. 158; R. v. Hollyoake (1975), 27 C.C.C. (2d) 63; R. v. Crease (No. 2) (1980), 53 C.C.C. (2d) 378; R. v. Cardoza (1981), 61 C.C.C. (2d) 412; R. v. Gabourie (1976), 31 C.C.C. (2d) 471; R. v. Hancock and Proulx (1976), 30 C.C.C. (2d) 544, referred to.

APPEAL from a judgment of the Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 13 Man. R. (2d) 155, 65 C.C.C. (2d) 507, allowing an appeal from appellant's acquittals by Dubienski Prov. Ct. J. Appeal dismissed.

Robert L. Pollack, for the appellant.
John D. Montgomery, Q.C., for the respondent.

Solicitors for the appellant: Skwark, Myers, Baizley and Weinstein, Winnipeg.
Solicitors for the respondent: Manitoba Department of the Attorney-General, Winnipeg.

The judgment of Laskin C.J. and Estey and McIntyre JJ. was delivered by

McINTYRE J.:-- The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV.1 of the Criminal Code from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the Code had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> ...
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

No objection was taken by the Crown to this line of examination.

On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> "No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency."

As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the Criminal Code and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the Code. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in Canadian Transport

(U.K.) Ltd. v. Alsbury, [1953] 1 D.L.R. 385, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex parte injunction in the Supreme Court restraining the defendant and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the Trade-unions Act and the Laws Declaratory Act; (3) that the injunction was in permanent form and no Court could grant a permanent injunction ex parte.
>
> To this the general answer is made that the order of a Superior Court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, viz. Scott v. Bennett (1871), L.R. 5 H.L. 234 at p. 245; Revell v. Blake (1873), L.R. 8 C.P. 533 at p. 544; Scotia Construction Co. v. Halifax, [1935] 1 D.L.R. 316, S.C.R. 124; and to these I might add Re Padstow (1882), 20 Ch.D. 137 at p. 145, and Hughes v. Northern Elec. etc. Co. (1915), 21 D.L.R. 358 at pp. 362-3, 50 S.C.R. 626 at pp. 652-3. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th ed., p. 668, and 7 Hals., p. 32, which include the authoritative decision in Eastern Trust Co. v. MacKenzie, Mann & Co., 22 D.L.R. 410 at pp. 418-9, [1915] A.C. 750 at p. 761, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are Leberry v. Braden (1900), 7 B.C.R. 403, and Bassel's Lunch Ltd. v. Kick, [1936], 4 D.L.R. 106 at p. 110, O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.

Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

> The order under review is that of a Superior Court of Record, and is

> binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

> In Eastern Trust Co. v. MacKenzie. Mann & Co., 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."

Duff C.J.C., approved the same principle in Scotia Construction Co. v. Halifax, [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."

In my opinion these submissions must be rejected.

On appeal to this Court, sub nom. Poje v. Attorney General for British Columbia, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

> I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal, both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

The case was referred to in Pashko v. Canadian Acceptance Corp. Ltd. (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

In addition to these authorities and those referred to in judgments of the majority in the Canadian Transport case, reference may be made as well to the words of Osler J.A. in Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690, at pp. 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osler J.A. said:

> If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that

> is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, 1902, p. 655; Yearly Practice, 1904, p. 504. Or the firm might have moved to set aside the faulty service on the manager: Nelson v. Pastorino (1883), 49 L.T.N.S. 564. Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule 228.

Further authority in support of the rule against collateral attack may be found in Clark v. Phinney (1896), 25 S.C.R. 633; Maynard v. Maynard, [1951] S.C.R. 346; Badar Bee v. Habib Merican Noordin, [1909] A.C. 615; and particularly in Royal Trust Co. v. Jones, [1962] S.C.R. 132. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was

> brought before him and his judgment in that action, not having been appealed from or otherwise impeached, is a valid judgment of the Court binding upon all those who were parties to it.

The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363 (Ont. C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(b) [now s. 178.16(3)(b)].

In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506, where he asserted a broader power in the trial judge to go behind the authorization.

The question then is: has Parliament by the enactment of Part IV.1 of the Criminal Code altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the Code. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine whether evidence has been rendered inadmissible only by a defect or an irregularity of a none substantive nature.

It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the Code. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge qua trial judge has not, and was not intended to have, access to the materials necessary to review the granting of the authorization. This makes any collateral attack on the authorization a virtual impossibility.

It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance of his task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in Charette v. The Queen, [1980] 1 S.C.R. 785, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in R. v. Parsons (1977), 37 C.C.C. (2d) 497, and that Dubin J.A. said in that case, at pp. 501-02:

> A voir dire is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the

trial judge is limited to matters appearing on its face, and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

Since no right of appeal is given from the granting of an authorization and since prerogative relief by certiorari would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an ex parte application. In civil matters, there is a body of jurisprudence which deals with the review of ex parte orders. There is a widely recognized rule that an ex parte order may be reviewed by the judge who made it. In Dickie v. Woodworth (1883), 8 S.C.R. 192, Ritchie C.J. said, at p. 195:

> The judge having in the first instance made an ex parte order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted ....

This view is reflected in the words of Mathers C.J.K.B. in the case of Stewart v. Braun, [1924] 3 D.L.R. 941 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders ex parte, where only one side is represented and where the order granted is not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an ex parte order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it ....

Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in Re Stewart and The Queen (1975), 23 C.C.C. (2d) 306 (County Court, Ottawa-Carleton Judicial District (Ont.)), application for certiorari dismissed: (1976), 30 C.C.C. (2d) 391 (Ont.H.C.); Re Turangan and Chui and The Queen (1976), 32 C.C.C. (2d) 249 (B.C.S.C.), appeal dismissed for lack of jurisdiction (1976), 32 C.C.C. (2d) 254 (B.C.C.A.)

The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an ex parte order. See, for example, Bidder v. Bridges (1884), 26 Ch.D. 1 (C.A.), and Boyle v. Sacker (1888), 39 Ch.D. 249 (C.A.) In the case of Gulf Islands Navigation Ltd. v. Seafarers' International Union (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's ex

> parte order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, e.g., where he acts by consent or by leave of the first Judge, or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it de novo as to both the law and facts involved.

I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the ex parte review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the Criminal Code and the confusion thereby created, the practice above-described should be adopted.

An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in Wong (No. 1), supra) an application to review the authorization could be made to him directly, rather than incurring extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

The reasons of Dickson and Chouinard JJ. were delivered by

DICKSON J.:-- The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications in admissible in evidence.

I

The Facts and Judicial History

The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to adduce wiretap evidence. Dubienski Prov. Ct. J. ruled the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

> ... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(g) and 178.13(1)(b) of the Criminal Code:

> 178.12 (1) An application for an authorization shall be made ex parte and

> in writing...
>
> and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:
>
> ...
>
> (g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
>
> 178.13 (1) An authorization may be given if the judge c to whom the application is made is satisfied
>
> (a) that it would be in the best interests of the administration of justice to do so; and
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(b) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

> My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

He further commented:

> I am inclined to say the police have developed a pattern of application based on routine.

It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the Code, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

An authorization to intercept a private communication is an ex parte order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the Criminal Code, or a judge, as defined in s. 482. That means that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

The collateral attack issue is this: in the absence of an actual application to set aside the

authorization, can a trial judge, qua trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of R. v. Dass (1979), 47 C.C.C. (2d) 194 (Man. C.A.), Huband J.A., speaking for a five judge Court, said this, at p. 214:

> A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench ... . There is a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see Re Sproule (1886), 12 S.C.R. 140 at p. 193. In this instance, however, defence counsel does not complain that an application to intercept communications was made. He does not complain that an order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(b)(iii) was applied.) Despite its asseveration to the contrary, it is hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in Dass.

I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.I of the Criminal Code, ss. 178.16(1) and 178.16(3)(b):

> 178.16(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> ...
>
> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
>
> (a) is relevant to a matter at issue in the proceedings, and
> b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,
>
> he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In Charette v. The Queen, [1980] 1 S.C.R. 785, affirming, sub nom. R. v. Parsons (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In Charette this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

> A voir dire is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the

> Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a voir dire. [Emphasis added.]

The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV.I of the Criminal Code. The fact that an authorization purports to be made under Part IV.I is insufficient. Section 178.16(3)(b) gives the trial judge discretion to admit unlawfully obtained evidence if there is a non-substantive defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is substantive, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s. 178.16(3)(b). The combination of ss. 178.16(1)(a) and 178.16(3)(b) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

Does the same rationale apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization invalid for all purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

I am of the view that ss. 178.16(1)(a) and 178.16(3)(b) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is dehors the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In

many cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(b) refer to defects or irregularities in the giving of the authorization, but also in the application for the authorization. Once again, since s. 178.16(3)(b), in effect, gives a discretion to cure for non-substantive defects or irregularities it would seem to follow as a necessary inference that substantive defects or irregularities in the application for the authorization will result in the evidence being inadmissible. In R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

> Subsection (2)(b) [now 178.16(3)(b)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.
>
> I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(a). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, 32 C.R.N.S. 192, and with the reasons of McDonald J. of the Alberta Supreme Court, Trial Division, in Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58, [1976] W.W.D. 100.

A view similar to that of Lambert J.A. was expressed by Meredith J. in R. v. Wong (No. 1) (1976), 33 C.C.C. (2d) 506 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. Wong (No. 1) involved, as does the present case, a question of compliance with s. 178.13(1)(b).

> Notwithstanding what has been said by D.C. McDonald, J., in the case cited above, it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the ex parte order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

R. v. Ho (1976), 32 C.C.C. (2d) 339 (Vancouver Co. Ct. (B.C.)) is to the same effect. See Krever J. in Re Stewart and The Queen (1976), 30 C.C.C. (2d) 391 (Ont. H.C.), at p. 400. See also Manning, The Protection of Privacy Act, (1974) at pp. 135-37; Bellemare, La révision d'une autorisation en écoute électronique (1979), 39 R. du B. 496.

As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in Re Donnelly and Acheson and The Queen (1976), 29 C.C.C. (2d) 58 (Alta. S.C.), and by Anderson J. in Re Miller and Thomas and The Queen (1976), 23 C.C.C. (2d) 257 (B.C.S.C.) I will refer specifically to the arguments raised by McDonald J. in Donnelly and Acheson, considerably influenced by the wording of s. 178.14:

> 178.14(1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> (a) opened or the contents thereof removed except
>
> (i) for the purpose of dealing with an application for renewal of the authorization, or
> (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
>
> (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).
>
> (2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

McDonald J. started with the assumption that, but for s. 178.16(2)(b) (now 3(b)), he would have thought "lawfully made" in s. 178.16(1)(a) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(b) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging

that this relegated portions of s. 178.16(2)(b) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(b) were interpreted to enable a trial judge to go behind an apparently valid authorization.

> (1) That which was on its face lawfully done, pursuant to an order (i.e., the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.
>
> (2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.
>
> (3) The Protection of Privacy Act, 1973-74, c. 50, amended both the Criminal Code and the Crown Liability Act, R.S.C. 1970, c. C-38.
>
> 7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.
>
> (2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of
>
> (a) was lawfully made; (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or (c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

> Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(a) of the Criminal Code must surely be given also to s. 7.2(2)(a) of the Crown Liability Act, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the Crown Liability Act, the contention of the defence would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced by an argument along the same line in Goldman v. The Queen, [1980] 1 S.C.R. 976, at pp. 998-99. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work Invasion of Privacy: Police and Electronic Surveillance in Canada (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

I therefore conclude that s. 178.16(1)(a) and 178.16(3)(b) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(b) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in Wong (No. 1), supra, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in

the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(g) and 178.13(1)(b) and hence make the authorizations valid. I therefore conclude Dubienski Prov. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s. 178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; R. v. Gill, supra; Re Stewart and The Queen, supra; R. v. Miller and Thomas (No. 4) (1975), 28 C.C.C. (2d) 128 (Yale Co. Ct. (B.C.)); R. v. Newall (No. 1) (1982), 67 C.C.C. (2d) 431 (B.C.S.C.); R. v. Johnny and Billy (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); R. v. Bradley (1980), 19 C.R. (3d) 336 (Que. S.C.); Re Royal Commission Inquiry into the Activities of Royal American Shows Inc. (No. 3) (1978), 40 C.C.C. (2d) 212 (Alta. S.C.); Re Zaduk and The Queen (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); R. v. Has lam (1977), 36 C.C.C. (2d) 250 (Nfld. District Ct.); Re Regina and Kozak (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); contra R. v. Kalo, Kalo and Vonschober (1975), 28 C.C.C. (2d) 1 (Peel Co. Ct. (Ont.)) It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that prima facie evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a primafacie finding of either misleading disclosure or non-disclosure.

Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong--he signed an order not in accordance with the Criminal Code. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him--the invalidity arose because the evidence was false or incomplete--the fault of others.

Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(b) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(g) or 178.13(1)(b) would, in my view, amount to a substantive and non-curable defect.

Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude,

contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the Criminal Code.

(iv) Cross-examination of the Deponent

Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(b) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in R. v. Blacquiere (1980), 57 C.C.C. (2d) 330 (P.E.I. S.C.); Re Regina and Collos (1977), 37 C.C.C. (2d) 405 (B.C.C.A.), reversing on other grounds (1977), 34 C.C.C. (2d) 313 (B.C.S.C.); R. v. Haslam, supra; R. v. Robinson (1977), 39 C.R.N.S. 158 (Vancouver Co. Ct. (B.C.)) The rationale was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in R. v. Johnny and Billy, supra, and in R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) I prefer the latter view. These authorizations are made ex parte and in camera. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

v) Review by a Judge Other than the Trial Judge

I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an ex parte order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a

review.

The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14 seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition that only the judge or court that made the order can review an authorization.

There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the Criminal Code does not grant an appeal.

The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

As earlier noted, in Charette v. The Queen, supra, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> ... it is for the trial Judge to pass upon such matters as the validity of the authorization ....
>
> The determination of whether the statutory conditions precedent have been

> fulfilled rests exclusively with the trial Judge...

The appeal case in Charette discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

Other examples of an inferior trial court assessing the validity of a superior court authorization are: R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C. (2d) 363 (Ont. C.A.); R. v. Crease (No. 2) (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (York Co. Ct. (Ont.)); R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); R. v. Hancock and Proulx (1976), 30 C.C.C. (2d) 544 (B.C.C.A.)

None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(a) and (3)(b) give the trial judge, qua trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, supra). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether to order opening of the packet. He may refuse, and if so the provincial court judge will have to abide by that decision: see Re Regina and Kozak, supra.

III Bringing the Administration of Justice into Disrepute

After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

> 178.16(1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(a) the interception was lawfully made; or

(b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

Section 178.16(2) deals with derivative evidence only, i.e. evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, i.e. evidence of the private communication itself--the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(b) are applied.

IV

Conclusion

I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the sealed packet, that none of the three alternate preconditions of s. 178.13(1)(b) had been met.

I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

Appeal dismissed.

TAB 13

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

Blue Range Resource Corp., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended; and in the matter of **Blue Range** Resources Corporation; Enron Canada Corp., and the Creditor's Committee (Appellants/Appellants) and National Oil-well Canada Ltd. et al. (Respondents/Respondents)

Alberta Court of Appeal

Russell, Sulatycky, Wittmann JJ.A.

Heard: June 15, 2000
Judgment: October 24, 2000
Docket: Calgary Appeal 99-18564, 99-18565, 99-18566, 99-18567, 99-18568, 99-18569, 99-18570, 99-18571, 99-18802

Proceedings: affirmed *Blue Range Resource Corp., Re* (1999), 1999 CarswellAlta 1053, 251 A.R. 1 (Alta. Q.B.)

Counsel: *A. Robert Anderson* and *Scott J. Burrell*, for Enron Canada Corp. and Creditors' Committee.

S. Collins, for TransAlta Utilities Corporation.

D.W. Dear, for Rigel Oil & Gas Ltd.

D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.

K.E. Staroszik, for Founders Energy Ltd.

J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

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

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — **Claims bar date** was set during which creditors could prove claims — Notices of claim filed after **claims bar date** by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of **claims bar date** — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by Court — Miscellaneous issues

Monitor appointed by court obtained order establishing procedure to determine claims of creditors of corporation — **Claims bar date** was set during which creditors could prove claims — Notices of claim filed after **claims bar date** by certain creditors were disallowed by monitor — Partial distribution was made by court — Late-filing creditors applied to court for permission to file or amend claims after expiry of **claims bar date** — Applications were allowed on basis that same test should apply to late-filing creditors under Companies' Creditors Arrangement Act (CCAA) as under Bankruptcy and Insolvency Act (BIA) — Creditor EC Corp. and creditors committee appealed — Appeal dismissed — Claims bar orders setting out claims procedure ought not to purport to extinguish debt, but simply set deadline for obtaining remedy — Inadvertence alone can be basis for permitting late filing, provided claimant can show it acted in good faith and not in effort to manipulate its position — Any prejudicial effect of permitting claim is relevant factor, as is availability of means to alleviate prejudice — All creditors had acted in good faith and existing creditors suffered no prejudice as result of late filings or amendments — Existing creditors were aware of potential for further claims and that these might be permitted by court — No evidence existed to suggest that existing creditors would have voted differently on plan of arrangement had late-filing creditors filed in time — Value of claims of late-filing creditors was less than one per cent of total of claims filed in time — Fact that existing creditors might receive less money if late claims allowed did not constitute prejudice, since policy of CCAA depends on all legitimate creditors being able to participate in available proceeds — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 — Companies' Creditors

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Wittmann J.A.*:

Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 2 Q.B. 229, [1968] 1 All E.R. 543 (Eng. C.A.) — applied

Cohen, Re (1956), 19 W.W.R. 14, 3 D.L.R. (2d) 528, 36 C.B.R. 21 (Alta. C.A.) — considered

Hogan v. Kolisnyk, [1983] 3 W.W.R. 481, 25 Alta. L.R. (2d) 17, 43 A.R. 17 (Alta. Q.B.) — considered

Kuziw v. Kucheran Estate, 2000 ABCA 226 (Alta. C.A.) — considered

Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326, 20 C.P.C. (2d) 11, 79 A.R. 321, 40 D.L.R. (4th) 544 (Alta. C.A.) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Mount James Mines (Que.) Ltd., Re (1980), 28 O.R. (2d) 271, 33 C.B.R. (N.S.) 227, 110 D.L.R. (3d) 80 (Ont. Bktcy.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) — considered

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership (1993), 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn.) — considered

Smoky River Coal Ltd., Re, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94 (Alta. C.A.) — considered

Specialty Equipment Cos. Inc., Re (1993), 159 B.R. 236 (U.S. Bankr. N.D. Ill.) — considered

W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada (1979), 9 Alta. L.R. (2d) 232, 19 A.R. 196, [1980] I.L.R. 1-1210 (Alta. Dist. Ct.) — considered

312630 British Columbia Ltd. v. Alta Surety Co., 30 C.C.L.I. (2d) 165, 10 B.C.L.R. (3d) 84, [1995] 10 W.W.R. 100, 23 C.L.R. (2d) 273, 61 B.C.A.C. 208, 100 W.A.C. 208 (B.C. C.A.) — applied

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

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

Generally — considered

s. 6 — considered

s. 12(2)(a)(iii) — referred to

Insurance Act, R.S.A. 1980, c. I-5

s. 205 — referred to

s. 211 — referred to

s. 385 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — considered

R. 244(4) [en. Alta. Reg. 234/94] — considered

Federal Rules of Bankruptcy Procedure (U.S.)

Generally — referred to

R. 9006(b)(1) — considered

APPEAL by creditor EC Corp. and creditors committee from judgment reported at (1999), 251 A.R. 1 (Alta. Q.B.), permitting creditors to file notices of claim, or amended claims, after expiry of **claims bar date**.

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

The judgment of the court was delivered by *Wittmann J.A.*:

Introduction

1 The *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, as amended ("*CCAA*"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the *CCAA* distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the *CCAA* on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P.01, A.B.P.06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a **claims bar date** which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the *CCAA*, s. 12(2)(iii) did not mandate a claims pro-

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

cedure. He stated that preserving certainty in the *CCAA* process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a *CCAA* proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the *United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure*, for Chapter 11 Reorganization Cases, ("*U.S. Bankruptcy Rules*") the chambers judge chose to incorporate the test in place under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the *BIA* was appropriate. Under the *BIA*, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the *BIA* may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a *CCAA* supervising judge should only be interfered with in clear cases. Deference to a *CCAA* supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) (cited with approval by Hunt, J.A. in *Smoky River Coal Ltd., Re* (1999), 237 A.R. 326 (Alta. C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the *CCAA* in granting an extension of the **claims bar dates**. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P.01)

The first page of Schedule "A" stated in part:

> A **Claims' Bar Date** of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the **Claims' Bar Date** will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings.
>
> [Emphasis added] (A.B.P.03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the *CCAA* has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the *U.S. Bankruptcy Rules*, Chapter 11, while the respondents favoured either the application of the tests under the *BIA* or some blending of the two standards.

12 Rule 9006 of the *U.S. Bankruptcy Rules* deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

The key phrase in this section is "excusable neglect". In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489 (U.S. Tenn. 1993) the U.S. Supreme Court dealt with the interpretation of this phrase. In *Pioneer*, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. *Specialty Equipment Cos. Inc., Re*, 159 B.R. 236 (U.S. Bankr. N.D. Ill. 1993).

13 The Canadian approach under the *BIA* has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the *BIA* when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: *Mount James Mines (Que.) Ltd., Re* (1980), 110 D.L.R. (3d) 80 (Ont. Bktcy.). The Canadian standard under the *BIA* is, therefore, less arduous than that applied under the *U.S. Bankruptcy Rules*.

14 I accept that some guidance can be gained from the *BIA* approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in *CCAA* proceedings. But I also take some guidance from the *U.S. Bankruptcy Rules* standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the *BIA* and *U.S. Bankruptcy Rules* approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the *CCAA*. Through oversight, the applicant Lindsay was not sent the relevant *CCAA* materials by APCL and was not included in the *CCAA* proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the *CCAA* proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the *CCAA* process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para 19). She then went on to conclude that Lindsay preferred not to participate in the *CCAA* process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the *CCAA* and the terms of the plan" (para 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the *CCAA* proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While *Lindsay* is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the *CCAA* proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In *Lethbridge Motors Co. v. American Motors (Can.) Ltd.* (1987), 53 Alta. L.R. (2d) 326 (Alta. C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543 (Eng. C.A.) where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of

> issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the *Alberta Rules of Court* in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes *prima facie* evidence of serious prejudice: *Kuziw v. Kucheran Estate*, 2000 ABCA 226 (Alta. C.A.).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the *Insurance Act*, R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the *Insurance Act* and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: *Hogan v. Kolisnyk* (1983), 25 Alta. L.R. (2d) 17 (Alta. Q.B.). In *Hogan* the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in *Hogan* quoted from a decision of Stevenson, D.C.J. in *W. Schoeler Trucking Ltd. v. Markel Insurance Co. of Canada* (1979), 9 Alta. L.R. (2d) 232 (Alta. Dist. Ct.) at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In *312630 British Columbia Ltd. v. Alta Surety Co.* (1995), 10 B.C.L.R. (3d) 84 (B.C. C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B.432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the *CCAA* process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B.549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the *CCAA* proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26,

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

1999 requesting that its claim be included in the *CCAA* proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the **claims bar date**, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s.6 *CCAA*.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B.269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B.1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Com-

2000 CarswellAlta 1145, 2000 ABCA 285, 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352, [2000] A.J. No. 1232

mittee.

40 In a *CCAA* context, as in a *BIA* context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the *CCAA* involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in *312630 British Columbia Ltd.* It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a **claims bar date** in a claims bar order, a *CCAA* supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the *CCAA* proceedings. The appeal is dismissed.

Appeal dismissed.

END OF DOCUMENT

TAB 14

Case Name:

BA Energy Inc. (Re)

IN THE MATTER OF Section 193 of the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended;
AND IN THE MATTER OF the Judicature Act, R.S.A. 2000, c. J-2, as amended
AND IN THE MATTER OF a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc.
AND IN THE MATTER OF the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, as amended;
AND IN THE MATTER OF BA Energy Inc.

[2010] A.J. No. 920

2010 ABQB 507

70 C.B.R. (5th) 24

2010 CarswellAlta 1598

Docket: 0801 16292

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E.C. Romaine J.

Heard: June 1, 2010.
Judgment: August 5, 2010.

(66 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- With unsecured creditors -- Claims -- Application by Dresser-Rand Canada, Inc., for acceptance of its late-amended proof of claim so it might

participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. dismissed -- It would not be fair or equitable to accept the late-amended claim -- There were no conditions alleviating relevant prejudice -- DR filed a very late revised claim after months of relative lack of diligence with respect valuing its security at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial -- Companies' Creditors Arrangement Act.

Application by Dresser-Rand Canada, Inc. (DR), for acceptance of its late-amended proof of claim so that it might participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. under the Companies' Creditors Arrangement Act. The issue was whether DR, having initially filed a claim characterized as fully secured on the basis of holding assets it described as having a value equal to its claim, was entitled to file a late-amended claim that now alleged a large portion of the claim was unsecured. DR argued the amended proof of claim filed on March 26, 2010 was not a late claim but merely an amendment to the Sept. 2009 proof of claim filed in a timely manner in compliance with a claims procedure order. BA argued DR's conduct arose from a deliberate intent to reframe its claim when it became apparent there would be a distribution to unsecured creditors of approximately 55 cents per dollar of claim. DR's recovery would be improved by $1.6 million by its late re-characterization of the claim if its new submissions with respect to the re-sale value of a compressor were accepted. DR submitted that equity favoured its application as it was a wronged party with a legitimate claim that had been compromised by CCAA proceedings.

HELD: Application dismissed. It would not be fair or equitable to accept the late-amended claim. There were no conditions that would alleviate relevant prejudice. The amended proof of claim purported to assert an unsecured claim for the first time, one that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changed the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment. By initially filing its claim on the basis that it was in possession of sufficient assets to satisfy its claim and maintaining that position for eight months, it led the debtor and monitor to reasonably believe DR would not be an affected creditor in a plan of arrangement. BA structured its plan on that assumption. The consequences of the delay in adequately investigating the value of the assets DR held as security for its claim, which accounted for most of the delay in filing the amended claim, were to be borne by DR. If the amendment was accepted, it would reduce the amount available to unsecured creditors from 55 cents per dollar of claim to 53. It was not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. However, it was apparent a significant number of creditors were not aware of the amended claim when they decided how to vote. The parties prejudiced by the late-amended claim were BA and its parent, Value Creation, BA's largest secured creditor. The postponement of a portion of VC's secured claim was arrived at in consideration of the status of creditor claims as they had been filed. Nor did BA have a realistic opportunity to amend its plan to include DR without the risk of losing support from other creditors and jeopardizing the plan. There

was no evidence the debtor or the monitor anticipated DR's late change of position on value. DR had filed and relied upon affidavits sworn by Kaffka, and BA was required to pay reasonable conduct money for his attendance at cross-examination, as he was not clearly an inappropriate witness.

Statutes, Regulations and Rules Cited:

Alberta Business Corporations Act, RSA 2000, c. B-9, s. 193

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,

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

Judicature Act, RSA 2000, c. J-2,

Sale of Goods Act, RSA 2000, c. S-2,

Counsel:

Chris D. Simard and Kelsey J. Drozdowski, for Dresser-Rand Canada, Ltd.

David LeGeyt, for Ernst & Young Inc.

Howard A. Gorman and Kyle D. Kashuba, for BA Energy Inc.

Reasons for Decision

B.E.C. ROMAINE J.:--

Introduction

1 Dresser-Rand Canada, Inc. ("Dresser-Rand") applies for acceptance of its late amended proof of claim so that it may participate in a distribution to unsecured creditors pursuant to the plan of arrangement and reorganization of BA Energy Inc. ("BA Energy") under the *Companies' Creditors Arrangement Act.*

2 The issue is whether Dresser-Rand, having initially filed a claim which it characterized as fully secured on the basis of holding assets that it described as having a value equal to its claim, is entitled to file a late amended claim that now alleges that a large portion of the claim is unsecured.

Facts

3 In 2006, BA Energy had entered into an agreement of sale with Dresser-Rand for the purchase of a wet-gas compressor and ancillary equipment for use at the proposed Heartland Upgrader, a heavy oil upgrader that BA Energy was in the process of constructing at a site near Fort Saskatchewan, Alberta. The total purchase price for this compressor was USD $8,577,942.39.

4 On December 30, 2008, BA Energy was granted an initial order under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 as amended (the "CCAA").

5 At the time of the filing under the CCAA, BA Energy had paid USD $7,021,918 pursuant to the purchase agreement, leaving a balance owing of USD $1,651.543.63. The compressor was still in the possession of Dresser-Rand at its premises in Edmonton, with the exception of some of the ancillary equipment which had been delivered to the proposed site of the Heartland Upgrader.

6 On March 9, 2009, counsel to Dresser-Rand enquired of counsel to BA Energy and counsel to the Monitor whether the balance of the purchase price would be paid, "failing which Dresser-Rand will be free to exercise its right of sale pursuant to the *Sale of Goods Act.*" On May 15, 2009, Dresser-Rand sent a Proof of Claim to the Monitor, signed by Dresser-Rand's General Manager in Canada, indicating that it had a secured claim for USD $1,655,477.95 and that "in respect of the said debt, we hold assets of the CCAA Debtor valued at $1,655,477.95 US as security". Under the Claims Procedure Order, claims were to be filed by June 15, 2009.

7 On August 26, 2009, BA Energy repudiated the purchase agreement and advised Dresser-Rand that it had a duty to mitigate its losses with respect to the terminated agreement.

8 In an email dated August 31, 2009, counsel to Dresser-Rand asked counsel to BA Energy to confirm that Dresser-Rand was free to deal with the compressor equipment in its possession and enquired whether BA Energy would return the parts in its possession. On the same day, counsel to BA Energy responded that Dresser-Rand could deal with the equipment subject to any requirement to act reasonably in performing its duty to mitigate and said that he would ask his client about the equipment in its possession.

9 On September 18, 2009, the Monitor advised counsel to Dresser-Rand that, in light of the repudiation, Dresser-Rand's previous claim may have been stayed and that Dresser-Rand may have the right to file "Subsequent Claim" as set out in the Claims Procedure Order. The Monitor also told Dresser-Rand that BA Energy believed that the ancillary equipment in its possession was worth about $1 million. Counsel to Dresser-Rand responded that he did not believe his client would be interested in the equipment at that price.

10 On September 22, 2009, Dresser-Rand submitted a Subsequent Claim for USD $1,651,543.63 (taking into account a further invoice paid by BA Energy). Again, Dresser-Rand in its claim form characterized the claim as secured and, again, the claim form states that Dresser-Rand held assets of the CCAA Debtor valued at USD $1,651.543.63.

11 On December 16, 2009, the Monitor issued a Notice of Revision or Disallowance of the claim. This notice indicates that the Proof of Claim as submitted in the amount of USD $1,651,543.53 was revised and accepted at nil. The Monitor noted as follows:

> Retained Assets
>
> [Dresser-Rand] retained possession of certain assets as a result of the termination of the Purchase Order. In the Termination Letter the Applicant directed [Dresser-Rand] to mitigate its losses in respect of the termination of the Purchase Order. The Applicant noted in its review of [Dresser-Rand]'s Claim that the retained assets have a value in excess of the amount of [Dresser-Rand]'s Claim. Accordingly, the Applicant has revised [Dresser-Rand]'s claim to $0.00.

12 On December 18, 2009, counsel to Dresser-Rand asked to meet with counsel to BA Energy and the Monitor to discuss the reasoning behind the Notice of Revision, commenting that "(p)reviously you did not dispute our priority to the extent of what we could realize from the equipment we have in our possession." The email also notes that the compressor is custom-made equipment and that its sale may take some time.

13 On December 20, 2009, counsel to Dresser-Rand delivered a Notice of Dispute to the Monitor, with a covering letter that noted as follows:

> With respect to the enclosed Notice of Dispute, in reviewing the documentation you forwarded to Dresser-Rand Canada, Inc. in this regard, this simply may be a situation where there is misunderstanding of terminology between us. Looking at your statement about the "retained assets", you do not appear to be disputing Dresser-Rand Canada, Inc.'s right to retain the assets in question (being compressor equipment) and deal with it as it wishes. To this stage, we have always valued the retained assets as being worth as much or more than the debt that is owed by BA Energy Inc. to Dresser-Rand Canada, Inc. We do not believe that you should have put $0.00 beside the secured aspect of this claim in the Notice of Revision or Disallowance dated December 16, 2009.

14 The Notice of Dispute lists $1,651.543.63 under the designation "Reviewed Claim or Subsequent Claim as Disputed" and characterizes this amount as "Secured". It makes no claim on an unsecured basis. The Notice stipulates that "(t)his claim is fully secured. The Notice of Revision or Disallowance did not reflect this fact."

15 A without-prejudice conference call was held on January 6, 2010 among counsel to BA Energy, the Monitor and counsel to Dresser-Rand.

16 In an email dated January 11, 2010, the Monitor asked Dresser-Rand's counsel whether he had

been able to determine the appropriate person for the Monitor to speak to with respect to the equipment in the possession of BA Energy. Counsel to Dresser-Rand responded that he had not and that he was "awaiting the letter [counsel to BA Energy] indicated last week you would be sending on the other point that deals more generally with the claim, etc."

17 On January 14, 2010, the Monitor sent counsel to Dresser Rand an email that attached a letter that he was asked to review, commenting: ... "let me know if it meets your needs before I finalize it."

18 The letter, marked "draft", reads as follows:

> As Court Appointed Monitor of BA Energy Inc. I am sending this letter to you as a follow-up to our teleconference of January 5, 2010 and to provide more clarity with respect to the Notice of Revision and Notice of Dispute between BA Energy Inc. ("BA Energy") and Dresser Rand Canada, Inc. ("DRC").
>
> As agreed on our teleconference, BA Energy does not dispute DRC's rights to retain the assets in question and deal with them as it wishes. This right means DRC shall have no claim against BA Energy given that the value of the assets are at least as much or more than the claim amount. Furthermore, I must note that DRC will accept all potential risks and rewards of its actions in dealing with the assets. For further clarity, should DRC sell the assets for an amount greater than the amount of the claim filed against BA Energy, then this excess amount benefits DRC. Should DRC sell the assets for an amount less than DRC's claim against BA Energy, DRC will not be able to claim the difference against BA Energy.
>
> I trust this clarifies any misunderstanding between the parties. (emphasis added)

19 Counsel to Dresser-Rand responded saying that the letter would be reviewed internally and by his client and that he would get back to the Monitor. Numerous emails ensued between counsel to Dresser-Rand and the Monitor. On January 25, 2010, counsel to Dresser-Rand advised the Monitor that "I am told that I should hear from someone in the US part of the organization tomorrow. Unfortunately, many people have become involved within my client and has made it more complex for me to get instructions."

20 In an email dated January 27, 2010, counsel to Dresser Rand advised the Monitor that:

> ... my people as of yesterday were still assessing their position, including what can be done with the part of the compressor they have and those parts which BA has in its position. Unfortunately, these machines are very custom made for a

> particular customer and are not readily saleable or useable for anyone else. They [sic] inquiries out to see what they can do and hope to get back to me this week.

21 On February 19, 2010 counsel to Dresser-Rand left a voice mail for the Monitor. The recording was not preserved. Counsel to Dresser-Rand in an email to his client said that in the voice mail, he enquired if BA Energy was interested in making an offer to Dresser-Rand for the compressor "with the concept being that if an acceptable cash offer was made to [Dresser-Rand] for that equipment, [Dresser Rand] would forego any further claim against [BA Energy] for the balance owing." The Monitor in an email to BA Energy said that in the voice mail, counsel to Dresser-Rand was enquiring whether BA Energy would like to acquire the compressor for an unnamed price and that "if [BA Energy] acquired this equipment then Dresser-Rand would withdraw their claim".

22 On February 23, 2010, BA Energy advised the Monitor that it did not wish to purchase the compressor. On the same day, the Monitor filed its Ninth Report with the Court and served it on the parties on the service list. The report states that BA Energy anticipated filing a plan of arrangement which would result in a recovery that would be better than a liquidation, and that it was expected that the plan would be brought to the Court for approval in mid to late March, 2010. During this time period, the Monitor and BA Energy were finalizing the sale of a key asset necessary to fund the plan and were in the course of structuring the plan.

23 On March 15, 2010, BA Energy filed and served its Notice of Motion for approval to circulate a plan of arrangement and hold a meeting of creditors. Dresser-Rand was not listed either as an affected or unaffected creditor nor was it mentioned on the list of disputed claims.

24 Apparently, counsel to Dresser-Rand had not yet been added to the service list at this time and did not receive a copy of the Ninth Report until it was posted on the Monitor's web-site on March 16, 2010. Counsel to Dresser-Rand received a copy of the plan motion materials on March 17, 2010 and requested to be put on the service list on that date. The Monitor also informed counsel to Dresser-Rand on March 17, 2010 that BA Energy was not interested in purchasing the compressor from Dresser-Rand and that it took the position that the Dresser-Rand claim had been satisfied.

25 On March 18, 2010, the Court approved the circulation of the plan of arrangement to creditors.

26 On March 26, 2010, Dresser-Rand submitted a late amended proof of claim in which it stated it had an unsecured claim of USD $1,474,161.63 and a secured claim of USD $177,382.

27 On April 5, 2010, the Monitor issued a Notice of Revision or Disallowance relating to Dresser-Rand's amended proof of claim, with a revised claim amount of zero. The Monitor set out the following as reasons for disallowance:

> Dresser-Rand's Late Amended proof of claim dated March 26, 2010, claiming an unsecured claim in the amount of $1,474,161.63 USD and a secured claim in the amount of $177,382.00 USD (the "Late Amended Claim") is barred and

extinguished pursuant to the claims procedure order dated April 29, 2009 (the "Claims Procedure Order"). The Late Amended Claim is in essence the same as the Initial Claim (as defined below) submitted by Dresser-Rand, which claim has been resolved as described below.

Dresser-Rand was aware of and participated in the claims process established under the Claims Procedure Order. Dresser-Rand's initial proof of claim was received by the Monitor on or about May 15, 2009, as amended to a Subsequent Claim (as defined in the Claims Procedure Order) on September 22, 2009 (the "Initial Claim") following BA Energy's repudiation of the purchase order. The Initial Claim by Dresser-Rand was for $0.00 unsecured and Dresser-Rand acknowledged it held equipment or collateral of a value equal to its claim.

On December 16, 2009, the Monitor issued a notice of revision or disallowance thereby disallowing the total claim amount listed by Dresser-Rand in its Initial Claim (the "NOR"). The reason for the disallowance in the NOR was that Dresser-Rand acknowledged that it retained possession of the collateral equipment that it held in full satisfaction of the Initial Claim amounts (the "POC Satisfaction"), therefore, Dresser-Rand had no claim against BA Energy. Dresser-Rand did respond by issuing a notice of dispute on December 21, 2009 (the "NOD"); however, the NOD served to only address a "misunderstanding of terminology" on the part of Dresser-Rand regarding the classification of the claim amounts and not a dispute as to or the rejection of the POC Satisfaction. After further discussions between the parties, the Monitor sent draft correspondence to Dresser-Rand's solicitors dated January 13, 2010 affirming the POC Satisfaction, that Dresser-Rand was retaining the equipment in full satisfaction of its claim and that it had the risk and benefit of any potential recovery. Throughout the process leading up to the Late Amended Claim, Dresser-Rand valued the collateral equipment as being worth as much or more than the debt owed by the Applicant.

BA Energy and the Monitor relied upon the proofs of claim as filed in the claims process, including the Initial Claim, in calculating the dividend in the BA Energy Plan of Arrangement filed March 10, 2010 (the "Plan"). The inclusion of the Late Amended Claim would have significantly affected BA Energy's/the Monitor's calculations and provisions contained in the Plan, and the subsequent BA Energy creditor review, consideration and implementation of the Plan.

> The Dresser-Rand filing of the Late Amended Claim occurred only after distribution of the Plan proposing a 55% dividend. Allowance of the Amended Proof of Claim would: (i) circumvent the *Companies' Creditor Arrangement Act* (Canada) process, the Claims Procedure Order and provide Dresser-Rand an unjustified and improper advantage, and (ii) prejudice BA Energy and/or BA Energy's creditors generally in the pro rata or total distribution under the Plan.

28 Dresser-Rand filed a Notice of Dispute on April 8, 2010, submitting that there was no resolution of its claim as asserted by the Monitor, that it was "prudent and reasonable" for it to amend its claim on March 26, 2010 and that not accepting the claim would be prejudicial to Dresser-Rand and not prejudicial to BA Energy or its creditors. Dresser-Rand filed a Notice of Motion with respect to its claim on April 12, 2010 and served the service list.

29 The meeting of creditors was held on April 15, 2010. Only one creditor appeared in person: the rest voted by proxy. No-one voted against the plan. Counsel to Dresser-Rand read a prepared statement indicating that it had filed an amended proof of claim that may impact the other creditors if ultimately validated.

Analysis

30 Dresser-Rand submits that the amended proof of claim it filed on March 26, 2010 is not a "late claim", but merely an amendment to the September, 2009 proof of claim which was filed in a timely manner in compliance with the Claims Procedure Order. I cannot agree with this submission. The amended proof of claim purports to assert an unsecured claim for the first time, a claim that would qualify as an affected claim under the plan as opposed to the fully-secured claim previously asserted. It changes the nature of the original claim to such a degree that it must be considered a new claim and not a mere amendment.

31 Dresser-Rand initially filed its claim on the basis that it was in possession of assets of such a value as to satisfy its claim and that it was secured by its possession of such assets. It maintained that position for approximately eight months, leading the debtor and the Monitor to believe, not unreasonably, that Dresser-Rand would not be an affected creditor in a plan of arrangement. BA Energy structured its plan on that assumption. Dresser-Rand changed its approach and amended its claim to file in large part as an affected unsecured creditor at a time when it would have been clear to creditors that the distribution to unsecured creditors under a plan would be substantial, albeit prior to a formal vote by unsecured creditors on the plan.

32 While this application involves a determination of whether Dresser-Rand's late amended claim should be accepted, it is neither a clear case of a creditor "lying in the weeds" nor is it clearly the kind of late claim reviewed by Wittmann, J. A. (as he then was) in *Re: Blue Range Resource Corp.*, 2000 ABCA 285 (Alta. C.A.), the leading authority on the assessment of late claims. However, the principles set out in *Blue Range* are relevant to the application.

33 Wittmann, J. A. set out the following as appropriate criteria for a court to apply to the assessment of late claims:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

34 In identifying these criteria and applying them to specific late claims, Wittmann, J. A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act.* and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

A. Inadvertence and Good Faith

35 Wittmann, J.A. noted that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

36 BA Energy submits that Dresser-Rand's conduct in this case cannot be described as careless, negligent or accidental, but arose from a deliberate intent to reframe its claim as an unsecured claim when it became apparent that there would be a distribution to unsecured creditors of approximately $0.55 per dollar of claim.

37 It is clear that Dresser-Rand was aware of BA Energy's process under the CCAA from shortly after the initial order and had retained counsel active on its behalf as early as March, 2009. It filed its initial proof of claim in a timely manner in May, 2009. It was aware from August, 2009 that BA Energy had repudiated the agreement but it was also clear that from March, 2009, Dresser-Rand took the position that it was free to exercise a right of sale of the equipment in its possession. I agree that it cannot be said that Dresser-Rand's amended proof of claim arose from inadvertence.

38 BA Energy alleges that Dresser-Rand has acted in bad faith in putting forth its recharacterized and amended claim only when it became apparent that it may do better as an unsecured creditor, given the level of distribution to unsecured creditors anticipated by the successful monetization of assets.

39 While there is insufficient evidence to reach the conclusion that Dresser-Rand acted in bad

faith, it is true that it would have been clear to creditors in the relevant time period that a successful plan with an acceptable distribution to unsecured creditors was a strong possibility. At the least, Dresser-Rand delayed approximately eight months before taking any substantial or meaningful steps to value the assets in its possession in order to come to a valuation of its security. While Scott Kaffka, an employee of a U.S. affiliate of Dresser-Rand, suggests in his affidavits that Dresser-Rand was investigating the possibility of remarketing the equipment before January, 2010, it is also clear from the affidavits and cross-examination on them that relatively little was done in that regard until Mr. Kaffka became involved and contacted an equipment dealer to obtain an estimate of value for the compressor on January 28, 2010, some eleven months after counsel for Dresser-Rand first stated that it took the position that it was entitled to sell the equipment. It is noteworthy that on January 27, 2010, counsel to Dresser-Rand advised the Monitor that Dresser-Rand was still assessing its position, and that the opinion as to of value that Dresser-Rand relies upon was not formally prepared until March 19, 2010.

40 The consequences of the delay in adequately investigating the value of the assets it held as security for its claim, which accounts for most of the delay in filing the amended claim, must be borne by Dresser-Rand. The question of the resale value of the compressor was a question within the reasonable control of Dresser-Rand to determine.

41 The objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure order provides the debtor and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors given the financial circumstances of the debtor and that may be sanctioned by the court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a late claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

42 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

43 Dresser-Rand was offered an opportunity to amend its claim after the purchase agreement with BA Energy was formally repudiated, and did so on September 22, 2010, confirming its initial claim with only a slight variation in amount claimed. As late as December 21, 2009, Dresser-Rand characterized its claim as a fully-secured claim its Notice of Dispute and concedes that it believed at least to this point in time that the compressor was worth at least as much as its claim. Dresser-Rand submits that there was delay by the Monitor in responding to the amended claim, but a three-month delay in the circumstances of a large restructuring with many claims is not unusual. Dresser-Rand also submits that the Monitor should have reacted more quickly to its February 19, 2010 suggestion

that it was open to accepting an unspecified cash offer from BA Energy to settle its claim. While the Monitor did not respond for roughly a month, it is clear that the Monitor was involved in preparing and filing a key report on the restructuring with the Court and also involved in a major monetization of BA Energy's assets that would subsequently fund the plan.

B. Prejudice Caused by the Delay

44 BA Energy, in consultation with the Monitor, prepared its plan in the early months of 2010 without making any provision for an unsecured deficiency claim from Dresser-Rand. Given what had been communicated among the parties with respect to Dresser-Rand's claim at this point of time, this was not unreasonable.

45 It is difficult to determine what the effect Dresser-Rand's late amended claim may have had on the decisions of creditors with respect to whether to approve the plan. All but one creditor voted on the plan by proxy, and some of those proxies were authorized before Dresser-Rand served other creditors with a Notice of Motion with respect to its revised claim on April 12, 2010. Dresser-Rand states in its brief that 16 out of 30 proxies were submitted after April 7, 2010. Therefore, roughly half of the creditors in number had already voted on the plan several days prior to receiving notice of Dresser-Rand's late claim.

46 With respect to the materiality of the claim, it would if accepted comprise approximately 5.4% of the total pool of affected creditors and, if paid from plan proceeds, would reduce the amount available to unsecured creditors from 55 cents per dollar of a claim to 53 cents per dollar of claim. The Dresser-Rand claim therefore is not as insignificant as the late claims accepted by the Court in *Blue Range.*

47 As noted in *Blue Range* at paragraph 40, the fact that creditors may receive less money if a late claim is accepted is not prejudice relative to the second criterion. The test is whether creditors by reason of the late claim lost a realistic opportunity to do anything that they otherwise might have done. In this case, it is not possible to determine if any of the proxy votes cast in favour of the plan would have been affected by knowledge of the late claim. It is only apparent that a significant number of creditors were not aware of the claim when they decided how to vote.

48 During the sanction hearing of April 16, 2010, BA Energy indicated that, instead of reducing the distribution to other creditors if Dresser-Rand's late claim was accepted by the Court, BA Energy would find another way to pay the required distribution to Dresser-Rand.

49 Consideration of prejudice is not restricted to prejudice to other creditors. The second criterion also requires consideration of prejudice to the debtor company or other interested parties: *Blue Range* at paras. 14 and 18. The timing of the late claim with respect to the stage of proceedings is a key consideration in determining whether there has been prejudice: *Blue Range* at para. 36.

50 The parties prejudiced by this late amended claim are BA Energy and its parent Value

Creation, BA Energy's largest secured creditor. Value Creation refrained from requiring BA Energy to pay all of the proceeds of the assets it had monetized on Value Creation's secured claim and allowed BA Energy to use a portion of those proceeds to distribute to other creditors under the plan. While there is no doubt that Value Creation benefits from BA Energy's restructuring under the CCAA as a continuing entity with surviving assets, the postponement of a portion of Value Creation's secured claim was arrived at in consideration of the status of creditor claims as they had been filed, without Dresser-Rand's late amended claim.

51 It is not surprising that BA Energy did not attempt to alter its plan after having received notice of Dresser-Rand's amended proof of claim. Given the negotiations that necessarily proceed a vote on the plan, the status of proxy voting and the limited time to the creditors' meeting, BA Energy did not have a realistic opportunity to amend its plan to include Dresser-Rand without the risk of losing support from other creditors and jeopardizing the plan.

52 In *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.) at para. 74, Huddart, J. held, in a case where there would have been no effect on other creditors if a late claim was accepted as it would be paid from post-arrangement revenue, that it was fair to refuse to grant leave to the late creditor to commence an action against the debtor company for a number of reasons, noting that "(a) CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself ... As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything."

53 While the facts of this case are distinguishable from the facts before the Court in *Lindsay*, Dresser-Rand filed a very late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. Dresser-Rand's recovery would be improved considerably by its very late recharacterization of claim if Dresser-Rand's new submissions with respect to the resale value of the compressor is accepted.

54 Dresser-Rand submits that, from its perspective, the Monitor's draft letter of January 14, 2010 was a "proposed resolution" of the claim, and that thus BA Energy and the Monitor should have been aware from early 2010 that the Dresser-Rand claim was unresolved and that Dresser-Rand would be claiming a deficiency in value as an unsecured claim. While the letter is marked "draft" and the Monitor requested a response before it was finalized, it refers to an agreement reached in the teleconference and the clarification of a misunderstanding arising from the Notice of Revision. While the Monitor was advised that this letter was being reviewed by Dresser-Rand, and Dresser-Rand invited a proposal for settlement on February 19, 2010, it was not until March 26, 2010, ten months after the expiry of the initial claims bar date that Dresser-Rand made its revised position clear to the debtor and the Monitor.

55 Mr. Kaffka states in his affidavits that Dresser-Rand received a verbal estimate of value from an equipment dealer on January 28, 2010. It may well be that Dresser-Rand did not wish to disclose

the low resale value it was now alleging for the compressor at a point in time when it was hoping that BA Energy would make an offer to purchase the compressor, but this was a strategic decision by Dresser-Rand, and, again, the risk of further delay in clearly communicating its revised estimate of value because of this strategic decision must be borne by Dresser-Rand.

56 Dresser-Rand also submits that it would have filed its amended claim sooner had the Monitor advised it sooner that BA Energy was not interested in purchasing the compressor. It is true that Dresser-Rand may have been able to file its amended claim at the end of February, 2010 instead of at the end of March, 2010 had the Monitor responded earlier to Dresser-Rand's suggestion that BA Energy may wish to make an offer on the equipment, but it should be noted that Dresser-Rand's "proposal" was merely an invitation to BA Energy to make a settlement offer, and not a proposal specifying an acceptable price for the compressor that may have alerted the Monitor to its importance. The Monitor in the Thirteenth Report to the Court dated April 30, 2010 explained that it did not place a high priority on its response to the voice-mail enquiry as it thought that it was one of several enquiries that Dresser-Rand was making to potential purchasers to of the compressor.

57 Dresser-Rand submits that BA Energy knew as early as January 14, 2010 (the date of the Monitor's draft letter) that Dresser-Rand may have been in the position of recovering less than it was owed if it sold the equipment. While this was anticipated as a possibility in the January 14, 2010 letter, the responsibility for valuing the equipment Dresser-Rand claimed as its security cannot be transferred to the debtor or the Monitor. Dresser-Rand is in the business of manufacturing and marketing the equipment, and had as late as September 22, 2009 made the formal representation in its revised proof of claim that the equipment was worth the amount of its claim. It appears that in January 2010, an officer of BA Energy enquired of the Monitor whether BA Energy could recover any surplus proceeds from Dresser-Rand's sale of the compressor, further indicating that there is no evidence that either the debtor or the Monitor anticipated Dresser-Rand's late change of position on value.

C. Other Considerations

58 Dresser-Rand submits that equity favours its application, as it is a wronged party with a legitimate claim that has been compromised by the CCAA proceedings. While if Dresser-Rand's current position with respect to value is accepted, it may suffer a deficiency in its claim of roughly $1.6 million still owing on the purchase price of roughly $8 million for the compressor, Dresser-Rand has possession of the compressor and current estimates of a deficiency are still speculative. There is no overwhelming equitable consideration that would counter-balance relevant prejudice to BA Energy of the late claim.

59 Dresser-Rand submits that the situation is similar to that described in *Re Look Communications Inc.* (2005) 21 C.B.R. (5th) 265 (Ont. Sup. Ct. J.). However, this is not a situation where BA Energy was aware at all times of the applicant's claim and did not object, nor is it a case where, had court approval of the claim been sought prior to plan approval, it would be clear that

such approval would be granted as a matter of course. No assumptions can be made about the outcome if this amended claim had been brought in a timely way and disputed.

D. Conclusion on a Late Claim

60 It would not be fair or equitable to accept this late amended claim. Given the facts of this case, there are no conditions that would alleviate relevant prejudice.

61 If I am wrong in my assessment of whether the late revised claim should be accepted, I would agree with BA Energy that the claim should not in any event be accepted as set out in the Amended Proof of Claim, but should be remitted to the Monitor to allow a proper consideration of value. BA Energy and the Monitor have not been given an opportunity to test the allegations made as to the resale value of the compressor as would occur in the normal course of a claim, given the timing of the late claim in relation to the plan and its sanctioning. While the parties may not have discussed this in advance of the application, it is clear that this was not a normal claims dispute, but was restricted to the issue of whether the claim should be accepted.

E. Conduct Money

62 In support of this application, Dresser-Rand filed and relied upon affidavits sworn by Mr. Kaffka, who resides in New York. Mr. Kaffka was cross-examined on these affidavits. Dresser-Rand submits that BA Energy should be required to pay conduct money for Mr. Kaffka's attendance at cross-examination.

63 BA Energy objects to paying conduct money for Mr. Kaffka's cross-examination because he is not an employee of Dresser-Rand Canada Inc., because he had no involvement with the issues prior to January, 2010 and because Dresser-Rand has employees in Alberta who could have provided an affidavit, including Bill Colpitts, its recently-retired General Manager who was involved with the matter and signed the first Proof of Claim.

64 Dresser-Rand submits that Mr. Kaffka was an appropriate affiant because he was primarily responsible for Dresser-Rand's mitigation efforts after January, 2010 and because he was the individual who determined the market value of the compressor.

65 While Mr. Kafka's evidence of pre-2010 efforts by Dresser-Rand to mitigate and to assess value was of necessity hearsay, he was involved in 2010 mitigation efforts. He was not so clearly an inappropriate witness that Dresser-Rand is disentitled to reasonable conduct money. I direct that BA Energy be required to pay reasonable conduct money for Mr. Kaffka's attendance.

F. Costs

66 This is not an appropriate case to depart from the usual practice with respect to costs in commercial insolvency applications, and therefore both Dresser-Rand and BA Energy will bear

their own costs.

B.E.C. ROMAINE J.

cp/e/qlcct/qljxr/qljyw

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,* R.S.C. 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.

Applicants

BOOK OF AUTHORITIES OF THE RETIREES
(Returnable July 24, 2013)
VOL. II OF II

July 10, 2013

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Table of Contents

19. *AGB Halifax Enterprises Inc. v. Wood Street Developments Inc.* (1999), 125 O.A.C. 275 (Ont. C.A.)

20. *McKay v. Fee* (1860) 20 U.C.W.B. 268 (U.C.Q.B.) at paras. 1-4.

21. *Elguindy v. Wakeworth Institution* (2011) 2011 ONSC 4670

22. *The Law of Costs,* 2nd ed. (Aurora, Ontario: Canada Law Books, looseleaf).

23. *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77 at para. 37

24. *Heather's House of Fashion Inc., Re* (No. 2) (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.)

TAB 15

2004 CarswellOnt 5033,

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2004 CarswellOnt 5033

Noma Co., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, SECTION 18.6

IN THE MATTER OF THE APPLICATION OF NOMA COMPANY, ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE (Applicant)

Ont. S.C.J. [Commercial List]

Cameron J.

Heard: November 25, 2004
Judgment: November 30, 2004
Docket: 02-CL-4804

Counsel: Michael McGraw, for Applicant, Noma Company

Peter Carlisi, for Despina Koutlemanis

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Labour and Employment; Public

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Notice of disallowance

Plaintiff brought action against defendant company for damages resulting from alleged harassment — Defendant's parent American company filed application for relief under U.S. bankruptcy court — Defendant sought and received order recognizing U.S. proceedings and granting defendant stay against claims and proceeding against it or its property in Canada — Order provided that any Canadian resident with claims against defendant pre-dating order must file proof of claim before bar date — Defendant published bar date notice in three major Canadian newspapers — Defendant sent notice of bar date to list of creditors, with list including plaintiff — Plaintiff and plaintiff's attorney never

received notice — Plaintiff failed to file proof of claim before bar date — Defendant brought motion to dismiss plaintiff's action — Motion granted — Claim to action was forever discharged and released when plaintiff failed to file proof of claim by bar date — Defendant fulfilled all reasonable requirements of service — No evidence existed before court to suggest certification of service filed by defendant was not legitimate — No reason existed to lift bar and allow plaintiff to file late claim — Plaintiff did not act in timely fashion even after bar date expired — Plaintiff waited full 17 months before taking action after finding out about expired bar date.

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Enforcement of orders

Plaintiff brought action against defendant company for damages resulting from alleged harassment — Defendant's parent American company filed application for relief under U.S. bankruptcy court — Defendant sought and received order recognizing U.S. proceedings and granting defendant stay against claims and proceeding against it or its property in Canada — Order provided that any Canadian resident with claims against defendant pre-dating order must file proof of claim before bar date — Defendant published bar date notice in three major Canadian newspapers — Defendant sent notice of bar date to list of creditors, with list including plaintiff — Plaintiff and plaintiff's attorney never received notice — Plaintiff failed to file proof of claim before bar date — Defendant brought motion to dismiss plaintiff's action — Motion granted — Claim to action was forever discharged and released when plaintiff failed to file proof of claim by bar date — Defendant fulfilled all reasonable requirements of service — No evidence existed before court to suggest certification of service filed by defendant was not legitimate — No reason existed to lift bar and allow plaintiff to file late claim — Plaintiff did not act in timely fashion even after bar date expired — Plaintiff waited full 17 months before taking action after finding out about expired bar date.

Cases considered by *Cameron J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303, 1992 CarswellOnt 163 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Ivorylane Corp. v. Country Style Realty Ltd. (2004), 2004 CarswellOnt 2567 (Ont. S.C.J. [Commercial List]) — considered

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73, 1994 CarswellBC 620 (B.C. S.C.) — considered

Robinson v. Royal Bank (1995), 26 O.R. (3d) 627, 1 R.P.R. (3d) 25, 1995 CarswellOnt 1388 (Ont. Gen. Div.) — considered

2004 CarswellOnt 5033,

Tuckahoe Financial Corp. v. George W. Tindall Ltd. (1995), 37 C.B.R. (3d) 46, 1995 CarswellOnt 666 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

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

Generally — referred to

s. 6 — considered

s. 18.6 [en. 1997, c. 12, s. 125] — referred to

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39 — referred to

MOTION to dismiss action following failure of plaintiff to file proof of claim.

***Cameron J.*:**

1 These are motions:

1. by Noma Company to:

a) dismiss the action commenced by Despina Koutlemanis ("Ms. Koutlemanis") in 1997 against Noma Inc., a predecessor of Noma Company, for damages for harassment during employment (the "Action") set to be tried December 15, 2004;

b) for a declaration that the Action is a claim which, in this proceeding under the *Companies' Creditors Arrangement Act* ("CCAA"), was barred and extinguished on April 14, 2003 pursuant to a Claims Process and Bar Order ("Claims Bar Order") dated February 7, 2003 and a Canadian Recognition Order dated October 9, 2003 confirming a U.S. Federal Court order which confirmed a Plan of Reorganization respecting Noma Company and its affiliates ("Canadian Recognition Order").

2. by Ms. Koutlemanis for:

a) a declaration that the Action is a valid and subsisting action not subject to the Claims Bar Order or the Canadian Recognition Order; and

b) that this court can proceed to try the Action and that any judgment resulting therefrom is enforceable; or

c) that the Claims Bar Order be lifted as it may apply to the Action; or

d) that Ms. Koutlemanis be permitted to make a claim as contained in the Action notwithstanding the Claims Bar Order.

Chronology

2 The Action was commenced by Ms. Koutlemanis against Noma Inc. in 1997 for general, special and punitive damages totaling $650,000 for personal injuries resulting from harassment while she was an employee of Noma Inc. between 1990 and 1993.

3 Aylesworth Thompson Phelan O'Brien LLP ("Aylesworth") represented Ms. Koutlemanis and Gowling Henderson ("Gowlings") represented Noma Inc. and later Noma Company in the Action.

4 In or about 1998 Ms. Koutlemanis suffered personal injuries in a motor vehicle accident and in another incident and commenced actions in respect of them.

5 In 1999 Noma Inc. amalgamated with a numbered company under the laws of Nova Scotia and continued as Noma Company.

6 On October 11, 2002 (the "US Petition Date"), Noma's ultimate parent company, GenTek Inc. ("GenTek") and thirty-one of GenTek's subsidiaries and affiliates (the "Chapter 11 Debtors"), including Noma, filed petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "US Proceedings") in the United States Bankruptcy Court for the District of Delaware (the "US Court") to facilitate a global restructuring of the GenTek group of companies.

7 In November 2002 Aylesworth received a Notice of Commencement of Chapter 11 Bankruptcy Cases in the U.S. Court "In re GenTek Inc. et al." and "In re: Noma Company" as debtors, dated October 29, 2002 naming as

debtors 32 companies including "Noma Corporation" and "Noma Company", all having the address of: Liberty Lane, Hampton, New Hampshire, 03842.

8 The notice gave notice of a meeting of creditors on November 18, 2002 in Wilmington, Delaware and names as counsel for the debtors Skadden, Arps, Slater Meagher & Flom LLP of Wilmington, Delaware.

9 The notice gave notice of names used by the debtors in the last six years for some of the debtors. There were no prior names given for Noma Corporation or Noma Company.

10 On November 5, 2002 Aylesworth wrote to Gowlings asking whether the notice had any application to the Action against Noma Inc. Gowlings advised by voicemail that it was prepared to discuss the matter. Aylesworth, by letter, sought a written response. It received none.

11 On December 10, 2002, Noma Company sought and obtained an Initial Order pursuant to section 18.6 of the CCAA, recognizing the U.S. Proceedings and granting Noma Company, amongst other things, a stay against claims, proceedings and the exercise of any contractual rights against it or its property in Canada (the "Stay Period");

12 The Initial Order provides for a Stay of Proceedings against Noma Company such that actions could not be commenced or continued against Noma Company.

13 Noma Company was and is represented in this proceeding by Blake, Cassels & Graydon ("Blakes").

14 Neither Ms. Koutlemanis nor many other creditors of Noma Company received notice of the application for the Initial Order.

15 By Order of the Honourable Mr. Justice Ground dated February 7, 2003 (the "Claims Bar Order"), the Court granted an order establishing a process for filing proofs of claim and a bar date of April 14, 2003 (the "Bar Date") for creditors of Noma Company resident in Canada.

16 The Claims Bar Order provided that any Canadian resident with a claim against Noma Company which arose prior to October 11, 2002 was required to file a proof of claim to be received by Noma Company's claims agent on or before the Bar Date and that any party that failed to file such a proof of claim on or before the Bar Date, shall be forever barred, estopped and enjoined from asserting any claim against Noma Company.

17 Paragraph 3 of the Claims Bar Order provided:

> This court orders that Noma is authorized and directed to mail to all known creditors of Noma resident in Canada according to its books and records a proof of claim with instructions and notice of bar date substantially in the form annexed hereto...on or before February 13, 2003.

18 Paragraphs 10, 11, 12, 13 and 14 of the Claims Bar Order provided:

10. This court orders that notice of this Order and the Bar Date, substantially in the form of the notice of bar date attached hereto as Schedule "B" (the "Bar Date Notice"), shall be deemed good, adequate and sufficient notice if it is served by being deposited in the United States mail, first class postage prepaid, on or before February 13, 2003, upon:

(a) all Canadian Creditors listed on the Schedules at the address stated therein;

(b) all current and recent former employees of Noma who are resident in Canada;

(c) all current and recent former customers of Noma who are resident in Canada; and

(d) all persons and entities requesting notice of these proceedings.

11. This court orders that so long as the initial mailing of the Bar Date Notice occurs on or before February 13, 2003 as provided above, Noma may make supplemental mailings of the Bar Date Notice up to 23 days in advance of the Bar Date, as may be necessary in situations where (a) notices are returned by the Post Office with forwarding addresses, necessitating a re-mailing to the new address; (b) certain parties acting on behalf of parties in interest declining to pass along notices to such parties and instead return their names and addresses to Noma for direct mailing; and (c) additional potential claimants become known as a result of this process.

12. This court orders that Noma is entitled to establish Special Bar Dates (as defined in the US Order) with respect to any subsequently identified Canadian Creditors. All Special Bar Dates will be established in accordance with paragraph 14 of the US Order.

13. This court orders that Noma publish a bar date notice in substantially the form attached as Schedule "C" (the "Publication Notice"), in the Globe and Mail (National Edition), the Toronto Star and the Montreal Gazette (including a French translation) on or before February 15, 2003.

14. This court orders that notification of the Bar Date by the mailing of a notice of Bar Date and publication of the Publication Notice as provided herein is fair and reasonable and will provide good, sufficient and proper notice to all Canadian Creditors of their rights and obligations in connection with any claims they may have against Noma in these proceedings or the US Proceedings.

19 An affidavit filed in support of the Claims Bar Order purported to exhibit a list of the Canadian creditors of Noma Company which would be the basis of the mailing of the proofs of claim and notices to Canadian creditors. There were on the list the names of about 700 creditors resident in Canada. Ms. Koutlemanis' name is on the list with an address "c/o Aylesworth Thompson Phelan, South Tower, Royal Bank Plaza, P.O. Box 15, Suite 3000, Toronto".

20 Gowlings was provided with a copy of the Claims Bar Order. There is no evidence that Gowlings advised Aylesworth of it.

21 A document headed "Affidavit of Service" signed but not sworn by Kathleen M. Logan on February 28, 2003 stated that "I hereby certify under penalty that" on or about February 13, 2003 she caused copies of the proof of claim form and notice of bar date requiring filing of proofs of claim on or before the Bar Date to be inserted in first class, postage pre-paid and the pre-addressed envelopes and delivered to the U.S. Postal Service for delivery to those persons on the Service List attached to the "Affidavit of Service" as an exhibit. The Exhibit in the Applicant's Record herein is only page "94 of 181". The exhibit is headed:

Service List

Notice of Bar Date Requiring Filing Of Proofs Of Claim On Or

Before April 14, 2003, At 4:00 P.M. Eastern Time

Noma Company — Canadian Entities

DEBTOR: GEN — TEK US AND CANADA

22 The one page exhibit shows the names of 27 creditors with Canadian addresses whose names begin with "K" which includes:

Creditor ID: 189-03

Koutlemanis, Despina

c/o Aylesworth Thompson Phelan et al.

South Tower Royal Bank Plaza

PO Box 15 Ste 3000

Toronto ON M5J 2J1

Canada

23 The affidavit of the lawyer of Blake Cassels & Graydon ("Blakes"), counsel for Noma Company herein, who swore the affidavit in support of this motion was patently incorrect in saying the "Affidavit of Service" was sworn but the error is not material.

24 Counsel for Ms. Koutlemanis argues that a certificate is not sufficient to prove service. Rule 39 permits evi-

dence to be given by affidavit unless a statute or rule provides otherwise. This argument is initially not unattractive. However, I am satisfied from the material before me that the certificate was probably accepted by the U.S. Court. Further, on its face it was made "under penalty" which I take to mean that the certifier recognizes that she is subject to sanction if the information is false. That sanction is unlikely to carry the moral sanction of an oath but appears to have the potential of prosecution not unlike that for perjury. I equate the certificate to a solemn affirmation in our jurisdiction.

25 There is no evidence before me to suggest that the certification in the "Affidavit of Service" is not true.

26 On or about February 15, 2003, in accordance with the Claims Bar Order, Notice of the Bar Date was published in the Globe and Mail (National Edition), the Toronto Star and the Montreal Gazette.

27 The unchallenged evidence on these motions is that neither Aylesworth nor Ms. Koutlemanis received the Notice or Notice and Proof of Claim. Neither Aylesworth nor Ms. Koutlemanis saw the published notice. The Notice and Proof of Claim addressed to Aylesworth were not returned to Kathleen Logan's company.

28 Aylesworth moved its offices from Royal Bank Plaza to Toronto Dominion Centre in early June 2003.

29 Ms. Koutlemanis did not file a Proof of Claim by the Bar Date.

30 On June 17, 2003, Blakes sent a letter (the "June 17 Letter") to Aylesworth advising Aylesworth of Noma Company being the successor to Noma Inc. and of the Stay Period in the Initial Order, providing copies of the Initial Order, the Claims Bar Order, and an "Affidavit of Service" evidencing that Ms. Koutlemanis was served with a proof of claim and the notice as per the Claims Bar Order, and advising that Ms. Koutlemanis did not file a proof of claim by the Bar Date and a copy of an order extending the Stay Period to September 30, 2003. On June 18 Noma Company changed its solicitors in the Action to Blakes. On the same day Blakes attended at the pre-trial in the Action and advised Aylesworth again of the Stay Period and the bar of claims.

31 Aylesworth asked Blakes at the pre-trial of the Action how the Action was affected by the Chapter 11 proceedings. Blakes suggested a possible change of name on the amalgamation of Noma Inc.

32 Aylesworth took the position that Noma Inc.'s counsel was obliged to advise counsel of any change of its client's name.

33 On August 11, 2003, Noma obtained an order in the US Proceedings approving a Canadian claims dispute process and ceding jurisdiction for the resolution of claims of Canadian creditors governed by Canadian law to this court. On August 19, 2003, this court granted the Claims Dispute Process Order, whereby Canadian claims, as defined therein, would be disputed in this jurisdiction, if necessary, and under the supervision of this court.

34 On June 30, 2003, the Joint Plan of Reorganization under Chapter 11, Title 11, United States Code of GenTek Inc., et al., and Noma Company, Debtors was filed. On August 21, 2003 the Plan of Reorganization and Disclosure

Statement was filed with the US Court. The final Disclosure Statement and Plan of Reorganization was filed in the US Court on August 28, 2003 (the "Plan of Reorganization"). The US Court approved the Disclosure Statement on August 25, 2003.

35 In August 2003 Ms. Koutlemanis changed her solicitors from Aylesworth to Kapelos and Carlisi ("Kapelos"). Kapelos received the file from Aylesworth in September, 2003.

36 The Plan of Reorganization was approved by the requisite majority of creditors. By order of the US Court dated October 7, 2003 (the "US Confirmation Order"), the US Court found, among other things, that the Plan of Reorganization complied in all respects with the requirements of the US Bankruptcy Code and related rules.

37 On October 9, 2003, Noma Company sought and obtained a confirmation recognition order recognizing the US Confirmation Order in its entirety and directing that the US Confirmation Order be implemented and effective in Canada in accordance with its terms (the "Canadian Recognition Order").

38 Upon confirmation of the Plan of Reorganization, Noma Company was provided with a broad discharge and release of any and all claims and actions.

39 The Plan of Reorganization required claimants to elect by March 1, 2004 whether they wished to receive payment of their claims in money or in shares. In the absence of an election, the claimant was deemed to elect payment in shares. Successful unsecured claimants received six cents on the dollar or shares of the same value.

40 On December 1, 2003, Kapelos, the new and current counsel to Ms. Koutlemanis, sent a letter to Blakes requesting an adjournment of the trial of the Action. On December 4, 2003, Blakes sent a reply letter to Kapelos (the "December 4 Letter"), providing copies of the Claims Bar Order, the Affidavit of Service and advising Kapelos that Aylesworth was served with the Notice and a Proof of Claim form but failed to file a proof of claim in advance of the Bar Date as mandated by the Claims Bar Order. Blakes stated that any claims by Ms. Koutlemanis against Noma Company, including the Action, are forever barred, estopped and enjoined from being asserted against Noma Company. Further, in the December 4 Letter, Blakes refused to consent to an adjournment of the trial of the Action and requested that Ms. Koutlemanis consent to an order dismissing the Action as against Noma Company. Ms. Koutlemanis has refused to provide such a consent.

41 On February 4, 2004, Blakes received a copy of a letter (the "February 4 Letter") from Kapelos to the Court Office advising that they had attended Trial Scheduling Court on February 2, 2004 and by Order of the Honourable Mr. Justice Cameron, the Action was being transferred to case management and would be tried together with two other actions in which Ms. Koutlemanis is the plaintiff. Blakes was not present at Trial Scheduling Court. The status of the Action was not an issue before me then.

42 Blakes attempted to contact Kapelos to confirm that the Action was not proceeding by leaving messages at Kapelos' office on February 5, 15, 23 and April 13, 2004, and did not receive a return call.

43 On March 1, 2004 the accepted claims of unsecured creditors received shares and warrants of New Gen-Tek for their claims unless they elected to receive cash. Those electing the cash option received six cents on the dollar. The remaining available equity is reserved to satisfy disputed claims which are ultimately allowed.

44 On June 2, 2004, Blakes sent a letter to Kapelos enclosing a copy of a draft motion record in these proceedings to dismiss the Action, advising Kapelos that Noma Company would be bringing a motion in these proceedings to have the Action dismissed.

45 Kapelos asserted that the Action was not barred and extinguished because the Action was commenced against Noma Inc. and not Noma Company. On July 7, 2004 Blakes sent a letter to Kapelos enclosing a corporate search confirming that Noma Inc. and 3034843 Nova Scotia Company amalgamated on November 1, 1999 and continued as Noma Company and confirmed its position that the Action is forever barred and extinguished by the failure to file a proof of claim by the Bar Date.

46 Kapelos obtained the affidavit of Andrea Taylor, a solicitor of Aylesworth, sworn July 28, 2004 (the "Taylor Affidavit"), in support of Ms. Koutlemanis' position.

47 The Taylor affidavit in support of Ms. Koutlemanis' position was delivered to Blakes on September 27, 2004.

48 Noma Company served its first version of the notice of motion herein on or about October 9, 2004.

49 Ms. Taylor swore that Aylesworth was never advised by counsel for Noma Inc., the defendant in the Action, that the corporation became Noma Company in 1999, two years after commencement of the Action.

50 Ms. Koutlemanis served her cross-motion herein on November 18, 2004 and cross-examined the Noma Company witness on November 19, 2004.

Issues

1. Is the claim in the Action barred and extinguished by Ms. Koutlemanis' failure to file a proof of claim prior to the Bar Date in the Claims Procedure and Bar Order?

2. If so, should this court give leave to file a late claim so as to exempt the Action from the Claims Procedure and Bar Order?

51 I cast the second question in this way because all Ms. Koutlemanis lost by not receiving notice of the Claims Bar Order and requirement to file a proof of claim was her entitlement as an unsecured creditor in Noma Company's proposal. She has no grounds for the orders to have her claim excluded from the CCAA proceedings so that any judgment in the Action would be enforceable. She has not alleged fraud.

1. — Bar of the Action

52 The purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors. In furtherance of that objective it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors while the company attempts to carry on business as a going concern and to negotiate a corporate restructuring arrangement which is approved by the creditors: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at 309.

53 Section 6 of the CCAA provides that where the requisite majority of creditors agrees to a compromise or arrangement and it is sanctioned by the court it is binding on the company and on *all* creditors (emphasis added). Consequently no action can be brought by a creditor to enforce its claim as if the compromise had not been sanctioned by the court: *Tuckahoe Financial Corp. v. George W. Tindall Ltd.*, [1995] O.J. No. 4121 (Ont. Gen. Div. [Commercial List]) at para. 8, where a default judgment against the company obtained after court approval of the plan under the CCAA was declared a nullity.

54 *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.) was a case where a substantial unsecured creditor was, through inadvertence, not on the list of creditors and not given notice of the stay of proceedings or the CCAA approval of the plan.

55 At p. 124 the court stated that once the creditors, the company and the court have agreed to the plan of reorganization, the company must be able to carry on business free of the burden of the creditors' claims except as the creditors have agreed to in approving the plan. In obtaining the creditors' agreement, the creditors will have agreed to compromise their claims. It would be unfair to them if a dissident or absent creditor cold remain outside the plan and assert its full claim. The purpose of the CCAA is to avoid such a result. Those who participate in CCAA proceedings must be assured that there are no other creditors waiting outside the process for a mistake to be made of which they can take advantage or that an oversight or inadvertence in complying with court orders, will result in some claims remaining outside the system. The certainty of court orders must be assured. See *Lindsay v. Transtec Canada Ltd.* at pp. 125 and 129.

56 Counsel for Ms. Koutlemanis refers to *Ivorylane Corp. v. Country Style Realty Ltd.*, 2004 CarswellOnt 2567 (Ont. Gen. Div. [Commercial List]), June 22, 2004, 2004 WL1353660 at paragraphs 45, 49-52 as authority for the proposition that a claims bar of which notice has been published in a newspaper which has not been seen by the creditor cannot bind the creditor. However, in *Ivorylane* the debtor company did not comply with a term of the bar order requiring service on the creditor by fax transmission, personal delivery or pre-paid mail. More importantly the creditor was not a creditor affected by the plan of reorganization or obliged to file a proof of claim: See para. 34.

57 I am satisfied from:

a) the terms of the Claims Bar Order;

b) the certificate of mailing in the "Affidavit of Service" in accordance with the order;

2004 CarswellOnt 5033,

c) advertising in accordance with the order;

d) Ms. Koutlemanis' failure to file a proof of claim by the Bar Date;

e) the Canadian Recognition Order; and

f) the provisions of s. 18.6 of the CCAA respecting recognition and co-ordination of proceedings under the CCAA with foreign proceedings dealing with the collective interests of the creditors generally,

that the claim in the Action was forever discharged and released.

2. — Permitting a Late Claim

58 Notwithstanding the effect of the terms of the CCAA and the court's orders herein, Ms. Koutlemanis seeks leave to file a late claim. I assume the motion is based on the equitable jurisdiction of this court. There are precedents for such claims: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 55 O.A.C. 303 (Ont. C.A.); *Blue Range Resource Corp., Re* (2000), 193 D.L.R. (4th) 314 (Alta. C.A.) [hereinafter Enron].

59 *Enron* dealt with the issue of allowing the filing of late claims after a court ordered claims bar date. The court determined at para. 26 on p. 324, that the issue should be determined on the application of the following criteria:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice can be found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

60 In the context of the criteria, *Enron* stated that "inadvertent" includes carelessness, negligence and accident and is unintentional.

61 The delay immediately following the mailing and advertising on February 13, 2003 was probably caused by the inadvertence of either the mailing agent, the U.S. Postal Service, Canada Post or Aylesworth. There is no evidence that the non-receipt was not inadvertent.

62 However, on June 17, 2003 Blakes, Noma Company's new solicitor in the Action gave specific notice to Ms.

Koutlemanis, through her solicitor, in the context of the Action, that the claims bar applied to the Action. Aylesworth was clearly on notice that the Claims Bar Order and the Stay Order applied to the defendant in the Action and to the claim in the Action and that Ms. Koutlemanis had not filed a proof of claim by the Bar Date.

63 Any inadvertence by Ms. Koutlemanis ceased to run on or about June 17, 2003.

64 The claim by Ms. Taylor on behalf of Ms. Koutlemanis that Noma Company could not be said to be Noma Inc. is not a *bona fide* reason for not reacting to the Blakes letter. The first sentence of the letter stated:

> We are counsel for Noma Company, successor in interest to Noma Inc. ("Noma").

65 The letter was delivered in the context of the Action.

66 If Aylesworth had any doubt of what it was being told, Aylesworth was put on notice with a duty to inquire. They could have done a corporate search to confirm Blakes' advice. There is no suggestion they did so.

67 Kapelos received the file from Aylesworth in September, 2003. I assume the Blakes letter was in the file. There is no evidence it was not.

68 Kapelos clearly had a separate notification from Blakes on December 4,2003 confirming the information in the July 17, 2003 letter to Aylesworth and concluding that Ms. Koutlemanis' claim was barred. Kapelos did nothing. It continued as if the Action was still subsisting and refused to consent to a dismissal of the action requested by Blakes.

69 On June 2, 2004 Blakes sent to Kapelos a draft motion record to dismiss the Action by way of offering an opportunity to respond before formally instituting the motion.

70 Kapelos did not respond to the June 2, 2004 letter. They did not commence the cross-motion herein until after the Noma Company motion was served.

71 In my opinion Ms. Koutlemanis' solicitors did not act in good faith after June 17, 2003. They waited over 17 months before bringing this motion.

72 If Ms. Koutlemanis' claim is allowed, it would undermine the purpose and assumptions on which the CCAA process is based. By not reacting to the Blakes June 17, 2003 letter on a timely basis her counsel permitted the process of approval and confirmation of the plan of reorganization to continue.

73 There is no evidence before me of the total of the proven claims against Noma Company. I am unable to assess the value of Ms. Koutlemanis' claims in the Action. There is no evidence before me of Noma Company's current net worth. Noma Company can issue additional equity only for disputed claims ultimately allowed, not for late claims. However, with a recovery potential of 6 cents on the dollar, the Action cannot be worth more than $39,000.

74 Even if Ms. Koutlemanis had received the notice and filed the proof of claim by the Bar Date her recovery would not have exceeded $39,000, being 6% of her claim in the Action.

75 I am offered no grounds on which the relevant prejudice could be alleviated save and except that she is an individual with a damage claim suing a corporation which her counsel implies is wealthy and so there may be money there.

76 I am sensitive to her loss but that argument does not address the issue before me. I must also be alert to the prejudice to Noma Company, its creditors and the reliability of this court's orders as to their finality.

77 It is argued that Gowlings knew of the change of name, the Initial Order and the Claims Bar Order and had a duty, as solicitor in the Action for Noma Company, to tell Aylesworth on a timely basis but that Gowlings failed to do so.

78 Counsel for Ms. Koutlemanis could offer no authority for the existence of such a duty or when such a duty arose.

79 If there was such a duty respecting notice of the Claims Bar Order, was Gowlings not entitled to rely on the notice provisions of that order, provided they were complied with?

80 When asked, Gowlings failed to respond to Aylesworth's request for information as to the application of the Notice of Commencement of Chapter 11 Proceedings to the Action and the defendant therein. In my opinion they should have done so. It was a reasonable request by Aylesworth and deserved a response. Communication, cooperation and common sense should govern relations between counsel in all civil proceedings, not just on the Commercial List.

81 Even if Noma Company's counsel had made Aylesworth aware of the change of the defendant's name to Noma Company, it is unlikely Aylesworth would have received notice of the application for the Initial Order or of the Bar Date and the need to file a proof of claim. The problem only arises, respecting the motion for the leave to file a claim late, on the receipt by Aylesworth of Blakes' June 17, 2003 letter. At that point Aylesworth had clear knowledge of the change of name and the Claims Bar Order. Had this cross-motion been brought on a timely basis after June 17, 2003, leave would probably have been given. Instead, Ms. Koutlemanis' counsel, knowing of the problem, ignored it and delayed for 17 months. Noma Company acted in the interim in reliance on there being no other provable claims by preparing a proposal, putting it to its creditors and obtaining the approval of the U.S. Court and this court.

82 Counsel referred to *Robinson v. Royal Bank* (1995), 1 R.P.R. (3d) 25, 26 O.R. (3d) 627 (Ont. Gen. Div.) as authority for an obligation on a solicitor for a party to disclose to the other side important information. In *Robinson* the plaintiff sought to defend enforcement of the mortgage against her which she knew had been forged by her husband but failed to tell the mortgagee. Her husband later became bankrupt. The court determined that the plaintiff's knowledge of the forgery, without telling the mortgagee, estopped her from relying on the forgery to deny the validity of the mortgage and its enforceability against her. The mortgagee had been denied its opportunity to claim against the husband. This has no application to the issue of Noma Company's failure to tell Ms. Koutlemanis of its change of name

2004 CarswellOnt 5033,

or the effect of the Claims Bar Order.

Conclusion

83 I declare that the claim in the Action is barred and extinguished and is no longer a valid and subsisting action.

84 I decline to exercise my discretion to lift the Claims Bar Order as it applies to the Action to permit Ms. Koutlemanis to file a proof of claim.

85 The Action is dismissed.

Costs

86 Unless the parties agree as to costs, the issue may be addressed by written submissions to me. Those of Noma Company shall be made within 15 days after release of these reasons and those of Ms. Koutlemanis within 10 days thereafter.

Motion granted.

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TAB 16

C

2000 CarswellAlta 1336, 276 A.R. 273

Ontario v. Canadian Airlines Corp.

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

In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.

The Province of Ontario, Applicant and Canadian Airlines Corporation and Canadian Airlines International Ltd., Respondents

Alberta Court of Queen's Bench

Paperny J.

Heard: November 3, 2000
Judgment: November 7, 2000
Docket: Calgary 0001-05071

Counsel: *Larry B. Robinson*, for Applicant.

Chris Simard, for Respondents.

Subject: Provincial Tax; Corporate and Commercial; Insolvency

Taxation --- Provincial and territorial taxes — Ontario — Sales tax — Miscellaneous issues

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no prejudice if extension were granted — Funder had long been aware of province's claim — Equities did not favour airline's position in circumstances — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Corporations Tax Act, R.S.O. 1990, c. C.40 — Retail Sales Tax Act, R.S.O. 1990, c. R.31.

Taxation --- Provincial and territorial taxes — Ontario — Miscellaneous taxes

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no prejudice if extension were granted — Funder had long been aware of province's claim — Equities did not favour airline's position in circumstances — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Corporations Tax Act, R.S.O. 1990, c. C.40 — Retail Sales Tax Act, R.S.O. 1990, c. R.31.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Province assessed airline for taxes owing under Retail Sales Tax Act and Corporations Tax Act — Airline filed notices of objection and appeals were ongoing — Airline provided province with letters of credit to secure assessments under appeal — Airline obtained court protection under Companies' Creditors Arrangement Act — Airline neglected to serve province with copy of court order setting claims bar date — Province first received copy of order with voting package, which arrived three days before claims bar date — Claims bar date had passed by time information reached appropriate department — Province brought motion for extension of time to file proof of claim — Motion granted — Province's delay was inadvertent and partly caused by airline — Once package arrived at correct department, steps were taken promptly to file claim — No evidence suggested that province was attempting to gain any advantage over other creditors — Funder of airline's reorganization would suffer no prejudice if extension were granted — Funder had long been aware of province's claim — Equities did not favour airline's position in circumstances — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — Corporations Tax Act, R.S.O. 1990, c. C.40 — Retail Sales Tax Act, R.S.O. 1990, c. R.31.

Cases considered by *Paperny J.*:

Blue Range Resource Corp., Re, 2000 ABCA 285, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, [2001] 2 W.W.R. 477 (Alta. C.A.) — applied

Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, 5 C.C.P.B. 219, [1995] 2 W.W.R. 404, 99 B.C.L.R. (2d) 73 (B.C. S.C.) — distinguished

Statutes considered:

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

Generally — referred to

Corporations Tax Act, R.S.O. 1990, c. C.40

Generally — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31

Generally — referred to

MOTION by province for extension of time to file distribution dispute notice.

***Paperny J.*:**

1 This is an application by the province of Ontario ("Ontario") to extend the time within which to file its distribution dispute notice ("Dispute Notice"). I granted the application with reasons to follow. These are those reasons.

I. Facts

2 Canadian Airlines International Ltd. ("Canadian") has followed a practice of self-assessing its tax liabilities and has made installment payments of tax under two Ontario statutes, the *Retail Sales Tax Act* and the *Corporations Tax Act*. Pursuant to an ongoing auditing process, Ontario has assessed Canadian for taxes owing under these two statutes. The assessments date back as far as 1981. Following the assessments, Canadian filed eight notices of objection and appeals are ongoing. Canadian has provided Ontario with three separate letters of credit to secure the assessments under appeal. The letters of credit have been renewed at least once.

3 Ontario estimates the total assessments at approximately $2 million. This may be subject to adjustment due to ongoing audits and the failure of Canadian to have completed its 1999 and 2000 tax returns. Canadian has disputed these assessments from the outset and as stated in the affidavit of Nhan Le, Canadian's Director of Taxation, is of the view that its liability to Ontario for these taxes is contingent and negligible. In short, the tax liability of Canadian to Ontario has been in dispute for several years.

4 Canadian received court protection under the *Companies' Creditors Arrangement Act* on March 24, 2000.

5 Canadian included Ontario in its list of "Affected Unsecured Claims" and quantified Ontario's claim at zero. Contrary to paragraph 27 of the March 24, 2000 order, Ontario was not served with a copy.

6 Ontario did not receive a copy of the March 24, 2000 order until it received it as part of the voting package sent out in accordance with my April 7, 2000 order in these proceedings. The package was mailed on April 25, 2000, the last possible day under the terms of the April 7, 2000 order and arrived in the mail room of the Corporations Tax Branch of the Revenue Division of Ontario on May 2, 2000, three days before the Claims Bar Date set in that order. The Revenue Division has nine branches. According to the affidavit of Rosita Vinkovic, Senior Collections Officer for the Bankruptcy and Insolvency Unit in the Collections and Compliance Branch of the Ministry of Finance, the normal procedure is for insolvency related documents to be mailed directly to the Insolvency Unit, not to the Corporations Tax Branch. According to Ms. Vinkovic, a notice to this effect was published by the Minister of Finance in a 1997 newsletter of the Canadian Insolvency Practitioners' Association. Canadian did not cross-examine Ms. Vinkovic on her affidavit and does not challenge this practice in its own evidence.

7 The voting package did not make its way to the Insolvency Unit until May 18, 2000. Despite extensive inquiries, Ms. Vinkovic has been unable to determine the reason for this delay. The collection officer in the Insolvency Unit that received the package on May 18, 2000 did not have an opportunity to review it in its entirety until May 23, 2000, the first business day after the long weekend (and the date that a second package was sent

by the monitor to the Ministry of Finance public inquiry desk and directly routed to the Insolvency Unit).

8 As Senior Collections Officer, Ms. Vinkovic was assigned to handle the matter on May 25, 2000. She immediately noted the May 5, 2000 Claims Bar Date and a proof of claim along with copies of the letters of credit were faxed to the monitor that same day. The amount claimed was expressed as preliminary due to the ongoing audit, which was lengthy due to the extent of Canadian's operations and its failure to timely respond to requests for information and documents. The monitor initially advised Ms. Vinkovic that the claim would not be accepted as it was past the Claims Bar Date, but changed its position upon being advised of the related security.

9 On June 19, 2000, nearly one month later, Ontario received a letter from Canadian's counsel advising that its claim would not be accepted because it was submitted after the Claims Bar Date. Ms. Vinkovic was away on vacation from June 23, 2000 until July 10th. On her return on the 10th she read the June 19th letter and immediately sent a request for assistance to Joel Weintraub, Senior Legal Counsel in the Legal Services Branch. Mr. Weintraub contacted the Alberta firm that had handled a similar claim for the BC government and a request was sent to the Assistant Deputy Attorney General for Ontario to authorize the retention of outside counsel. Mr. Robinson advised that he was retained September 14, 2000 and immediately advised Canadian's counsel of his intention to bring this motion but that it would take some time to prepare the necessary material and have it sworn. A notice of motion to extend the time to file a proof of claim in these proceedings was filed by Mr. Robinson on September 26, 2000.

II. Discussion

10 The Alberta Court of Appeal has recently developed an approach that CCAA supervising judges should follow in considering claims filed or amended after a claims bar date, as follows:

> 1. Was the delay caused by inadvertence, and if so, did the claimant act in good faith?
>
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
>
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order to permitting late filing?
>
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

(*Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.) at paragraph 41)

11 Canadian argued that the Court of Appeal in *Blue Range Resource Corp.* restricted the use of these criteria to liquidation-style CCAA proceedings and that therefore the test is not applicable here. This is a narrow interpretation. In my view the Court of Appeal was providing guidelines generally applicable to late claims in CCAA proceedings. Even if the Court of Appeal did intend to direct its criteria only to liquidation-style CCAA proceedings, I would in any case find the principled approach of the Court of Appeal to be an excellent framework for the exercise of my discretion; I applied similar criteria in my June 28, 2000 reasons in these proceedings allowing the government of British Columbia to file a late claim.

12 On the facts of this case, the prejudice to the funder of the plan, Air Canada, will necessarily need to be considered. However, the criteria described by the Court of Appeal in *Blue Range Resource Corp.* do not in my

view rule out, but instead embrace addressing the interests of such a party. The *Blue Range Resource Corp.* criteria are consistent with the rationale of the CCAA to consider and attempt to balance the interests of all affected parties, the character of which will vary with each case and type of plan involved. Emphasis on those interests and the appropriate weight to be given to each will also necessarily vary. In my view the criteria in *Blue Range Resource Corp.* allow for this type of analysis. Accordingly I now turn to application of these criteria.

1. Delay due to inadvertence and presence of good faith

13 In *Blue Range Resource Corp.*, Wittmann J.A. held that "inadvertence" includes carelessness, negligence, accident and is unintentional. The distinction to be drawn is that between a careless claimant and one who "lies in the weeds" hoping to gain an advantage.

14 Ontario is not in this latter category. It was not served with the initial order. The voting package was mailed on the last possible day to the wrong office, arriving just three days prior to the Claims Bar Date. I can fairly infer from the circumstances that the internal procedures in the government of Ontario failed in having the package re-routed to the proper place in a timely fashion. Once it arrived at the correct destination, however, steps were taken promptly by the responsible officer to file the claim and the monitor received it by fax on May 25, 2000, the very day that the responsible officer was assigned to handle the matter.

15 Canadian did not notify Ontario of its decision to reject its claim until June 19th, 2000. Vacations intervened and a request by the Insolvency Unit for assistance from internal government counsel to deal with this rejection was made within about two weeks. This led to a request to the Assistant Deputy Attorney General of Ontario for permission to hire outside Alberta counsel to handle the matter. It is reasonable to assume that this authorization process would have taken some time and counsel confirmed that this was the case.

16 I have difficulty concluding that the delay here was due to anything but inadvertence. Canadian conceded that there was no evidence of deliberate intent by Ontario to avoid participating in the CCAA process. There is no suggestion or evidence that Ontario was intentionally attempting to circumvent the CCAA process or gain some advantage over other creditors, unlike the applicant in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.). The position of Ontario is not unlike that of TransAlta Utilities Corporation as described in *Blue Range Resource Corp.* at paragraph 30 (appeal book references omitted):

> It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service ... There is no evidence that TransAlta was attempting to circumvent the CCAA process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

17 Further, there is a similarity to the late claim filed by Campbell's Industrial Supply Ltd. also referred to in *Blue Range Resource Corp.* at paragraph 29 where Wittmann J.A. noted that it was arguable that errors on the part of the debtor company resulted in the late filing. In this case, Canadian contributed to the delay by failing to serve Ontario with the initial order, not mailing the voting package until the last possible day, mailing it to the wrong office and waiting nearly a month to advise Ontario that its late claim was rejected.

2. Any relevant prejudice caused by the delay

18 Canadian argues that the most critical factor in this and any re-organization (as opposed to a liquidation) case is the economic effect on the funder of the reorganization. I note that the second criteria of "any relevant

prejudice" is broadly drawn and not restricted by the Court of Appeal to the interests of creditors and the debtor company. I agree that in consideration of this criteria in this case I must focus on the prejudice to Air Canada.

19 I would firstly note that despite being served with this application, Air Canada chose not to attend and make submissions or present evidence of prejudice.

20 Applying the test for prejudice adopted by the Court of Appeal in *Blue Range Resource Corp.*, the question here is whether by reason of the late filing by Ontario, Air Canada lost a realistic opportunity to do anything that it might otherwise have done. There is no evidence to suggest this. As with the creditors in *Blue Range Resource Corp.*, Air Canada and Canadian were specifically aware of the existence of Ontario's claim; Ontario was listed on the Affected Unsecured Claims list. The tax dispute with Ontario was longstanding and Canadian has filed eight notices of objection. Letters of credit have been posted as security for the assessments under appeal. Air Canada is the funder of the plan and has been directly involved in Canadian management and operations since early this year. This knowledge effectively negates any allegation of prejudice. As Wittmann J.A. concluded with respect to the late claimants in *Blue Range Resource Corp.*, it cannot be said that Ontario was "lying in the weeds waiting to pounce" (paragraph 39).

21 Canadian referred to "procedural prejudice" in the costs associated with determination of the dispute and with potentially having to pay a dividend to Ontario. However, this prejudice too is negated by the knowledge of Ontario's claim. Air Canada and Canadian would have been well aware of the potential that the matter would need to be resolved, with concomitant costs, either by the tax courts in Ontario or the claims officer in these proceedings.

22 Wittmann J.A. held in *Blue Range Resource Corp.* that the materiality of the late claims is also relevant to prejudice. In that case, the late claims totalled $1,175,000 as compared to the total timely claims pool of $270,000,000. In this case, the evidence of Air Canada's Chief Financial Officer at the fairness hearing was that Air Canada's funding cost amounted to approximately 3 billion dollars, including the anticipated dividend on creditors' claims. The possibility of paying 14 cents on the dollar on a further $2 million (which assumes Ontario will be entirely successful on its claim, which Canadian suggests is not likely) in relation to Air Canada's total cost cannot be described as material.

23 Having concluded that there is no relevant prejudice to Canadian or Air Canada, I need not review the final two criteria in the *Blue Range Resource Corp.* test.

24 Even if I were to couch my analysis as a consideration of the equities between Air Canada and Ontario, as Canadian would have me do in following what they submit is the applicable test as set out in *Lindsay*, I would not find that the equities lie in Air Canada's favour. This analysis is largely encompassed in my review of the first two *Blue Range Resource Corp.* criteria. Canadian adds that, as in *Lindsay*, if not for Air Canada's funding, the unsecured creditors would have received only 1-3 cents on the dollar and accordingly, Air Canada is entitled to certainty at some point in the process. It submits that Ontario's failure to act in a timely manner should subordinate its interest to the interest of certainty to the funding party, who will have to absorb the entirety of Ontario's claim. Canadian argues that the interests of Air Canada must be supreme in this non-liquidation scenario.

25 The problem with this argument is that unlike the "white knight" in *Lindsay*, for the reasons I have already described it cannot be fairly said that Air Canada was unaware of Ontario's claim. I emphasize that it is not a surprise claim by a creditor hoping to gain an advantage by delaying action; there is no suggestion of bad

faith and certainly there was nothing to be gained by waiting. Under the circumstances, which are distinct from those in *Lindsay*, it is not unfair to the funder of this plan to deal with Ontario's claim. Certainty, while always desirable, is not as compelling in this case as in *Lindsay* due to the knowledge surrounding Ontario's claim. Canadian and Air Canada were well aware of the claim and are now attempting to use the delay to avoid having to resolve the dispute with Ontario and potentially paying a further dividend.

26 Ontario shall have seven days from the date of these reasons to amend and submit its claim. It shall be entitled to make any further amendments necessitated by the late filing of Canadian's 1999 and 2000 returns.

27 Each party shall bear its own costs of this application.

Motion granted.

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TAB 17

Case Name:

SemCanada Crude Co. (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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. and 1380331 Alberta ULC
(Re: Celtic Exploration Ltd. #2)

[2012] A.J. No. 839

2012 ABQB 489

93 C.B.R. (5th) 188

546 A.R. 203

2012 CarswellAlta 1399

219 A.C.W.S. (3d) 755

Docket: 0801 08510

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E.C. Romaine J.

July 31, 2012.

(77 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Admission -- Application by creditor for relief from suspension of agreement it had entered with bankrupt dismissed -- Agreement suspended when bankrupt applied for protection under Companies' Creditors Arrangement Act ("CCAA") -- Creditor sought order permitting late filing of claim for damages arising from suspension of agreement -- Claims for suspension damages were all affected claims that could have been dealt with by compromise under subsection 19(1) of CCAA -- Creditor's application filed more than two years after claims bar date -- Delay not inadvertent or in good faith -- Other creditors would have been prejudiced -- Creditor's statement of claim struck.

Application by Celtic Exploration Ltd. ("Celtic") for relief from the suspension of an agreement it had entered with SemCanada Crude Co. ("SemCanada"). The agreement was suspended when SemCanada applied for protection under the Companies' Creditors Arrangement Act (the "CCAA"). Celtic sought an order permitting it to file a late amended claim for damages arising from the suspension of the agreement and a declaration that its claims for suspension damages were not affected claims compromised, barred and released by the plan or otherwise. In October 2010, Celtic refused to accept amended terms of the agreement proposed by SemCanada. Celtic purported to unilaterally reinstate the agreement as of October 2010.

HELD: Application dismissed. The claims for suspension damages were all claims that could have been dealt with by a compromise under subsection 19(1) of the CCAA. They were affected claims. The claims for suspension damages were new claims. Celtic's application was filed more than two and a half years after the claims bar date. Celtic did not act in good faith in delaying its claim. Its delay was not inadvertent. There was relevant prejudice to other creditors arising from the delay. The policy reasons emphasizing the need for certainty and finality in an approved plan outweighed the prejudice to Celtic of disallowing a late claim. Celtic's statement of claim was struck.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 121(1), s. 121(2), s. 135

Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, s. 2(1), s. 19, s. 19(1), s. 19(1)(b), s. 19(2), s. 20(1)(a)

Counsel:

A. Robert Anderson, Q.C., Doug Schweitzer, for SemCAMS ULC.

Anthony Jordan, Q.C., for Celtic Exploration Ltd.

Ashley John Taylor, Erica Tait, for the Bank of America, N.A.

Reasons for Decision

B.E.C. ROMAINE J.:--

Introduction

1 Celtic Exploration Ltd. applies for relief arising from the suspension of an inlet gas purchase agreement (the "IGPA") that it had entered into with SemCAMS ULC. The IGPA was suspended in July, 2008 in connection with SemCAMS' filing for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and was the subject of reasons for decision dated August 27, 2010, cited as 2010 ABQB 531 (the "IGPA decision"). Leave to appeal the IGPA decision was denied on December 17, 2010.

2 Celtic seeks an order (i) permitting it to file a late amended claim for damages arising from the suspension of the IGPA for the period from July 22, 2008 (the date of the Initial Order in the CCAA proceedings) to and including November 30, 2009 when the Plan of Arrangement (the "Plan") came into effect and SemCAMS emerged from the protection of the CCAA (the "CCAA Period"), and (ii) declaring that its claims for suspension damages for the periods from December 1, 2009 to and including September 30, 2009 (the "Post Plan Implementation Period") and from October 1, 2010 onwards (the "Post October 2010 Period") are not Affected Claims compromised, barred and released by the Plan or otherwise.

3 Alternatively, in the event that the Court finds that the suspension damages claims for the Post Plan Implementation Period and the Post October 2010 Period are subject to the claims process established under the CCAA proceedings (the "Claims Process") and are therefore Affected Claims as defined in the Plan, Celtic seeks an order permitting it to file a late amended claim for those damages.

4 SemCAMS objects to Celtic's application and, in response, has brought an application pursuant to which it seeks an order declaring that (i) Celtic's proposed damages claim, including its claim for suspension damages arising from the

CCAA Period, the Post Plan Implementation Period and the Post October 2010 Period, is subject to the Claims Process, (ii) the proposed damages claim is an Affected Claim within the meaning of the Plan that was comprised, released and barred by the Plan and the order approving and sanctioning the Plan dated October 27, 2009 (the "Sanction Order"), and (iii) Celtic is precluded from filing a late or amended claim. SemCAMS also seeks an order declaring the Statement of Claim filed by Celtic with respect to the proposed damages claim to be a breach of the Plan and the Sanction Order, and directing that it be struck out.

5 The Bank of America (the "BA") as Agent on behalf of the Secured Lenders of SemCAMS (as defined in the Plan) supports SemCAMS' application in so far that it submits that, if the proposed damages claim by Celtic is an Affected Claim, it should be declared to be barred, extinguished and released by the Plan and Sanction Order and Celtic should not be allowed to file any late or amended claim.

Issues

6 The main issues arising from these applications are as follows:

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings, and therefore subject to the Claims Process?
b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?
c) Should Celtic's Statement of Claim be struck out?

Analysis

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings and therefore subject to the Claims Process?

7 As part of a Settlement Agreement dated March 18, 2011 and approved by the Court, Celtic agreed that, if its claim for suspension damages for the CCAA Period was found not to be barred by the Claims Process Order, it would not take the position that this portion of its damages claim would be other than an unsecured claim compromised by the Plan. Thus, the only issue with respect to any damages that Celtic submits it may have a claim to during the CCAA Period is whether Celtic should be allowed to amend its previously filed Proof of Claim to include damages arising from the suspension of the IGPA during this period. This issue will be discussed later in this decision.

8 However, Celtic submits that its claims for damages arising from the suspension of the IGPA for the Post Plan Implementation Period and/or the Post October 2010 Period are not subject to compromise under the Plan.

Relevant Facts

9 To understand the submissions that have been made on this issue, it is necessary to refer to some of the long and complicated history of this claim and the prior litigation between the parties. I described in paragraphs 3 through 53 of the IGPA decision the nature of the contractual relationship between SemCAMS and Celtic and what occurred between July 22, 2008, the date of the Initial Order under the CCAA, and February, 2010 when the application that resulted in that decision was heard, and those paragraphs are incorporated into this decision for clarity.

10 I found in the IGPA decision that an agreement had been reached between SemCAMS and Celtic to suspend the IGPA because of SemCAMS' inability to market sales gas and related product as a result of the CCAA proceedings: para. 103. I found that parties to a contract may by mutual agreement suspend a contract even if the contract itself does not specifically provide for suspension: para. 110. Specifically, I found that Celtic purported to suspend the IGPA, given SemCAMS' anticipatory breach of its obligations to market the sales gas and products, and that SemCAMS agreed to the suspension.

11 Celtic submits that I made a finding of fact in the IGPA decision that Celtic had exercised a right under the IGPA to suspend delivery of natural gas, and identifies that right as arising from Section 10.2 of the Gas EDI Base Contract for Sale and Purchase of Natural Gas that forms part of the IGPA. This is an out-of-context interpretation of paragraph 111 of the IGPA decision. Section 10.2 of the Gas EDI Base Contract was not in issue before me at the time of the IGPA decision, and I made no finding that the mutual agreement to suspend the contract arose from any right specifically referred to in the IGPA. At any rate, as SemCAMS notes, the precondition of notice of the intention to exercise Section 10.2 required by the contract was never given by Celtic to SemCAMS at the time of suspension. There was only an anticipatory, and not an actual, breach of the IGPA at the point of suspension. In its submissions on this point, Celtic ignores the fact that Section 10.2 of the Gas EDI Base Contract only allows a short-term suspension, and not the lengthy suspension that I found the parties had agreed to. This provision has no connection or application to the finding of suspension I made in the IGPA decision.

12 Celtic submits that it had a unilateral right to reinstate performance under the IGPA effective October 1, 2010 for various reasons. SemCAMS disagrees, but submits that whether or not Celtic had that unilateral right makes no difference to the issue of whether the damages claims for either the Post Plan Implementation Period or the Post October 2010 Period are subject to the CCAA proceedings and should have been part of the Claims Process, or whether these claims were released and discharged by the Plan and the Plan Sanction Order. I agree that, given the decisions I have reached on these issues, it is not necessary that I make any findings with respect to the merits of the reinstatement issue, other than the comments I have made with respect to the applicability of Section 10.2 of the Gas EDI Base Contract and comments made in the IGPA decision.

13 Prior to the Claims Bar Date of December 1, 2008 set out in the Claims Process Order, Celtic filed a Proof of Claim against SemCAMS that did not include a contingent or other claim for suspension damages arising from the IGPA.

14 SemCAMS held a meeting of its creditors to consider the Plan on October 8, 2009. It received the requisite creditor support and applied for, and was granted, the Sanction Order on October 26, 2009. Celtic voted on the Plan and was served with a copy of the Sanction Order. The Plan Implementation Date was November 30, 2009.

15 After the application that resulted in the IGPA decision was heard, but before a decision was released, Celtic purchased an interest in the KA Plant and became a party to the CO & O Agreement with SemCAMS and the other joint owners of the KA Plant. In July, 2010, correspondence was exchanged between SemCAMS and Celtic on the issue of whether gas delivered by Celtic to the KA Plant would thenceforth be processed pursuant to the CO & O Agreement or the IGPA. Celtic advised SemCAMS on September 7, 2010 that it proposed to reinstate deliveries under the IGPA effective October 1, 2010 for all of its gas other than gas that was dedicated to the KA Plant by reason of the CO & O Agreement. On September 30, 2010, SemCAMS advised Celtic that Celtic's change in status to a joint owner of the KA Plant and a counterparty to the CO & O Agreement made it impossible to reinstate the IGPA unless it was first amended to address certain issues, including exclusion of Plant Area Gas. Further correspondence followed.

16 On October 15, 2010, SemCAMS set out the terms of an amended IGPA that at the time SemCAMS was willing to execute. Celtic did not accept these offered terms.

17 On February 14, 2011, Celtic advised SemCAMS that it took the position that it had unilaterally reinstated performance of the IGPA effective October 1, 2010, and that SemCAMS was therefore in breach of the agreement. The following day, it filed a Statement of Claim alleging that the granting of the Initial Order under the CCAA Proceedings was an event of default under the IGPA, and that Celtic, as the non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. Celtic claims damages arising from this suspension.

18 SemCAMS advised Celtic on March 17, 2011 that, in its opinion, the IGPA could not be reinstated unilaterally, and restated its pervious position. SemCAMS also advised Celtic that, if it was found that Celtic could unilaterally reinstate the IGPA effective October 1, 2010 (which SemCAMS denied was the case), SemCAMS gave notice of termination of the IGPA effective March 31, 2013.

19 Pursuant to the Settlement Agreement, SemCAMS and Celtic jointly instructed the Monitor to hold the amount of $900,000 of surplus funds in the SemCAMS' Ordinary Creditors Pool under the Plan as a reserve for the damages claims. The Settlement Agreement also provides that in the event the damages claims, or any portion of such claims, are determined to be Affected Claims compromised by the Plan and that such Affected Claims are not determined to be barred by the Claims Process Order, the Plan or the Plan Sanction Order, Celtic will only be entitled to a distribution

from the damages reserve of the lesser of 4% of such proven damages claim and the amount in the damages reserve, if any. The Monitor is currently holding the damages reserve.

Analysis

20 On the issue of whether the damages claims for the Post Plan Implementation Period and the Post October 2010 Period are compromised or otherwise affected by the CCAA proceedings, Celtic references Section 19 of the CCAA, the Plan itself, the Plan Sanction Order and what it refers to as the purpose of the CCAA.

21 The relevant portions of Section 19(1) of the CCAA are as follows:

> 19.(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> ...
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) ... [emphasis added]

Section 19(2) does not apply in this case.

22 As noted by SemCAMS, Section 19(1) was not proclaimed in force until September 18, 2009, which was after the Initial Order was granted, but prior to the Sanction Order. It may thus be argued that Section 19(1) does not apply to this issue, but I am satisfied that it would not make a difference to Celtic's application if former Section 12 was the applicable statutory provision, and I have conducted the analysis under Section 19.

23 Celtic submits that Section 19(1) permits the compromise of debts and liabilities in respect of two time periods: the period up to commencement of proceedings under the CCAA and claims that relate to debts or liabilities to which the debtor may become subject before the Sanction Order in respect of obligations incurred by the debtor before the commencement of proceedings.

24 This interpretation of Section 19(1) ignores the words "that relate to liabilities, present or future" that modify the term "claims". It is clear that SemCAMS was subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

25 The claims relating to the suspension of the IGPA during the CCAA Period and beyond are exactly the kind of anticipatory, future claims that are referenced in Section 19(1). A "claim" for the purpose of the CCAA includes any indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended: Section 2(1) of the CCAA. Section 121(1) of the BIA defines "provable claims" as being:

> ... (a)ll debts and liabilities, present and future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt, or to which the bankrupt may become subject before the bankrupt's discharge by reasons of any obligation incurred before the day on which the bankrupt becomes bankrupt ...

26 Section 121(2) of the BIA makes it clear that this includes contingent or unliquidated claims, with the procedure for evaluating contingent or unliquidated claims described in Section 135. Section 20(1)(a) of the CCAA describes how the amount of an unsecured claim that is a provable claim under the BIA may be determined by a court on summary application if it is not admitted by the debtor company.

27 It may well have been difficult to value a contingent claim for future suspension damages that was filed before the Claims Bar Date, but that is often the nature of a contingent or future claim. In particular, there may have been issues relating to when the IGPA could reasonably be reinstated. As noted by SemCAMS, contingent claims are routinely filed in CCAA proceedings and in proceedings under the BIA.

28 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp*, [1992] 4 WWR 309 (AltaCA), a fact scenario that occurred after the date of bankruptcy based on a pre-bankruptcy contract was held to give rise to a claim provable in the bankruptcy. The issue was whether mortgagees could claim in the bankruptcy for costs incurred after the date of bankruptcy, where the claims for costs were based on indemnities by the bankrupt found in pre-bankruptcy mortgages.

29 The trustee in *Abacus Cities* submitted that future claims had to be limited to those that could be valued before they arise, and that a future liability that could not be calculated in advance could not be a provable claim. The Court commented as follows at page 318:

> I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof ...
>
> One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process: ...

30 SemCAMS concedes that Celtic would not have known by the Claims Bar Date if and when the IGPA would be reinstated, but argues that Celtic could have claimed damages on the assumption that the IGPA would not be reinstated. There could have been a summary determination of the claim or a reservation for the full amount of claimed damages. Or, the Court may have determined that the contingent claim was too remote or speculative to be properly considered a contingent claim and thus not a provable claim: *Re Confederation Treasury Services Ltd.* 1997 CarswellOnt 31 43 CBR (3d) 4, (sub nom. Confederation Treasury Services Ltd. (Bankrupt), Re) 96 OAC 75 at para. 4.

31 Celtic submits that, if this was an ordinary action alleging breach of contract, it could not claim continuing damages for any future period of time in the absence of a repudiation of the contract. It therefore submits that it would not have a claim for the alleged suspension damages after the Plan Implementation Date that could be subject to compromise. While it may be true that a creditor cannot sue for contingent damages in the ordinary course, the legislative framework of the CCAA and the BIA allows debtor companies to deal with contingent claims in insolvency proceedings. There was no reason why Celtic could not have filed such a claim.

32 In a similar argument, Celtic submits that, in order for its claim for suspension damages to be a claim that arises prior to the Plan Implementation Date, it must be an amount of damages that Celtic would have been entitled to recover within the CCAA Period. Again, this ignores the fact that the provisions of the CCAA and the BIA allow the debtor to deal with future and contingent claims within the ambit of the CCAA proceedings.

33 Celtic also submits that its claim for suspension damages does not fall within the type of claim that can be compromised as set out in Section 19(1) because it is not a "debt". That is true, but a provable claim may be a "debt" or a "liability". As noted by the British Columbia Court of Appeal in *Re West Bay SonShip Yachts Ltd.*, 2009 Carswell BC 139, 2009 BCCA 31, [2009] BCWLD 1230, 71 CCEL (3d) 45, 49 CBR (5th) 159, [2009] 4 WWR 415, 89 BCLR (4th) 82, 265 BCAC 203, 446 WAC 203, 306 DLR (4th) 294 at para. 22, "liability" is a broad term that is most often used to describe an unliquidated or unspecified legal obligation, and "debt" is a narrower term that means a specific kind of obligation for a liquidated or certain sum. The definition of "claim" under the CCAA includes both.

34 Celtic relies in its submissions on the fact that the IGPA was not repudiated. Section 19(1) does not restrict the type of claims that may be compromised under CCAA proceedings to claims arising solely from repudiated contracts. Section 19(1)(b) anticipates that claims may arise by virtue of the CCAA proceedings themselves, and allows the debtor company to put forward for approval by its creditors an arrangement that would compromise those claims. The claim for damages for suspension of the IGPA is that type of claim. It arises from and relates to the suspension of the IGPA that occurred by reason of the CCAA filing, and the inability of SemCAMS as a result of such filing to continue to market the Celtic gas.

35 Celtic itself concedes that there is no basis in the IGPA itself to distinguish its right to damages before the Plan Implementation Date of November 30, 2009 and after. The obligation to pay damages arising from the suspension is not

a a new breach of the IGPA that occurred after the Plan Implementation Date, but a claim of continuing damages that arise from the suspension of the IGPA, whether or not Celtic has the right to unilaterally reinstate the agreement.

36 I find that the claim for suspension damages as it relates to the Post Plan Implementation Period is a claim that may be dealt with by a compromise under Section 19(1) of the CCAA.

37 Celtic seeks to distinguish its claim for suspension damages for the Post October 2010 Period onward on the basis that SemCAMS' alleged refusal to accept deliveries under the IGPA after Celtic unilaterally purported to reinstate the agreement was a "distinct" breach of the IGPA, and not the same as either the failure to make payments under the IGPA which precipitated the suspension, or the suspension itself which gives rise to an obligation to pay damages as long as it remains in effect.

38 I cannot agree that this alleged refusal to reinstate the IGPA was a fresh breach, even if Celtic was entitled to act unilaterally. The issue of reinstatement of the IGPA and whether it could be accomplished unilaterally or required the consent of both parties is an issue that arises from the suspension, and is not a new issue under the IGPA. Celtic seeks to distinguish the IGPA as an executory contract, the non-performance of which can give rise to new breaches, but it is not the non-performance of a properly reinstated executory contract that is at issue here, but when and how the IGPA is to be reinstated. The damages claimed for the alleged breach in the Post October 2010 Period are the same type of damages claimed for the preceding periods. It is not necessary for the analysis of the issue before me that I decide whether Celtic was entitled to unilaterally reinstate the IGPA, and I do not do so. However, I find that the claim for suspension damages in the Post October 2010 Period also is a "claim" that may be dealt with by a compromise under Section 19(1) as this claim does not arise from a fresh breach.

39 I turn next to the portions of the Plan that may be relevant to the issue of whether the damages claim for the Post Plan Implementation Period and the Post October 2010 Period were compromised; Section 8.1 of the Plan states as follows:

> On the Plan Implementation Date ... the Company ... shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages ... on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert ... whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connect with the Claims, the business and affairs of the Company whenever or however conducted, ... the Plan, the CCAA Proceedings, any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; ...

40 As I have found that the claim for suspension damages during the Post Implementation Period and the Post October 2010 Period are claims that may be subject to compromise under Section 19(1) of the CCAA, it is clear that they are caught by Section 8.1 of the Plan. Paragraphs 28 and 45 of the Sanction Order give effect to Section 8.1 as follows:

> 28. Pursuant to and in accordance with the Plan, any and all Affected Claims of any nature against the Company, ... shall be forever compromised, discharged and released, and the ability of any Person to proceed against the Company in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims.
>
> ...
>
> 45. Pursuant to and in accordance with Section 8.1 of the Plan, on the Plan Implementation Date the Released Parties shall be released and discharged from any and all demands, claims, actions, causes of action ... on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to

> assert ... whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted ... any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law: ...

41 As noted by SemCAMS, the only potential events of default under the IGPA at the time it was suspended were SemCAMS' insolvency and its commencement of CCAA proceedings. Any claim for damages arising from the suspension constitute an Affected Claim. Those potential events of default were cured by the stay imposed under the Initial Order and by the Sanction Order, which provided for a waiver of all defaults. The Affected Claims are caught by the release and discharge contained in section 8.1 of the Plan, which was given effect by the Sanction Order.

42 Celtic submits that it would be inconsistent with the general purposes of the CCAA if SemCAMS and its counterparties remained bound by existing contracts, but SemCAMS could not be compelled to fully perform its obligations as they arise as a result of the Sanction Order. That would certainly be true if it was in fact the case. However, while Celtic and SemCAMS have not been able to resolve their difference over what is required or necessary to reinstate the IGPA, that does not mean that SemCAMS has been relieved of its obligations under the agreement, or relieved from a claim for damages arising from the suspension.

43 The fact that the IGPA was suspended by mutual agreement and not terminated implies an obligation to reinstate the agreement when the impediment to performance, here the CCAA proceedings, has ceased to exist. However, changes in the status and positions of the parties in the interim must also be taken into consideration, and it is on that issue that the parties are unable to agree. If SemCAMS failed to agree to the reinstatement of the IGPA on terms that adequately reflected the changed circumstances, the continued suspension would give rise to a damages claim.

44 However, such a claim would be an Affected Claim within the meaning of the CCAA proceeding that could be, and was, compromised by the Plan and the Sanction Order.

b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?

45 Celtic submits that, in the event its claims for suspension damages are found to be Affected Claims under the CCAA proceedings, it should be permitted to amend its previously-filed Proof of Claim to claim such damages. While Celtic divides its claims into three periods: the period it characterizes as the "CCAA Period", the Post Plan Implementation Period and the Post October 2010 Period, I have found that the claims for damages for suspension of the IGPA for all of these periods fall within the definition of "claims" for the purpose of Section 19 and were thus subject to compromise by the Plan and the Sanction Order.

46 The only distinction that may be made among these three periods of time with respect to a late filing application relates to whether the claim for suspension damages for the CCAA Period would be an amendment to the Proof of Claim filed by Celtic on November 28, 2008 or a new claim.

47 I find that the claims for suspension damages for all three periods of time are new claims. The previously filed Proof of Claim related to amounts owing for the delivery of raw gas to the KA Plant in the months prior to the Initial Order. The proposed claims for suspension damages relate to losses incurred as a result of the suspension of the IGPA after the Initial Order was granted, arising from Celtic's inability to sell its gas to third parties at the same price it would have received under the IGPA. Thus, there is no reason to distinguish among the three periods of time with respect to the question of whether Celtic should be allowed to file a late claim.

48 I must agree with the BA and SemCAMS that Celtic's application to file a claim or claims for suspension damages at this late date is extraordinary. Celtic did not file its application until April, 2011, approximately two and a half

years after the Claims Bar Date of December 1, 2008 and approximately one and a half years after the Plan Implementation Date of November 30, 2009.

49 In para. 26 of *Re Blue Range Resources Corp*, 2000 ABCA 285, the Court of Appeal set out the appropriate criteria to apply to late claims in CCAA proceedings:

> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing?

50 As I noted in *Re BA Energy Inc.*, 2010 ABQB 507 at para. 34:

> ... in identifying these criteria and applying them to specific late claims, Wittmann, J.A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*, and the U.S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

1. *Inadvertence and Good Faith*

51 Celtic submits that "inadvertence" should not be taken too literally. However, Wittmann, J.A. noted at para. 27 of *Blue Range* that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

52 Celtic's failure to make a timely claim was not unintentional. It submits that it "simply" did not perceive it had a right to damages because it did not believe that the IGPA had been suspended. Celtic was aware of the CCAA proceedings from the time of the Initial Order and retained counsel with respect to the proceedings throughout. It filed a Proof of Claim for a different kind of claim. It cannot argue that its failure to file a claim was careless, negligent or accidental: it was Celtic's deliberate choice, acting with the advice of counsel, to maintain its position that the IGPA had not been suspended, but amended, without providing for the possibility that this position would be found to be incorrect and that it may have a claim for damages arising from a suspension. The financial implications to Celtic if the IGPA was found to be suspended were made clear to it when it received draft third party gas processing agreements from SemCAMS on August 26, 2008. In fact, Celtic itself calculated its suspension losses for the period from July 22, 2008 to September 30, 2009 in an affidavit filed in response to the application that resulted in the IGPA decision.

53 Celtic submits that the possibility of suspension damages must also have been apparent to SemCAMS and the BA before the Plan was negotiated and presented to creditors. That is beside the point: the Claims Process in CCAA proceedings requires creditors to identify and to file their claims or be barred from pursuing them. It is not up to the debtor company to guess at potential claims, or whether creditors will decide to pursue them.

54 Celtic also submits that its claims for suspension damages are not claims for a "debt". While this is true, the Claims Process provides for contingent claims for liabilities and that is what SemCAMS submits Celtic should have filed.

55 The Claims Process Order of October 22, 2008, which was served on Celtic and its counsel, makes it clear that "claim" includes contingent claims, defining "claim" as including:

> ... any ... claim ... made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation ... by reasons of any breach of contract or other agreement (oral or written) ... and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown ... and whether or not any right or claim is

> executory or anticipatory in nature including ... with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future ... [emphasis added]

The Monitor's Seventh Report dated October 21, 2008 provided a thorough summary of the claims process.

56 Had Celtic filed its claim for suspension damages, current and future, such claim would have been determined during the Claims Process or there would have been a reservation for the full amount of its claimed damages.

57 The first criterian of the *Blue Range* analysis requires that I consider whether Celtic acted in good faith.

58 SemCAMS and the BA submit that Celtic knew it had a potential claim for damages arising from the suspension of the IGPA as early as August 28, 2008, more than three months prior to the Claims Bar Date, or at any rate, by September 22, 2008, when it sent a letter to SemCAMS asserting that it had not in fact suspended the sale of gas under the IGPA. Celtic had by August 21, 2009 received the Plan and the Monitor's 20th Report, which identifies and alerts stakeholders to the fact that Affected Claims, which by definition include contingent claims, will be compromised, discharged and released under the Plan. Certainly, the question of suspension damages was a live issue during the application that led to the IGPA decision of August 27, 2010, and Celtic was well aware from submissions that were made that SemCAMS took the position that any such claim was barred by the Claims Process Order and compromised under the Plan. Despite all this, Celtic did not bring its application to file a late claim until April, 2011. I cannot find that Celtic acted in good faith by delaying its claim.

2. *Prejudice Caused by the Delay*

59 Celtic submits that, since during the application that gave rise to the IGPA decision, SemCAMS has indicated that it may, under certain conditions, consider agreeing to a late - filed claim for suspension damages. It argues that this is an indication that there is in fact no prejudice to SemCAMS or the ordinary creditors from its late claims. SemCAMS' offer to accept a late filed claim was made at a far earlier date than this application for leave to file a late claim, and at a time when the claim was for far less than the amount now claimed.

60 SemCAMS points out that several of the conditions to this offer to accept a late claim have not been met. The mere fact that SemCAMS considered agreeing to a late claim at an earlier time and under different circumstances does not indicate lack of prejudice now.

61 Celtic concedes that a late claim will prejudice the BA and its group of secured creditors, but submits that this should not be a factor since the BA has already agreed to an Ordinary Creditors' Pool, and the size of that pool will not increase as a result of granting leave to Celtic to amend its Proof of Claim.

62 As I indicated in *Re BA Energy*, the objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure provides the debtor company and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors, given the financial circumstances of the debtor, and that may be sanctioned by the Court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a later claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

63 The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

64 Celtic's proposed suspension damages claim would represent an approximately 22% increase in the total value of Ordinary Claims filed against SemCAMS. The new claim increases Celtic's total claims by about 66%. The Plan and the Monitor's Report made it clear that the Secured Lenders represented by the BA agreed to refrain from making a claim against SemCAMS in respect of their first-ranking, fully secured claim in part because they would receive the surplus remaining in the Ordinary Creditors Pool after the claims of ordinary creditors had been satisfied. It is a reasonable inference that this decision was made on the basis of claims that had been filed as of the Claims Bar Date, which did not include the Celtic $22.5 million suspension damages claim.

65 One of the tests for prejudice is whether a late claim causes another creditor to lose a realistic opportunity to do something it might otherwise have done: *Blue Range* at para. 40. While it is true that the secured lenders as represented

by the BA were likely aware that Celtic may have a potential claim for suspension damages, they were also entitled to rely on the Claims Bar Process, the release provisions of the Plan and the Sanction Order to expect some finality.

66 In *Blue Range*, the applications to accept late claims were made within a few months of the plan sanction order. Here, the delay is much longer, and the decision in *Blue Range* is clear that the timing of the late claim with respect to the stage of proceedings is a key consideration: para. 36.

67 If Celtic is able to file a late claim for suspension damages, the Secured Lenders could receive up to $900,000 less than they otherwise would. This is a material and significant claim, in contrast to the relatively minor value of late claims in *Blue Range* that were filed after that plan was implemented.

68 It is noteworthy that the Secured Lenders did not have to consent to the amount that was made available to Ordinary Creditors in the Ordinary Creditors' Pool, as they had clear priority for their claim of approximately US $2.939 billion.

69 This application also gives rise to a potential issue of unequal treatment among creditors. There were other unsecured creditors with claims arising from inlet gas purchase agreements. If Celtic's application is successful, it is not impossible that such creditors would seek to file similar late claims for suspension damages.

70 I find that there is relevant prejudice to other creditors arising from the delay, and I am not satisfied that such prejudice can be alleviated by attaching any conditions to an order permitting late filing.

3. *Other Considerations*

71 It is relevant that Celtic brings its application to file a late claim after the Plan has been sanctioned and implemented. In *Re T. Eaton Company Limited et al*, May 5, 1999 98-CL-2586 (Ont. S.C.J.), Blair J. noted, in a case where notification of the claims bar process had "fallen through the cracks" with respect to one creditor such that she had no opportunity to file a claim, that permitting a creditor to file a late claim after plan sanction and implementation "is tantamount to altering or modifying the Plan", and that the jurisdiction to allow such a late claim should thus be "exercised sparingly and in exceptional circumstances only", citing *Algoma Steel Corp. V. Royal Bank* (1992), 11 C.B.R. (3d) 11. While these comments pre-dated *Blue Range*, which is now the law in Alberta on this issue, the timing of such an application with reference to plan implementation is relevant to the issue of prejudice.

72 As previously described, this claim would be paid out of the Ordinary Creditors' Pool. It is clear that this large claim was not anticipated when the Pool was structured as part of the Plan and the BA consented to the Plan. The Plan specifically provides that it cannot be modified without the prior consent of BA as Agent of the secured creditors, acting reasonably, and, in the circumstances, it cannot be said that BA is acting unreasonably in opposing the application.

73 SemCAMS and the BA submit that to allow a creditor with full knowledge of the CCAA Proceedings and the Claims Process to ignore the Claims Bar Date and file a significant new claim more than two years after such date would throw the entire CCAA restructuring process into disrepute. I must agree. Celtic has no good or satisfactory reason to offer as to why it failed to file a contingent claim for suspension damages within a reasonable time. It decided on this strategy for its own reasons, and at its own peril. None of the factors set out in *Blue Range* or in *BA Energy* favour its application. The policy reasons that emphasize the need for certainty and finality in an approved and sanctioned plan and fairness of treatment to all creditors outweigh the prejudice to Celtic of disallowing a late claim. The application to file a late claim for suspension damages is thus dismissed.

c) Should Celtic's Statement of Claim be struck out?

74 Celtic alleges in its Statement of Claim that the granting of the Initial Order in the CCAA Proceedings was an event of default under the IGPA and that Celtic, as non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. I have found that the suspension damages claimed under the Statement of Claim are Affected Claims that may be, and were, compromised by the Plan and the Plan Sanction Order. Paragraph 44 of the Plan Sanction Order provides as follows:

> Any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings . . . declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any other matter which is released pursuant to paragraphs 45 to 47, inclusive, of this Plan Sanction Order and Article 8 of the Plan.

75 The filing of the Statement of Claim is thus a breach of the Plan Sanction Order and accordingly is struck out.

Conclusion

76 In summary, I find that Celtic's claims for damages arising from the suspension of the IGPA, whether they arose during the CCAA Period, the Post Plan Implementation Period or the Post October 2010 Period are "Affected Claims" under the CCAA proceedings, subject to the Claims Process and to being compromised by the Plan. I dismiss Celtic's application to file an amended or new late claim for these damages. I find the Statement of Claim claiming such suspension damages to be a breach of the Sanction Order and, accordingly, I direct that it be struck out.

77 If the parties are unable to agree on costs, that issue may be addressed through written submissions filed with 45 days.

B.E.C. ROMAINE J.

cp/e/qlcct/qllmr/qlced/qlcas/qlcas

TAB 18

Indexed as:

Doering v. Grandview (Town)

Town of Grandview (Defendant), Appellant; and
Arthur Herbert Doering (Plaintiff), Respondent.

[1976] 2 S.C.R. 621

Supreme Court of Canada

1975: May 21 / 1975: October 27.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Actions -- Waters of river impounded by dam -- Action for damages from flooding of lands dismissed -- Second action for damages occurring in subsequent years from water saturation due to effect of dam on aquifer -- Action barred -- Res judicata.

The respondent sued the appellant municipality in 1969 for damages to his land and crops resulting from flooding in the years 1967 and 1968 and alleged to be due to a dam earlier built by the municipality but altered by it in 1967. The action was dismissed on May 24, 1973.

Some nine months later, the respondent commenced a new action, claiming damage to his crops from water in 1969, 1970, 1971 and 1972 as a result of the municipality having maintained the river waters at an artificially high level behind the same dam, causing the water of the river to enter an aquifer consisting of sandy soil about four feet below the surface of the respondent's lands and thus to saturate the soil with water.

A motion was brought by the municipality seeking to have the second action stayed or set aside. The trial judge granted the motion and stayed the action. On appeal, the judgment of the trial judge was reversed by a majority of the Court of Appeal and from that decision the municipality appealed to this Court.

Held (Laskin C.J. and Spence, Pigeon and Beetz JJ. dissenting): The appeal should be allowed and

the order staying the action restored.

Per Martland, Judson, Ritchie, Dickson and de Grandpré JJ. The principle of res judicata applied in this case. The issue of whether the river was caused to overflow its banks and damage the respondent's lands because the town had wrongfully impounded the waters behind the dam was thoroughly explored in the first action. The same question was raised in the present action. Although the years when the damage was alleged to have occurred in the second action were different from the first, all other conditions were exactly the same except that since judgment was rendered in the earlier action, the respondent had taken advice leading him to the conclusion that the water which damaged his crops, although coming from the same source, reached his land by saturation through an aquifer rather than by "flooding".

It was not alleged by the respondent that he could not by reasonable diligence have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor could it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident". A burden lay upon the respondent to at least allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it so as to expose the appellant a second time to litigation arising out of the same conduct.

Per Laskin C.J. and Spence, Pigeon and Beetz JJ., dissenting: The same question was not raised in the present action as was raised in the earlier one. The question in the first action was whether the dam caused damage in high water, i.e., by causing the river to overflow its banks; in the second action, the question was whether the dam caused damage in low water, i.e., whether, due to the presence of an aquifer four feet under the surface, it caused water saturation by keeping the water level higher than it would be under natural conditions.

There was no valid reason preventing the respondent from claiming damage in later years because, by artificially keeping the water level higher than it would be under natural conditions after the flood has subsided, the town's dam causes damages to crops on account of the presence of an aquifer under the surface soil. To so hold is to deny justice by a technical application of rules of court. When dealing with statutes, it is the Court's duty to apply the law as Parliament has written it. However, when, as here, the Court is dealing with judge-made law, there is no reason for denying justice on account of technicalities.

Cases Cited

[Henderson v. Henderson (1843), 3 Hare 100; Ord v. Ord, [1923] 2 K.B. 432; Hall v. Hall and Hall's Feed and Grain Ltd. (1958), 15 D.L.R. (2d) 638; Phosphate Sewage Co. v. Molleson (1879), 4 App. Cas. 801; Fenerty v. City of Halifax (1920), 50 D.L.R. 435; Fidelitas Shipping Co., Ltd. v. V/O Exportchleb, [1965] 2 All E.R. 4; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; New Brunswick Ry. Co. v. British and French-Trust Corp., Ltd., [1939] A.C. 1, referred to.]

APPEAL from a judgment of the Court of Appeal for Manitoba [[1975] 1 W.W.R. 321, 52 D.L.R. (3d) 395.], setting aside an order made by Dewar C.J.Q.B. staying an action brought by the respondent against the appellant. Appeal allowed and order staying the action restored.

Knox B. Foster and Rodney Stevenson, for the defendant, appellant.
Walter C. Newman, Q.C., and L.J. Lucas, for the plaintiff, respondent.

Solicitors for the defendant, appellant: Aikins, MacAulay & Thorvaldson, Winnipeg.
Solicitors for the plaintiff respondent: Newman, MacLean, Winnipeg.

The judgment of Laskin C.J. and Spence, Pigeon and Beetz JJ. was delivered by

PIGEON J. (dissenting):-- This appeal is from a judgment of the Court of Appeal for Manitoba setting aside, Guy J.A. dissenting, an order made by Dewar C.J.Q.B. staying an action brought on January 21, 1974, by the respondent Doering against the present appellant, the Town of Grandview.

Doering had sued the town in 1969 for damages to his land and crops resulting from flooding in the years 1967 and 1968 and alleged to be due to a dam earlier built by the town but altered by it in 1967. The action also claimed an order for the removal of the dam. That action was dismissed by Tritschler C.J.Q.B. on May 24, 1973. His oral judgment disposed of the claims in the following words:

> This case has been before the Court for many years, and this is our second hearing. I have had an opportunity of studying carefully the report prepared by the Water Resources Branch under the direction of Mr. Bodnaruk, a professional engineer. His evidence today strengthens the conclusions which were reached in that report, and I see no reason for delaying this matter further.
>
> The very simple issue here is whether the frequent flooding of Mr. Doering's land, which no one disputes, is attributable to the maintenance by the town of Grandview of its dam.
>
> Unfortunately, Mr. Doering has convinced himself that the dam has been the cause of his flooding troubles. That is not so. Not only has he failed to satisfy the onus of proving that the flooding of his land was caused by the defendant's dam, but his own evidence establishes the very contrary of that; namely that the

flooding would have taken place if the dam had not been in existence.

At the north boundary of plaintiff's quarter section, that is at "Cross Section L" shown in Exhibit 8, the backwater effect of the dam was less than one-tenth of a foot for the 1967 flood, and at "Cross Section Q" and "U" there was no noticeable backwater effect from the dam.

Mr. Bodnaruk's report and the evidence establishes that, regardless of the dam, plaintiffs land will experience flooding when the river discharge exceeds 750 cubic feet per second.

In the spring of 1967 it was 1,330 cubic feet per second and there had to be flooding.

It is clear from the evidence that plaintiffs land is going to be flooded to some extent nearly every year because it will flood whenever the flow exceeds 750 cubic feet per second, and the mean flood is 879 cubic feet per second. You are going to have flooding there every year except in a dry year like the present.

The evidence fully satisfies the Court that the flooding, which is the subject matter of this action, was not caused and was not contributed to by the defendant's dam. The action fails and will be dismissed.

The essential allegations of the statement of claim in the present case as amended, are the following:

4. Prior to the 1st day of January, 1967, the defendant operated a dam in the said River at a point in the said River within the corporate limits of the defendant corporation. The said dam was operated in such a manner as to during the fall and winter seasons impound water and cause to be built up the water up stream from the dam to an artificially high level but after spring break up the defendant would cause the dam to be adjusted so as to return the water level to its natural height during the crop growing season. In 1966 the said dam was damaged, and was replaced by a mound of earth, stones and large pieces of waste concrete constructed by or on behalf of the defendant as a makeshift dam and no attempt was made except as hereinafter stated to reduce the level of the water impounded up stream by the said mound during the growing season in each year.
5. The said farm land of the plaintiff has a layer of natural aquifer consisting of

sandy soil about four feet below the surface of its top soil and in consequence of the defendant maintaining the water up stream at an artificially high level since 1967 during the growing season including where the said river runs through the plaintiffs land causes the water to enter the aquifer and to saturate the soil to such an extent that either crops cannot be sown or if they are sown then crops fail to grow on some 40 acres more or less thus causing the plaintiff damage.

6. The plaintiff has repeatedly demanded that the defendant reduce the height of water to its natural level during the growing season and has advised the defendant repeatedly of the damage caused but the defendant has refused or failed to do anything to eliminate the said cause except once just prior to the 1973 growing season when the said mound that serves as a make-shift dam was opened up in time to enable the plaintiff to sow his 1973 crop and for it to grow unaffected by the saturation aforesaid.
7. The acreage affected by the said saturation has never been less than 34 or more than 46 acres and the plaintiff has had to work the land whether or not he harvests the crop.
8. In consequence of the said wrongful actions of the defendant the plaintiff has suffered the following crop losses during the undermentioned years including interest, namely:

1969 46 acres	$1,350.00
1970 34 acres	$ 986.00
1971 40 acres	$1,118.00
1972 40 acres	$1,036.00

Total	$4,490.00

9. The defendant has refused to give assurances for the 1974 growing season, and for every year thereafter that the said river will be permitted to fall to its natural level during the crop growing season.

Allowing the town's motion to stay the action, Dewar C.J.Q.B. said in particular:

> None of the facts alleged re the conduct of the defendant in the pending action are new, in the sense that they did not exist when the prior action went to trial in September 1972. There is no suggestion the aquifer, now alleged to serve as a conductor of water from the forebay to plaintiff's lands, did not exist in the years 1967 through 1972. All of the facts now alleged as to tortious conduct (which is the essence of this type of actionable nuisance) were available and could have been brought forward in the prior action. If they were not, whether by

> inadvertence, failure to exercise reasonable diligence, or accident, the plaintiff is not now entitled to pursue what is substantially the same claim, but for damage alleged to have been sustained in subsequent years.
>
> ...
>
> The alleged tortious conduct of defendant is not the only issue that has already been the subject of litigation. The damages now claimed (i.e. for the years 1969 through 1972) were also at issue in the 1969 action, whether or not they were pleaded.
>
> Rule 222 provides:
>
> Damages in respect of any continuing cause of action shall be assessed to the time of assessment.
>
> The 1969 action was tried in September 1972 and May 1973.
>
> The effect of Rule 222 is indicated in the reasons of Schroeder, J.A. in Toronto General Trusts Corporation v. Roman (1962), 37 D.L.R. (2d) 16, affirmed by the Supreme Court of Canada, (1964), 41 D.L.R. (2d) 290.
>
> Plaintiff is not entitled to what would be a re-trial of the same issues determined in the earlier action. "The plea of res judicata is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation": per Maugham, J. in Green v. Weatherill [1929] 2 Ch. 213, at p. 221.

On the other hand, Matas J.A. with whom Freedman C.J.M. agreed, said:

> In my view, with respect, it is open to plaintiff in the case at bar to raise the question of the aquifer in a second action. That question was not raised and was not considered in the 1969 action nor was it fundamental to the decision in the first action. (Hill v. Hill (1966) 56 W.W.R. 260). It is clear from a reading of the judgment in the 1969 action, that Tritschler, C.J.Q.B., considered the liability of Grandview only in the context of a claim as to surface flooding. If plaintiff had sought to relitigate that issue he would he precluded from doing so by the plea of res judicata. But if plaintiff were to be successful in these proceedings, the

> judgment would not be inconsistent with that of Tritschler, C.J.Q.B., where the only question considered by the court was the effect the impounding of water on, surface flooding. The finding of the court in that action is not challenged by plaintiff in any way. The present action is concerned, with surface flooding, but with sub-surface saturation of the soil due to the alleged effect of the dam on the aquifer.

In my view, the majority opinion in the Court of Appeal reflects a sound approach to the doctrine of res judicata. It is in accordance with the guiding principle stated by Lord Maugham L.C. in New Brunswick Ry. Co. v. British and French Trust Corporation, [[1939] A.C. 1.], at pp. 20-21:

> ... I desire to make it plain that I am not desirous of questioning the general rule on the subject of res judicata, laid down by Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100, 114. His statement of the rule was cited and approved by the Judicial Committee in Hoystead v. Commissioners of Taxation, [1926] A.C. 155, 170. It is however, to be noted that the learned Vice-Chancellor was stating the rule in general terms, and he qualified the rule by the exception of special circumstances or special cases. I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are "odious"; but the adjective might well he applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

In the present case, the central fact is that Doering's claim for damages to his crops in 1969, 1970, 1971 and 1972 by water saturation due to the effect of the dam on the aquifer was never litigated. All that was litigated was a claim for damages due to flooding in 1967 and 1968. It was found that flood conditions were not appreciably aggravated by the dam and Doering should certainly not be allowed to raise that contention again, even in respect of later years.

It is true that the issue of whether the river was caused to overflow its banks and damage the respondent's lands because the town had impounded water behind the dam, was thoroughly explored in the first action. It was then determined that the impoundment had a negligible effect on the over-flow and it is the only basis on which the action was dismissed.

That same question is not raised in the present action. What is urged is a completely different cause of action said to have occurred at a different time of the year, not at flood time, but during the

growing season after any flood has subsided. It is not claimed that the dam has caused the river to overflow its banks, but that, due to the presence of an aquifer four feet under the surface, it has caused water saturation by keeping the water level higher than it would be under natural conditions. In other words what has been determined in the first action is that the dam did not cause the overflow that occurred in flood time, it has never been determined that it did not cause the water saturation that is alleged to have occurred after flood time. More simply, the question in the first action was whether the dam caused damage in high water, in the second, it is whether it caused damage in low water.

It is said that the aquifer always was there, this is true, but it is not by its mere presence that the crops are alleged to have been damaged, but by the raising of the water level, not to overflow level, but to aquifer level. Nothing shows that the damage suffered by the respondent in the two years covered by the first action was not, in fact, caused by the flooding for which the town was held not responsible. To say that it was in fact caused by water saturation as in the subsequent years covered by the second action, is to make an assumption for which there is no basis in the record. The respondent is precluded by res judicata from so contending in respect of the damage claimed by the first action. Then on what basis may the town so contend in order to defeat the claim in respect of subsequent years? I cannot see any.

I fail to see any valid reason preventing the respondent from claiming damages in later years because, by artificially keeping the water level higher than it would be under natural conditions after the flood has subsided, the town's dam causes damages to the crops on account of the presence of an aquifer under the surface soil. To so hold is to deny justice by a technical application of rules of court. When dealing with statutes, it is our duty as I see it, to apply the law as Parliament has written it. However, when, as here, we are dealing with judge-made law, I can see no reason for denying justice on account of technicalities, (cf Ares v. Venner [[1970] S.C.R. 608.]; Frank v. Alpert [[1971] S.C.R. 637.].

In my view, the rule concerning the assessment of damages up to the date of the trial for a continuing cause of action was meant to facilitate recovery of what is due in fairness, not to deprive litigants of claims they have not urged. Reference was made by Dewar C.J.Q.B. to Schroeder J.A.'s reasons in Toronto General Trusts Corp. v. Roman [(1962), 37 D.L.R. (2d) 16, affirmed [1963] S.C.R. vi.]. In my view, what was there decided is fully in accordance with the principle I am contending for as to the effect of the rule: it was not permitted to defeat the claim for damages subsequent to the trial.

In the present case, it is not a matter of assessment of damages that is in issue, it is the entitlement to damages that comes up for decision and in my view, the rule as to a continuing cause of action is not properly applicable. What happens each year is due to what occurs that year. There may be damage one year, not in another.

Concerning the contention that the staying order was made in the exercise of judicial

discretion, I would merely refer to such cases as Ladouceur v. Howarth, [1974] S.C.R. 1111. and Witco Chemical Co., Canada, Ltd. v. Town of Oakville, [1975] 1 S.C.R. 273. The Court of Appeal has made it a condition of its order that Doering pay the costs taxed against him in the 1969 action. In so doing it has, in my view, given the town all the protection against abuse of process that can properly be claimed.

I would dismiss the appeal with costs and would not accede to appellant's request for costs on respondent's motion at the hearing concerning the Bodnaruk report which was withdrawn. There was no real necessity for a memorandum on that motion, nor for copies of the evidence at the trial of the 1969 action.

The judgment of Martland, Judson, Ritchie, Dickson and de Grandpré JJ. was delivered by

RITCHIE J.:-- I have had the advantage of reading the reasons for judgment of my brother Pigeon in which he has recited many of the facts giving rise to this appeal as well as relevant portions of the pleadings and of the judgments in the Manitoba Courts.

This is the second of two actions brought by the respondent against the Town of Grandview; both actions are founded in nuisance and both assert claims for damage by water to the respondent's land and the crops thereon, allegedly caused by the conduct of the Town of Grandview in the construction and operation of a "make-shift" dam whereby the waters of the Valley River where it runs through the respondent's land, were so "impounded" as to have adversely affected his soil and crops.

The first action was brought in April 1969, claiming that by repairing and replacing a dam previously existing, the town had "impounded a large volume of water and caused to be built up a large unnatural and above normal head of water ... and raised the water levels in the said River ... and it is further alleged that "the said dam obstructed the natural flow of water and caused the waters therein to overflow the banks ... flooded, inundated, cut away and eroded the plaintiffs' said land."

The first case which related to damage to the plaintiffs lands and crops in the years 1967 and 1968, and is herein referred to as the 1969 action, was apparently not called for trial until September 1972, at which time the hearing was adjourned until May 1973, when Chief Justice Tritschler rendered his decision, the opening words of which indicate that both parties had ample time to consider all phases of the matter before and during the trial; in this regard, the Chief Justice observed:

> This case has been before the courts for many years, and this is our second hearing.

Chief Justice Tritschler's reasons for judgment are conveniently recited in the reasons of my brother Pigeon and I only find it necessary for the purpose of these reasons to abstract the following two

quotations:

> (i) The very simple issue here is whether the frequent flooding of Mr. Doering's land, which no one disputes, is attributable to the maintenance by the town of Grandview of its dam.
>
> Unfortunately, Mr. Doering has convinced himself that the dam has been the cause of his flooding troubles. That is not so. Not only has he failed to satisfy the onus of proving that the flooding of his land was caused by the defendant's dam, but his own evidence establishes the very contrary of that; namely that the flooding would have taken place if the dam had not been in existence.
>
> (ii) It is clear from the evidence that plaintiffs land is going to be flooded to some extent nearly every year because it will flood whenever the flow exceeds 750 cubic feet per second, and the mean flood is 879 cubic feet per second. You are going to have flooding there every year except in a dry year like the present.
>
> The evidence fully satisfies the Court that the flooding, which is the subject matter of this action, was not caused and was not contributed to by the defendant's dam.

Within nine months of this judgment being rendered, a new action was commenced by the same Mr. Doering claiming damage to his crops from water in 1969, 1970, 1971 and 1972 as a result of the Town of Grandview having maintained the waters of the Valley River at an artificially high level behind the same dam. The conduct alleged against the town as the foundation for both actions was the same, namely, the impounding of the waters of the river at an artificial height due to the dam, but in the second action it was alleged that the damage was occasioned by the "impounding" causing the water of the river to overflow and enter an "aquifer" consisting of sandy soil about four feet below the surface of Doering's lands and thus to saturate the soil with water.

The reason for bringing the second action is frankly explained in the affidavit filed herein by Mr. Doering where he says:

> I consulted Walter Carman Newman about taking an appeal from that judgment which held that the damage to my land and crops that I suffered in 1967 and 1968 was not caused by surface flooding by waters impounded by the dam in question.
>
> 4. I was advised by Walter C. Newman that the damage to my land and crops which

continued in 1968, 1969, 1970, 1971 and 1972, was probably not due to surface flooding at all but caused by the impounded water flowing through an aquifer layer underneath the topsoil of the plaintiff's land and saturating the ground above during the relevant periods. He further advised me that since these issues were not dealt with in the 1969 action, an appeal would be ineffectual in such a case and that I had to start another action.

5. Acting upon the suggestion of Walter C. Newman I consulted Professor Andrew Baracos, a recognized soils expert, who conducted tests on the said land and confirmed the suggestion of Walter. C. Newman.
6. Prior to 1973 I had no knowledge of an aquifer lying close beneath the topsoil of my land or the effect that such an aquifer would have when waters are impounded at an artificial height in a river to which the aquifer extends, I believing only that the saturation of my soil could only be due to surface flooding. The question of the aquifer was therefore not raised in the 1969 action and the action in any event could not deal with the damage caused to my land and crops in the years 1969 to 1972 both inclusive.

This affidavit was filed on a motion brought by the defendant before Chief Justice Dewar seeking to have the action stayed or set aside. Excerpts from the decision on that motion are once again conveniently recited in the reasons for judgment of my brother Pigeon. I only find it necessary to advert to the following paragraph which he quoted.

> None of the facts alleged re the conduct of the defendant in the pending action are new, in the sense that they did not exist when the prior action went to trial in September 1972. There is no suggestion the aquifer, now alleged to serve as a conductor of water from the forebay to plaintiffs lands, did not exist in the years 1967 through 1972. All of the facts now alleged as to tortious conduct (which is the essence of this type of actionable nuisance) were available and could have been brought forward in the prior action. If they were not, whether by inadvertence, failure to exercise reasonable diligence, or accident, the plaintiff is not now entitled to pursue what is substantially the same claim, but for damage alleged to have been sustained in subsequent years.

Later in his judgment, Chief Justice Dewar cited the cases of Henderson v. Henderson [(1843), 3 Hare 100.] and Ord v. Ord [[1923] 2 K.B. 432.] and quoted the following passage from Vice-Chancellor Wigram's reasons for judgment in the former case at p. 115:

> ... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter

> which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In reversing the judgment of Chief Justice Dewar, Matas J.A., speaking for himself and Freedman C.J.M., (Guy J.A. dissenting) in the Court of Appeal of Manitoba, referred to the last-quoted excerpt from the case of Henderson v. Henderson, but adopted the interpretation placed upon that case by Johnson J.A., with whom Ford C.J.A. agreed in the Court of Appeal of Alberta in Hall v. Hall and Hall's Feed and Grain Ltd. [(1958), 15 D.L.R. (2d) 638.], where he characterizes the proposition stated by Vice-Chancellor Wigram as "the wider principle of res judicata" and goes on the say:

> It was apparently the wider principle of res judicata that was applied in the present case. This doctrine has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct.

In that case the first action had been brought for an accounting between husband and wife, where the second action involved the allegation that a business partnership had existed between them which had been converted into a limited company and the wife sought compensation for her interest in the partnership. There were thus clearly two separate causes of action, but with the greatest respect, I cannot agree that the causes of action in the two cases here under consideration are separate and distinct. As Chief Justice Dewar points out, all the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial and it was there found that these facts did not support the present respondent's action for damage to his crops by water. The only new issue raised in the present case is the contention that the same conduct for which the town was exonerated from blame in respect of damage to crops in 1967 and 1968 is blameworthy in respect of the damage done in 1969, 1970, 1971 and 1972 because, although the water came from the same source, it reached the respondent's land by a different route. The aquifer was on the respondent's land before 1967 and he states in his affidavit that damage to his land and crops complained of in the first action was probably caused by it according to the information which he received from the expert whom he consulted after the trial. Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory. Such an expert could

probably have been consulted before the first action, and if he had been then the matter would no doubt have been put in issue at that time, but in my view the circumstances here are to be considered in the light of the principles established in Phosphate Sewage Co. v. Molleson [(1879), 4 App. Cas. 801.], where Lord Cairns said, at pp. 814-5:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words res noviter veniens in notitiam, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to.

This passage was adopted by the Supreme Court of Nova Scotia in Fenerty v. The City of Halifax [(1920), 50 D.L.R. 435.], where it was said at pp. 437-8:

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: "I will shew you this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been ascertained by me before."

The same proposition was stated by Lord Denning in Fidelitas Shipping Co., Ltd. v. V/O Exportchleb [[1965] 2 All E.R. 4.], where he said at pp. 8-9:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the selfsame issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.

The distinction between what has come to be referred to as "cause of action estopped on the one hand, which precludes a person from bringing an action again against another when the same cause of action has been determined in earlier proceedings, and "issue estoppel", is discussed and explained in the reasons for judgment of Dickson J., speaking on behalf of the majority of this Court in Angle v. Minister of National Revenue [[1975] 2 S.C.R. 248.], at p. 254.

It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent's soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in Henderson v. Henderson, supra, and the Phosphate Sewage Co. case, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident." In my opinion the burden lay upon the respondent to at least allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it so as to expose the appellant a second time to litigation arising out of the same conduct. I appreciate that my brother Pigeon has adopted what he refers to as "the guiding principle" stated by Lord Mangham L.C. in New Brunswick Ry. Co. v. British and French Trust Corporation [[1939] A.C. 1.], at pp. 20-1. It will be noted, however, that the Lord Chancellor did not question the rule in Henderson v. Henderson; but found that in the case before him there were exceptional circumstances which he described as follows:

> I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are "odious"; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action.

I cannot find any such exceptional circumstances in the present case. The issue of whether the river was caused to overflow its banks and damage the respondent's lands because the Town of Grandview had wrongfully impounded the waters behind the dam, was thoroughly explored in the first action. The same question is raised by the present action. Although the years when the damage is alleged to have occurred in the second action are different from the first, all other conditions are exactly the same except that since Chief Justice Tritschler rendered his judgment in 1973, the respondent has taken advice leading him to the conclusion that the water which damaged his crops, although coming from the same source, reached his land by saturation through an aquifer rather than by "flooding".

For all these reasons, as well as for those contained in the reasons for judgment of Chief Justice Dewar, I would allow the appeal and restore that judgment with costs, except that I would allow no costs of the respondent's motion made at the hearing which was withdrawn.

Appeal allowed; order staying action restored, LASKIN C.J. and SPENCE, PIGEON and BEETZ JJ. dissenting.

TAB 19

Indexed as:

AGB Halifax Enterprises Inc. v. Wood Street Development Inc.

Between
AGB Halifax Enterprises Inc., plaintiff (appellant), and
Wood Street Development Inc., Viewmark Homes Ltd., Shellfran Investments Limited, Karlub Joint Venture, Theodore Libfeld, Mark Libfeld, Sheldon Libfeld, Jay Libfeld and Irving Teper, defendants (respondents)

[1999] O.J. No. 3899

125 O.A.C. 274

91 A.C.W.S. (3d) 1040

Docket No. C31948

Ontario Court of Appeal
Toronto, Ontario

Abella, Goudge and MacPherson JJ.A.

Heard: September 29, 1999.
Judgment: October 22, 1999.

(12 paras.)

Agency -- Liability of principal and agent to third parties -- Liability of both for same debt -- Contracts, election by third party -- What constitutes an election -- Practice -- Judgments and orders -- Summary judgments -- To dismiss action -- Evidence, no factual conflicts.

Appeal by the plaintiff, AGB Halifax Enterprises, from summary judgment dismissing its action. The respondent, Wood Street, purchased a hotel. It held the property as bare trustee for three beneficiaries who were the corporate respondents. The three beneficial owners were parties to a partnership agreement that also bound Wood Street. Wood Street agreed to waive any indemnification rights from the beneficiaries. Wood Street gave the vendor a mortgage which was assigned to AGB. When the mortgage went into default, AGB sued Wood Street and obtained judgment. It commenced this action against the beneficial owners when it could not recover the judgment. The corporate respondents successfully moved to dismiss the action. AGB argued that the relationship be-

tween Wood Street and the corporate respondents was one of agency as well as trust. AGB argued that it could therefore sue the corporate respondents as undisclosed principals. It also argued that the motions judge acted improperly in that he weighed the conflicting evidence and conducted a paper trial.

HELD: Appeal dismissed. The agency argument failed because of the doctrine of merger. AGB obtained judgment against Wood Street who was the agent of the corporate respondents. It could not sue the principals even if it did not know of their existence at the time of judgment. The motions judge acted properly. There were no factual conflicts in the evidence that required resolution by trial.

Statutes, Regulations and Rules Cited:

Mortgages Act, R.S.O. 1990, c. M-40, s. 20(2).

Appeal from:

On appeal from a judgment of Sharpe J. dated March 12, 1999.

Counsel:

Alan J. Lenczner, Q.C and V. Ross Morrison, for the appellant.
Martin Teplitsky, Q.C. and S. Brunswick, for the respondents.

The following judgment was delivered by

1 THE COURT:-- This litigation arises out of the purchase by the respondent Wood Street Developments Inc. ("Wood Street") of the Westbury Hotel in Toronto. The transaction closed on February 15, 1990. On closing Wood Street gave the vendor a mortgage which was subsequently assigned to the appellant as mortgagee.

2 Title to the property was taken in the name of Wood Street and Wood Street was the mortgagor. However, Wood Street held the property as a bare trustee for three beneficiaries, the corporate respondents in these proceedings. The three beneficial owners were parties to a partnership agreement which also bound Wood Street. It provided that Wood Street waived any right of indemnification it may have from the partners.

3 When the mortgage went into default the appellants sued Wood Street on the mortgage and obtained judgment. When it was unable to recover on that judgment it commenced these proceedings claiming the following:

(a) that the corporate respondents are liable to indemnify Wood Street for the amount of the judgment against it;

(b) that the waiver of the right to indemnification was against public policy and, therefore, void;

(c) that the corporate respondents are liable under s. 20(2) of the Mortgages Act, R.S.O. 1990, c. M40;
(d) fraud and conspiracy.

4 The defendants moved by way of summary judgment to dismiss the action. Sharpe J. granted the motion finding no genuine issue for trial to be raised by any of the appellant's allegations. This is the appeal from that judgment.

5 Before this Court the appellant's primary argument was one not made below. It argued that the relationship between Wood Street and the corporate respondents could be one of agency as well as one of trust and, on the basis of agency law, the appellant could sue the corporate respondents as undisclosed principals.

6 In our view, this argument must fail because of the doctrine of merger. The appellant has proceeded to judgment against the agent. It has sought to enforce that judgment. It cannot afterwards sue the principals whether it knew of their existence at the time of judgment or not. See Lang Transport Ltd. v. Plus Factor International Trucking Ltd. (1997), 32 O.R. (3d) 1 (Ont. C.A.); Halsbury's Laws of England, 4th Edition, Reissue, Vol. I (2), para. 143.

7 The appellant's second argument before this court was that Sharpe J. went beyond the role asked of him on a summary judgment motion to weigh conflicting evidence and conduct a paper trial.

8 In our view there is no basis for this assertion. The only evidence tendered on the motion by the appellant was an affidavit of its expert witness Mr. Buchnall. While his assertion that the form of this transaction was unusual conflicted with the view of the respondents' expert, resolution of this conflict would not affect the outcome of the litigation. On the issue which does matter, the legal relationship among the partners and Wood Street, Mr. Buchnall was not able to come to a conclusion. Hence his evidence does not raise a conflict which would necessitate a trial.

9 In our view, there are simply no factual conflicts either of direct evidence or of the reasonable inferences to be drawn therefrom that would require a trial to resolve. Consequently, this ground of appeal must fail.

10 In its factum the appellant also challenges the principal finding of Sharpe J., namely, that Wood Street was a party to the partnership agreement thereby depriving itself of the right to indemnity from the beneficiaries. Sharpe J. found the contrary contention so weak that it raised no genuine issue for trial. We agree with his conclusion and his reasons for that conclusion. We could not improve upon them.

11 The appellant did not raise before this Court any of the other issues addressed by Sharpe J. In any event, for the reasons he gave, we agree with his disposition of them.

12 In the result the appeal must be dismissed with costs.

ABELLA J.A.
GOUDGE J.A.
MacPHERSON J.A.

cp/e/nc/qlmcc

TAB 20

1860 CarswellOnt 322, 20 U.C.Q.B. 268

C

1860 CarswellOnt 322, 20 U.C.Q.B. 268

McKay v. **Fee**

McKay v. **Fee**

Upper Canada Court of Queen's Bench

John Beverley Robinson, Bart., C. J., Archibald McLean, J., Robert Easton Burns, J.

Judgment: 1860

Counsel: *Cameron*, Q. C., for the plaintiff.

McMichael, contra.

Subject: Corporate and Commercial; Civil Practice and Procedure

Bills of Exchange --- Promissory notes — Consideration — Usurious consideration or contract.

Practice --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Finality of judgment or order.

Interest — Recovery of principal and six per cent. — Subsequent action on agreement to pay a higher rate.

Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest, and at the trial to support this count he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months' time. The learned judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict, against both defendants for the amount of the note sand interest at six per cent. After judgment had been entered up on this and satisfied, he sued defendant on his undertaking, to recover 24 per cent., the balance of interest agreed to be paid by it.

Held, that the judgment recovered was a bar to any further claim for interest upon the same notes.

This was a special case stated for the opinion of the court, as follows: —

Case.

An action was commenced in the Court of Common pleas by the above named plaintiff against the above named defendant as maker, and one Robert Armour as endorser, of two promissory notes, the one for the sum of $231.60, and the other for the sum of $1915.15. A count was added in the declaration for interest.

At the trial of the cause, which took place at the fall assizes for 1859, at Toronto, evidence was offered to support the court for interest by putting in the following memorandum.

> I undertake to allow Mr. McKay the holder of my promissory notes for $231.60, and $1915.15, respectively, both of which matured on the 27th of December, 1858, interest upon these amounts at the rate of 2 $^{1}/_{2}$ per cent. per month, until the date of payment, in consideration of the said McKay having consented to give me three months' time for payment.
>
> (Signed,) JOHN FEE.
>
> Bowmanville, 14th January, 1859.

And a similar memorandum signed by the defendant, Robert Armour.

At the trial, at Toronto, before *Draper*, C. J., the learned judge ruled that being a joint action against maker and endorser, evidence could not be offered of any separate liability against either. The plaintiff abandoned any claim on the memorandum in that form of action, and a verdict was taken against the defendant as maker, and the said Robert Armour as endorser, for the amount of the two promissory notes, and interest up to date of verdict at six per cent., and judgment for the same was entered upon the 24th day of October, 1859, which judgment has been since satisfied.

This action has now been brought against the defendant to recover interest on the memorandum above mentioned.

It is admitted that the period for which the six per cent. was taken covers that portion of the period for which the interest is now demanded at the greater rate up to the date of the entry of the said judgment, and that the principal sums are identical, but the plaintiff demands twenty-four per cent., being the thirty per cent. in the memorandum, less six per cent. recovered.

The defendant contends that the judgment recovered for the six per cent. is a bar to the recovery of any other amount of interest on the above mentioned memorandum, and that the verdict rendered on the said notes with legal interest, and the judgment entered thereon, is a complete bar to the recovery of the interest claimed in this action, and that this action must fail.

If the court shall be of opinion that the judgment recovered for interest at the rate of six per cent. on the original amount

due up to date of the said judgments, does not bar the recovery of the interest claimed in this action, judgment is to be entered for the plaintiff for the amount of interest at the rate of twenty-five per cent. a year on the principal sum, from the date of said agreement to the date of payment, or a less sum up to the date of entering judgment in this action, or less rate, as the court may see fit to award.

If the court shall be of opinion that no portion of the said twenty-four per cent. can be recovered after recovery of judgment for six per cent., then judgment is to be entered for the defendant with costs of suit.

Cameron, Q. C., for the plaintiff, cited Seddon v. Tutop, 6 T. R. 607; Hadley v. Green, 2 Cr. & J. 374.

McMichael, contra, cited 1 B. & B. 432; Lord Bagot v. Williams, 3 B. & C. 235.

***Robinson, C. J.*, delivered the judgment of the court.:**

1 We think there can be no further recovery upon the promissory notes after judgment obtained against both the parties for the sums payable with six per cent. interest, which judgment moreover has been satisfied. The interest was an accessory to the debt, damages in effect for detaining it, and such interest as the plaintiff shewed himself entitled to in the opinion of the court and jury on the former trial covered the whole period up to the judgment. Can there then be another recovery for interest for forbearance of the same debt, for the same period of time? We think there cannot be.

2 Admitting that the special agreement for paying so exorbitant a rate of interest could be enforced against each on his separate undertaking, the plaintiff might have sued each separately, and might have advanced in support of each action this special agreement signed by each defendant respectively.

3 Whether it was quite clear that he could not have the same advantage in an action under the statute against the maker and endorser, we need not give any opinion. The learned judge at the trial decided that question at the time, and the plaintiff acquiesced, and took his verdict for the interest at six per cent., and has entered judgment on it. We think after this he can sue for no more interest on those notes, though he has endeavored to recover upon the special agreement respecting interest, or for a distinct and independent cause of action.

4 Judgment must in our opinion be entered for the defendant.

Judgment for defendant.

END OF DOCUMENT

TAB 21

Case Name:

Elguindy v. Warkworth Institution

Between
Emad Elguindy, Applicant, and
The Warden of Warkworth Institution, a penitentiary operated by Correctional Service of Canada, Respondent

[2011] O.J. No. 3631

2011 ONSC 4670

Court File No. 0367-11

Ontario Superior Court of Justice

S.E. Healey J.

Heard: July 20, 2011.
Judgment: August 3, 2011.

(37 paras.)

Criminal law -- Parole -- Appeals and judicial review -- Day parole -- Revocation or termination -- Suspension -- Application by Elguindy for habeas corpus and an order that he be restored to full parole, or alternatively day parole, dismissed -- Elguindy had previously applied to Superior Court for relief after his parole was suspended and then revoked -- Court had declined to exercise jurisdiction, finding application properly belonged in Federal Court -- Elguindy brought another application, arguing fresh evidence and special circumstances merited the exercise of jurisdiction -- Court declined to exercise jurisdiction -- Corrections and Conditional Release Act provided a complete procedure for reviewing Parole Board decisions to Federal Court -- Moreover, application barred by res judicata -- Corrections and Conditional Release Act, ss. 135, 147.

Application by Elguindy for habeas corpus and an order that he be restored to full parole, or in the alternative, to day parole. The applicant was a first-time federal offender serving a six-year sentence for fraud over $5,000. The applicant was granted day parole in October 2009, but it was suspended by his parole officer three weeks later. In the opinion of the parole officer, the applicant's risk of reoffending in the community was unmanageable. The Parole Board confirmed his suspension and

revoked his day parole. That decision was upheld by the Appeal Division of the Board. The applicant's subsequent application for habeas corpus with certiorari in aid to quash the Board's decision was dismissed by Brown J. of the Superior Court of Justice. Brown J. declined to exercise jurisdiction to hear the matter, finding that it ought to have been brought as a judicial review application before the Federal Court. The applicant now argued that the current application differed from his previous habeas corpus application, as he was now challenging the suspension of his parole as opposed to its revocation. He also argued there was fresh evidence and special circumstances that merited the exercise of the court's jurisdiction. The two issues for determination were (1) whether the court should exercise its jurisdiction to hear the application, and (2) whether the application was barred by the doctrine of res judicata.

HELD: Application dismissed. The Court did not accept the applicant's fresh evidence, finding that the applicant lacked credibility, that the evidence was not the type of fresh evidence necessary to change the course of the application, and further that some of the applicant's arguments could have been made in prior proceedings but had not been raised. With respect to the jurisdictional issue, the Court declined to exercise jurisdiction to hear the matter. The statutory review process set out in ss. 135 and 147 of the Corrections and Conditional Release Act constituted a complete, comprehensive and expert procedure for review of a Parole Board decision. Accordingly, the application was more appropriately within the realm of the Federal Court on an application for judicial review. The Court also went on to find that the applicant's application was also barred by the doctrine of res judicata, specifically by cause of action estoppel. The current application before the Court and the application brought before Brown J. were both based on the same set of facts and alleged that the Correctional Service of Canada had erred in law and acted without jurisdiction in suspending and revoking his parole. Accordingly, there was nothing novel in the current application beyond that which was contained in the application that was heard and determined by Brown J.

Statutes, Regulations and Rules Cited:

Corrections and Conditional Release Act, S.C. 1991, c. 20, s. 107(1), s. 135, s. 135(1), s. 135(3), s. 135(5), s. 147

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1

Counsel:

The Applicant, Self Represented.

M.J. Sims, for the Respondent.

1 S.E. HEALEY J.:-- By this application the applicant seeks the remedy of *habeas corpus*, together with an order that he be restored to full parole, or in the alternative, day parole. His application is based on the following grounds:

i) the decision to suspend the applicant's parole was unlawful as it was so unreasonable on its face as to result in loss of jurisdiction;
ii) the decision to suspend was neither necessary nor reasonable to protect society;
iii) the decision to suspend was not tied to the criteria set out in the *Corrections and Conditional Release Act* S.C. 1991, c. 20 ("*CCRA*");
iv) the decision to suspend parole was beyond the scope of what Parliament intended and therefore the decision lacked jurisdiction and was unlawful;
v) the decision to suspend exceeded the jurisdiction of the Correctional Service of Canada ("CSC") and the parole officer;
vi) the subsequent decision of the parole board to revoke the applicant's parole cannot cure the unlawful aspect of the parole officer's decision to suspend parole;
vii) the *CCRA* does not provide a complete, comprehensive and expert procedure for the review of the lawfulness of a parole officer's decision to suspend;
viii) the procedure, if any, set out in the *CCRA* to review lawfulness is less advantageous than the availability of *habeas corpus* in the Superior Court of Justice;
ix) the applicant did not breach any of his release conditions or commit any crime during his parole; and
x) the parole officers who suspended parole acted in bad faith and fabricated reasons for their decision and the reasons were not tied to the criteria for suspending parole.

2 On July 20, 2011 this court declined to exercise its jurisdiction to hear the application, with these written reasons to follow.

3 The facts are that the applicant is a first time federal offender serving a six year sentence for fraud over $5,000 for stealing approximately $248,000 from a mentally ill client of his unlicensed paralegal practice. However, he has a criminal record stretching back to 1993, and has been convicted of numerous dishonesty related offences, for which he served time in provincial custody.[1]

4 The applicant was granted day parole on October 2, 2009 subject to various special conditions imposed by the Parole Board of Canada (the "Board"). His day parole was suspended by his parole officer three weeks later. In her opinion a suspension of the applicant's parole was required for the protection of society, as his continuing deceit and manipulation meant that his risk of re-offending was unmanageable in the community.[2]

5 The Assessment for Decision details the various forms of deceit and manipulative behaviours engaged in by the applicant during his day parole and up until the time of his suspension.[3]

6 During the three weeks that the applicant was on day parole he had three disciplinary interviews.[4]

7 In November 2009 the applicant appeared before the Board for a post-suspension hearing. He made lengthy written submissions in advance of the hearing.[5] The Board reviewed the grounds for suspension, questioned the applicant, received his evidence, listened to his submissions, and ultimately confirmed the suspension and revoked his day parole.[6]

8 The applicant appealed that decision to the Appeal Division of the Board, where he made further lengthy written submissions.[7] In a unanimous decision, the Appeal Division affirmed the Board's decision and denied the appeal.[8]

A Previous *Habeas Corpus* Application

9 In 2010 the applicant brought an application for *habeas corpus* with *certiorari in aid* to quash the Board's decision.[9] On that prior application the applicant argued that the CSC had acted without jurisdiction in suspending his parole, and that the Board had erred in revoking his parole. In an endorsement dated March 17, 2010, Brown, J. declined to exercise his jurisdiction to hear the application, in favour of a judicial review proceeding before the Federal Court.[10] In his endorsement Brown, J. explained that he declined to exercise his jurisdiction to hear the application for *habeas corpus* on the basis that the statutory appeal process to the National Parole Board under section 147 of the *CCRA* is a complete, comprehensive and expert procedure to challenge the decision of the Board, citing *L.R.F. v. Canada (National Parole Board)*, [2008] N.S.J. No. 252 (NSCA) at para. 15, and *R. v. Latham*, [2009] S.J. No. 103 (SKCA) at para. 25. It was his view that the issue placed before the Superior Court of Justice on that application should more properly be litigated in the Federal Court as a judicial review proceeding.

10 The applicant argues that the current application differs from the application heard by Brown, J. in that he now seeks *habeas corpus* to challenge the suspension of his parole instead of its revocation. He also argues that there is fresh evidence that this court should consider on this application, which should compel it to exercise its jurisdiction. Such evidence, he argues, constitutes special circumstances of the sort referred to by Brown, J. when he wrote:

> There may be exceptional circumstances where a statutory appeal procedure, comprehensive on its face, is so ineffective as to warrant the exercise of judicial discretion by *habeas corpus*.[11]

The applicant argues that the special circumstances in this case arise out of the fact that there is a lengthy delay in the judicial review proceeding which therefore merits the exercise of jurisdiction by this court. He further argues that his health is deteriorating while in jail, and in part relies on the

facts behind this assertion as being fresh evidence. Further, the applicant was permitted at the hearing of this application to give *viva voce* testimony with respect to what he considered to be further new evidence, namely a recent assault upon him by another inmate.

Fresh Evidence

11 With respect to the fresh evidence, the applicant firstly supplied no corroborating medical evidence from any physician or health care provider even though he claims that he is at risk of a further heart attack or other assaults to his heart muscle as a result of the stress of the penal environment. In his oral testimony he was permitted to described an alleged assault that occurred at the Warkworth penitentiary on July 12, 2011. He described a vicious assault whereby he was punched in the face and particularly the eye area by an aggressive inmate. He stated that he was bleeding from his eyes and that blood was pouring down his face from the various injuries and lacerations inflicted by the other inmate. When he was testifying, a mere eight days after this supposedly severe beating, I noted that the applicant had a noticeable yet small purple bruise under one of his eyes. He filed no records, medical or otherwise, arising from this event. I find the applicant's evidence lacking in credibility. The applicant's testimony lacked any air of reality, was exaggerated and not believable in the slightest. Further, even if the events in question are partially true such evidence would not be considered fresh evidence of the sort necessary to change the course of this application.

12 I also note that there have been previous judicial findings with respect to the applicant's complete lack of credibility. In sentencing the applicant in 1994 for his conviction for fraud over $1,000 and failure to comply with the recognizance, Allen, J. wrote:

> There is no real indication of remorse on the part of this man. He is a thoroughly dishonest, untrustworthy person and he is not a violent person, but I have very strong suspicion that he has absolutely no intention of stopping his dishonest conduct.[12]

In passing sentence on the applicant following his current conviction for fraud, Justice Langdon of the Superior Court of Justice found:

> One could imagine a worse offender than Mr. Elguindy, but it would take some difficulty. My observations of him, his actions and his testimony have convinced me that he is a cunning, amoral, unscrupulous, untrustworthy, lying, parasite who is incapable of feeling concerned for anyone but himself, and that, given the opportunity, he would repeat this offence in a heartbeat.[13]

13 The applicant also argues, by way of fresh evidence, that he does not have proof that the warrant was faxed to the National Parole Board within the required time limitation of 30 days from the suspension. He objects to the evidence of a handwritten note on the warrant of apprehension which indicates that it was faxed to "N.P.B. police fax 2009/10/22", saying that such evidence is

unreliable. Even if this court were to accept the respondent's submission that there is insufficient proof that the warrant was faxed to the Board, which I do not accept, this argument and this evidence was available for the applicant to bring forward both at the initial post-suspension hearing before the Board, at the Appeal Division, and before Mr. Justice Brown.

Issues

14 The two issues for determination on this application are 1) should this court decline to exercise its jurisdiction to hear this matter; and 2) is this application barred by the doctrine of *res judicata.*

15 As earlier indicated this court has already determined that it will not exercise its jurisdiction to hear this matter.

16 Part II of the *CCRA* governs the conditional release of offenders in the community. Parliament has granted the Board exclusive jurisdiction and absolute discretion regarding parole matters, including parole revocation and the cancellation of parole suspensions.[14]

17 Subsections 135(1) and (3) of the *CCRA* set out the statutory parole suspension process. A person designated by the chair of the Board may suspend an offender's parole when that offender breaches a condition of his parole, or when the designated person is satisfied that it is necessary and reasonable to do so to prevent a breach of any condition or to protect society.[15] A parole supervisor is such a designated person. Once a federal offender's parole has been suspended, his or her case must be referred to the Board for a post-suspension hearing within 30 days of the recommitment. On the hearing, the Board has three options:

a) where it is satisfied that, in view of the offender's behaviour since release, the offender will not present an undue risk to society by reoffending before the expiration of the offender's sentence according to law, it shall cancel the suspension;
b) where the Board is not satisfied as provided in paragraph (a), it shall revoke the parole; or
c) where the offender is no longer eligible for parole, the Board shall revoke it.[16]

18 An offender has the right of appeal from decision of the Board to the Appeal Division, which has broad remedial powers.[17] Judicial review of a decision of the Appeal Division lies to the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.

19 The leading case on the availability of *habeas corpus* is the decision of the Supreme Court of Canada in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809. In *May v. Ferndale* the court held that provincial superior courts retain the jurisdiction to hear a *habeas corpus* application alleging an "unlawful restriction of liberty" despite the fact that such allegations can also be raised in the

Federal Court by way of judicial review.[18] However, the ratio of *May v. Ferndale Institution* is that superior courts should decline to exercise their jurisdiction in cases where there is a complete, comprehensive and expert procedure for review of an administrative decision. In such circumstances, any review of the administrative decision in question should more appropriately be carried out by the Federal Court on an application for judicial review.[19]

20 The statutory review process set out in section 135 and 147 of the *CCRA* has been recognized by the Courts of Appeal of six provinces as constituting such a complete, comprehensive and expert procedure: *John v. Canada (National Parole Board)*, 2011 BCCA 188 at para. 35; *Armaly v. Canada (Parole Service)*, 2001 ABCA 280 at para. 2; *R. v. Latham*, 2009 SKCA 26 at para. 25; *R. v. Graham*, 2011 ONCA 138 at para. 10; *Lena v. Donnacona Prison*, 2011 QCCA 140 at para. 9; *L.R.F. v. Canada (National Parole Board)*, 2008 NSCA 56 at para. 15.

21 As previously stated, in dismissing the applicant's prior application for *habeas corpus*, Brown, J. referred to the decision of the Courts of Appeal of Nova Scotia and Saskatchewan in *L.R.F. v. Canada*, supra and *R. v. Latham*, supra, respectively.

22 The applicant relies on a decision of the British Columbia Supreme Court in *Woodhouse v. William Head Institution*, 2010 BCSC 754 where at para. 341 Walker, J. held that,

> The *CCRA* does not provide a complete, comprehensive, expert procedure in respect of the review of the lawfulness of decisions made by parole officers to suspend parole.

However, the decision in *Woodhouse* was overturned by the Ontario Court of Appeal in *R. v. Graham*, supra, upholding the decision of the application judge. Blair, J.A., delivering the unanimous judgment of the court, referred to other Canadian appellate and lower court decisions that have also come to the conclusion that the *CCRA* provides a complete, comprehensive and expert procedure for administering the parole review process including *Armaly v. Canada (Parole Service)*, supra, *R. v. Latham*, supra, *Lord v. Coulter* (2009), 266 B.C.A.C. 122 (C.A.); *McGrayne v. Canada (Attorney General)*, [2002] O.T.C. 191 (Sup. Ct.); as well as the decision of Brown, J. in *R. v. Elguindy*, 2010 ONSC 1757 (S.C.J.).[20]

23 Accordingly there is clear direction from the Ontario Court of Appeal that the *CCRA* provides the type of complete, comprehensive and expert procedure that places it more appropriately within the realm of the Federal Court on an application for judicial review as directed by *May v. Ferndale Institution*, supra, and therefore this court declines to exercise its jurisdiction.

The Doctrine of *Res Judicata*

24 While not necessary to consider this aspect of the respondent's argument, I will do so for sake of completeness.

25 I further find that this application is barred by the doctrine of *res judicata*, and specifically by cause of action estoppel.

26 Cause of action estoppel precludes a party from bringing an action against another when the same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.[21] The leading modern case on cause of action estoppel remains the decision of the Supreme Court in *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621, which adopted the following oft-quoted passage from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100 at 114 (P.C.):

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes a subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time.

27 The traditional criteria for cause of action estoppel, drawn from the decisions in *Angle v. Minister of National Revenue*, [1974] 2 S.C.R. 248 and *Grandview (Town) v. Doering*, supra are:

1) there must be a final decision of a court of competent jurisdiction in the prior action;
2) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;
3) the cause of action in the prior action must not be separate and distinct;
4) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[22]

28 Thus, cause of action estoppel will bar a party from asserting not only issues that were raised before the court on the previous proceeding, but also issues that could have been decided had they been brought before that court.[23]

29 Furthermore, a party may not simply reframe its case, predicated on the same set of facts in order to avoid the operation of the doctrine of cause of action estoppel. In *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 at para. 24 (Gen. Div.); affirmed (1997), 32 O.R. (3d) 651 (C.A.), Sharpe, J. held that "the authorities establish that a litigant cannot establish a new and fresh cause of action by advancing a new legal theory in support of a claim based upon essentially the

same facts".

30 On this application, the applicant challenges the decision to suspend as well as the evidence before the Board on the post-suspension hearing, together with the other elements that he characterizes as fresh evidence and which I have previously rejected on the basis of lack of reliability and relevance. In this application he focuses on the decision to suspend, rather than to revoke, although the actions of the parole officer and parole supervisor in suspending were also the subject matter of his previous application. In particular, in paragraph 2 of his earlier application he sets out one of the grounds as follows:

> 2. The Correctional Service of Canada erred in law and acted unlawfully and without jurisdiction while suspending the applicant's day parole when he did not violate any of the conditions of his release.

As part of his affidavit in support of that application he relied on the following statements:

> 7. I resided at the halfway house from October 2nd, 2009 till October 22nd, 2009 when my community parole officer (C.P.O.) suspended my parole and sent me back to jail. She prepared an Assessment for Decision (A4D) dated November 11th and 12th, recommending revocation of my parole. I do not feel that I did anything wrong to deprive me of my accelerated parole. I never violated any of my release conditions.

His affidavit continued from there to outline various interactions between he and his community parole officer.

31 Furthermore, both applications are based, *inter alia*, on the fact that CSC erred in law and acted without jurisdiction in suspending the applicant's day parole when he did not breach a condition of his release, and that the parole review regime is unfair and inadequate.

32 In *Graham*, supra, the Ontario Court of Appeal has held that the suspension and revocation of parole are part of the same process.[24] Accordingly, when Brown, J. declined to exercise his jurisdiction to review the applicant's detention on the prior application he disposed of all issues that were or could be raised by the applicant relating to both suspension and revocation of his parole.

33 Finally, in the present application the applicant has adduced most of the same evidence that he relied on before Justice Brown, or relies on evidence that was available to him at the time of his previous application. While he claimed during argument that a new issue was raised by the matter of the faxing of his warrant of apprehension, this was evidence that was available at the time of the hearing before Brown, J. and in any event would not affect the outcome of any *habeas corpus* application had I exercised this court's jurisdiction to hear such application.

34 In fact, what has compelled this present application is precisely described by the applicant in

his affidavit sworn May 2, 2011 at para. 48:

> After I had researched the law and consulted with many lawyers I realized that the only remedy for my compensation was a claim against Alina and Justin in order to free myself from the unlawful incarceration was by *habeas corpus* challenging the decision to suspend me not the decision of the Parole Board which was only in the hands of the Federal Court.[25]

Accordingly, this is a new legal theory being advanced by the applicant, but on the same facts that were placed before Brown, J.

35 Accordingly this application meets the four criteria for being barred by cause of action estoppel:

1. the decision of Brown, J. was a final decision with respect to whether the statutory appeal process set out in the *CCRA* is a complete, comprehensive and expert procedure;
2. the parties to this application are the same as the parties to the previous application. The Crown is the respondent in both applications, notwithstanding that different Crown agents were named as respondents;
3. the cause of action in this application and the prior application are not separate and distinct, in that both applications challenge the lawfulness of the Board's decision to suspend and revoke; and
4. the basis of this application was argued or could have been argued in the prior action if the applicant had exercised reasonable diligence.

36 I would go further than this and state that in substance there is nothing novel contained in this application beyond that which was contained in the application heard and determined by Brown, J.

37 For the foregoing reasons the application is dismissed.

S.E. HEALEY J.

cp/e/qllxr/qlvxw/qlced

1 *R. v. Elguindy*, Reasons for Sentence, October 2, 2008, at pp. 5, 17, Respondent's record, Tab B, pp. 105, 117.

2 Application Record, Tab 13, p. 59

3 Application Record, Tab 13

4 Ibid., p. 57

5 Responding Brief, November 24, 2009, Application Record, Tab 14, pp. 63-99.

6 Decision of the Parole Board, January 14, 2010, Application Record, Tab 15, pp. 100-102.

7 Notice of Appeal to the Appeal Division, Memorandum of Argument, Supplementary Notice of Appeal, Respondent's Record, Tabs 87, 88, 89, pp. 77-88.

8 Decision of the Appeal Division, February 24, 2010, Application Record, Tab 16, pp. 103-108.

9 Notice of Application dated February 3, 2010, Respondent's Record, Tab 1 pp. 6-13; Affidavit of Emad Elguindy sworn February 3, 2010, Respondent's Record, Tab 2, pp. 14-23.

10 Endorsement of Brown, J. March 17, 2010, Application Record, Tab 21, pp. 143-144.

11 Endorsement of Brown, J. supra

12 *R. v. Elguindy*, [1994] O.J. No. 4357 (O.C.J.) at para. 3, Respondent's Authorities, Tab 3

13 *R. v. Elguindy*, Reasons for Sentence, October 2, 2008, Respondent's Record, Tab B, p. 122

14 *Corrections and Conditional Release Act,* S.C. 1992, c. 20 as amended, section 107(1).

15 Ibid., section 135(1).

16 *CCRA*, supra, subsections 135(3) and 135(5).

17 Ibid., section 147.

18 *May v. Ferndale Institution*, supra, at para. 33.

19 *May v. Ferndale Institution*, supra, at para. 44.

20 *R. v. Graham,* supra, at para. 10

21 *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254.

22 *Cliffs Over Maple Bay Investments Ltd. (re.)*, 2011 BCCA 180 at para. 28.

23 In *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 at para. 37 (C.A.),

leave to appeal ref'd [1997] S.C.C.A. No. 656, 167 N.S.R. (2d) 400n, Cromwell, J.A. held that the rule is that any issue that *should* have raised, rather than *could* have been raised, will be barred by operation of the doctrine.

24 *Graham*, supra, at paras. 14, 16.

25 Application record, tab 2, p. 19

TAB 22

§402. Awards of Costs — *Continued*

although successful, has been deprived of costs where the material filed in support of the motion was defective,[8] or where counsel failed to bring relevant and significant authorities to the attention of the court.[9] An award of costs in any event of the cause has been called the extreme expression of disapproval by the court; it should normally be made when a party, by conduct or default, forfeits any right to costs of the motion even though that party may subsequently be successful in the main action.[10]

Costs were reduced to reflect a lack of focussed strategy which wasted the court's time.[11]

When an order makes no provision for costs it is as though the court had ordered no costs with respect to the motion.[12]

The court has no jurisdiction to award costs for a prior contested event for which costs were awarded.[13]

An individual respondent who was not named in the notice of motion, but was served and participated, was entitled to partial indemnity costs.[14]

In British Columbia costs of an interlocutory application are "costs in the cause" in the absence of any other order.[15]

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7 *Dionisio v. El Popular* (2008), 163 A.C.W.S. (3d) 714 (Ont. S.C.J.); *Daggett v. Allstate Insurance Co.* (2008), 61 C.C.L.I. (4th) 299, 166 A.C.W.S. (3d) 838 (Ont. S.C.J.) (costs ordered in the cause where unjust to award defendants costs of motion prior to trial).

8 *Gibbons v. Cannell* (1912), 8 D.L.R. 232 (Ont. H.C.J.). *Cf. Dixon v. Sperry Inc.* (1988), 7 A.C.W.S. (3d) 385 (Ont. H.C.J.) (moving party unsuccessful but held entitled to costs).

9 *Giacomelli v. O'Reilly* (1979), 96 D.L.R. (3d) 126 (Ont. Master), at p. 134.

10 In *Kostopoulos v. Weinberg* (1986), 38 A.C.W.S. (2d) 71 (Ont. Dist. Ct.), costs of a motion to renew a writ of summons *post diem* were given to the defendant on a solicitor-and-client scale where the default was more than mere inadvertence.

11 *Lake v. Demb* (1998), 82 A.C.W.S. (3d) 27 (Ont. Ct. (Gen. Div.)). See also *Toll v. Marjanovic* (2001), 104 A.C.W.S. (3d) 821 (Ont. S.C.J.) (no costs awarded to successful moving party who generated confusion in his materials and contributed to unnecessary expenditure of time).

12 *Delrina Corp. (c.o.b. Carolian Systems) v. Triolet Systems Inc.* (2002), 165 O.A.C. 160(C.A.); *Radvar v. Canada (Attorney General)* (2006), 145 A.C.W.S. (3d) 208 (Ont. S.C.J.) (motions with no order with respect to costs assumed to have been decided on without costs basis).

13 *Kordic v. Bernachi* (2007), 161 A.C.W.S. (3d) 692 (Ont. S.C.J.), at para. 5; *Hollinger Inc. v. Ravelston Corp.* (2008), 54 C.P.C. (6th) 211, 169 A.C.W.S. (3d) 271 (Ont. C.A.) (unfair to order respondents to pay costs of original motion because motion judge made no order as to costs).

14 *George v. Harris* (2003), 122 A.C.W.S.(3d) 433 (Ont. S.C.J.).

15 *Mainland Sawmills Ltd. v. USW, Local 1-3567* (2008), 54 C.P.C. (6th) 214 (B.C.S.C.).

TAB 23

Indexed as:

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79

Canadian Union of Public Employees, Local 79 ,
appellant;
v.
City of Toronto and Douglas C. Stanley, respondents, and
Attorney General of Ontario , intervener.

[2003] 3 S.C.R. 77

[2003] S.C.J. No. 64

2003 SCC 63

File No.: 28840.

Supreme Court of Canada

Heard: February 13, 2003;
Judgment: November 6, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(135 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Labour law -- Arbitration -- Dismissal without just cause -- Evidence -- Recreation instructor dismissed after being convicted of sexual assault -- Conviction upheld on appeal -- Arbitrator ruling that instructor had been dismissed without just cause -- Whether union entitled to relitigate issue decided against employee in criminal proceedings -- Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 -- Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Judicial review -- Standard of review -- Labour arbitration -- Recreation instructor dismissed after being convicted of sexual assault -- Arbitrator ruling that instructor had been dismissed without just cause -- Whether arbitrator entitled to revisit conviction -- Whether correctness is appropriate standard of review -- Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 -- Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Summary:

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. [page78] The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy [page79] result. The common law doctrines of issue estoppel, collateral

attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, [page80] an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions -- for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of

relitigation -- typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between [page81] patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC para. 220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC para. 220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Counsel:

Douglas J. Wray and Harold F. Caley, for the appellant.

Jason Hanson, Mahmud Jamal and Kari M. Abrams, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

[page86]

Sean Kearney, Mary Gersht and Meredith Brown, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J.:--

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to [page87] testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied

to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each [page88] case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the [page89] resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> **22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

[page90]

> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

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

> **48.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged

> violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also [page91] *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard.... An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these

rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she [page92] must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction -- the finding of another court -- admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

[page93]

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para 39. Section

22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law [page94] doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided [page95] in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has

been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, [page96] as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants ... .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is

> illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due [page97] process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category -- what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".
>
> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that [page98] is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in

> an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free [page99] rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the [page100] arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in [page101] subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral

attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of [page102] oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[page103]

> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual

issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in [page105] previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq.*). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less [page106] on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar

against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to [page107] secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment

litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues [page108] determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.... Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined .... [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac, supra*, at pp. 26-27; *Bjarnarson, supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also [page109] P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice

vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended [page111] or not. The administration of justice must equip itself with all

legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of [page112] sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court -- or the jury --, guided by rules of evidence that are sensitive to a fair search for the

truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

[page113]

The reasons of LeBel and Deschamps JJ. were delivered by

LeBEL J.:--

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [page114] 2002 SCC 86 , I

raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64 , released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise , it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149 ; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the [page115] pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the

> light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular [page116] representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less [page117] deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions -- for

instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

[page118]

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances

of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate [page119] question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp., supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 , at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para.

37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop [page121] a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe, supra.* In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49 ; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can [page122] be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning,

having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC, supra*, of patent unreasonableness as a "very strict test", [page123] which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so

flawed that no amount of curial deference can justify letting it stand.

[page124]

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q, supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

[page125]

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE, supra*, Dickson J. offered two

characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE, supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*") , at p. 389, and in *CUPE, supra*, at p. 237:

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147. [page126] *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers, supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70) .

89 If Dickson J.'s reference to *Anisminic* in *CUPE, supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as [page127] one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE, supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but ... then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. [page128] concurring) took to patent unreasonableness in *Paccar, supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> ...
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but

rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local 301, supra*, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been... . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

[page129]

> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness -- whether the employees' criminal convictions could be relitigated -- and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness -- whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision -- indeed, what that decision is wholly premised on -- is a legal determination that the adjudicator was required, but

failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable -- a conclusion that flows from the applicability of two separate standards of review -- is very different from suggesting [page130] that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 -- "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" -- the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, [page131] there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.
>
> (L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she ... reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*
>
> (I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review [page132] under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of

curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear", [page133] the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> (*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *CUPE, supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to [page134] find it. Both approaches raise their own problems.

(ii) <u>The Magnitude of the Defect</u>

104 In *PSAC, supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> ... admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense [page135] of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.
>
> (Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or

> obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar, supra*, at p. 1004, *per* La Forest J.; *Ryan, supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin, supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead [page136] that tribunal to reach the decision it did" (*Ryan, supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar, supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain, supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the ... standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan, supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser -- *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness [page137] are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable .

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" [page138] of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above -- i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev. 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing

examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, [page139] and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law, supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE, supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed . An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is [page140] flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident -- i.e., clear, obvious, or immediate -- is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent

unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

[page141]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

(*Ryan, supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on

> the face of the record ... Or can one go beyond the record to demonstrate -- "identify" -- why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?
>
> (D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

[page142]

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch -- i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language -- and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be

patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators [page143] in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 , at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be [page144] overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible -- whether its illegibility is evident on a cursory glance or only after a close examination -- the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the [page145] decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p.

> 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"... . A third aspect of the rule of law is ... that "the exercise of all public [page146] power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance .

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> ... societies governed by the Rule of Law are marked by a certain *ethos of justification.* In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*
>
> (See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original) ; see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a [page147] way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what

those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts [page148] should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68) . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Solicitors:

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

cp/e/qw/qllls

TAB 24

1977 CarswellOnt 89, 24 C.B.R. (N.S.) 193

C

1977 CarswellOnt 89, 24 C.B.R. (N.S.) 193

Heather's House of Fashion Inc., Re (No. 2)

Re Heather's House of Fashion Inc. (No. 2)

Ontario Supreme Court, In Bankruptcy

Henry J.

Judgment: June 15, 1977
Docket: No. 586/76

Counsel: *M. B. Page, Q.C.*, for trustee.

G. F. Windsor, for petitioning creditor.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Practice and procedure.

Fraudulent preferences — Validity of debenture — Validity attacked by trustee because of defect in registration procedure — Debenture declared valid by court decision — Subsequent application by trustee that debenture void as fraudulent preference under s. 73(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3 — Res judicata.

Initially the trustee brought an application to have a debenture declared void as against the trustee on the ground that there was a defect in the registration procedure. However, the court declared the debenture to be valid. Thereupon the trustee brought another application in which he sought a declaration that the debenture was void as against the trustee as a fraudulent preference under s. 73(1) of the Bankruptcy Act. In the earlier proceedings the court had stated that the debenture was given in good faith and was not a fraudulent preference, 23 C.B.R. (N.S.) 161, 1 B.L.R. 1, 15 O.R. (2d) 73, 75 D.L.R. (3d) 9, reversing 22 C.B.R. (N.S.) 153.

Held, since the fact of fraudulent preference could easily have been raised in the original proceedings and the court could have adjudicated on the question of the validity or otherwise of the debenture as a fraudulent preference, the present application should be dismissed because the trustee was now estopped by res judicata from asserting the position he now took. It would be an abuse of the process of the court to permit successive motions on different occasions to be brought in those circumstances when by the exercise of reasonable diligence the means could be found to assert them all and have them disposed of at the same time. *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 applied.

***Henry J.* (orally):**

1 The trustee applies for an order declaring that the debenture given by the bankrupt to the Royal Bank of Canada, dated 11th December 1975 and registered on 8th January 1976, constitutes a fraudulent preference within the meaning of s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3. This is obviously an application brought by the trustee with the object of having the court apply, as against the debenture, the provisions of s. 73(1) of the Bankruptcy Act, which provides that:

> 73. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred ... by an insolvent person in favour of any creditor ... with a view to giving such creditor a preference over the other creditors shall, if the person making ... the same becomes bankrupt within three months after the date of making ... the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

2 While it is not expressly so stated in the trustee's notice of motion, if the application were successful the result would be an order declaring the debenture void as against the trustee.

3 A preliminary objection is taken to this application on behalf of the holder of the debenture, the Royal Bank of Canada, on the ground that this issue is res judicata, and the applicant, the trustee, is estopped from asserting a claim for this relief.

4 In an earlier application before me by the trustee to have the debenture declared void as against the trustee, inter alia, on the ground that the debenture was not registered in accordance with the provisions of The Corporation Securities Registration Act, 1971 (2nd Sess.) (Ont.), c. 8, I held [22 C.B.R. (N.S.) 153] that the debenture was void as against creditors who advanced credit prior to 8th January 1976, the date of registration of the debenture. This order was appealed and was reversed by the Court of Appeal, the judgment being released on 14th February 1977 [23 C.B.R. (N.S) 161, 1 B.L.R. 1, 15 O.R. (2d) 73, 75 D.L.R. (3d) 9]. The effect of the Court of Appeal's decision is that the debenture is not void as against the trustee.

5 In the application before me it was submitted that there was now no issue for me to determine with respect to the question whether the debenture, if valid, constituted a fraudulent preference. In the Court of Appeal, according to the judgment of Dubin J.A., it was stated [p. 162]: "It was common ground that, although no moneys were advanced by the bank after registration of the debenture, the debenture was given in good faith and was not a fraudulent preference."

6 In the result, the application by the trustee to declare the debenture void has been dismissed. It is the submission of Mr. Windsor on behalf of the bank that the application now before me raises issues that have already been disposed of by the Court of Appeal. Mr. Windsor relies principally upon the decision of the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241, and the authorities there cited, particularly by Cartwright J. at pp. 356-61.

7 The judgment of the court was unanimous in the matter. The ratio of that decision was that "the real issue before the Trial Judge having been determined in part by adjudication and in part by consent, as I understand it, had already been adjudicated and it was not open to one of the parties to reopen the matter, and in effect ask the Court to reconsider the substance of the order that was made."

8 In setting out the principles applicable to the objection raised that estoppel applied in that case, Cartwright J. [at p. 358] cited with approval a passage in *Green v. Weatherill*, [1929] 2 Ch. 213 at 221-22, in which was contained the following observation from the decision in the leading case of *Henderson v. Henderson* (1843), 3 Hare 100 at 114, 67 E.R. 313:

> I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest ... The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

9 Cartwright J. further states [at p. 359], referring to the decision of the Judicial Committee in *Hoystead v. Commr. of Taxation*, [1926] A.C. 155 at 165:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

10 Cartwright J. [at p. 359] further referred with approval to a statement of the law in 13 Hals. (2d) 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

11 In the case at bar the application made originally and which has now been adjudicated upon by the Court of Appeal, as I have mentioned, was to have the debenture declared void as against the trustee, the ground for the application being a defect in the registration procedure.

12 The application that now comes before me is to have the debenture declared void under s. 73(1) of the Bankruptcy Act as against the trustee, but on different grounds. In my opinion, both of these motions which I regard as separate steps in the litigation (separate causes of action, if you like, because under the Bankruptcy Act proceedings by the trustee for relief are ordinarily claimed by way of originating motion) seek, in effect, the same objective, namely, a declaration that the debenture is void as against the trustee.

13 In the prior proceedings it was the position taken by the trustee before the court that no issue was to be adjudicated by the court as to there being a fraudulent preference.

14 In the Court of Appeal the matter was stated as common ground and, perhaps in more categorical terms, the debenture was given in good faith and was not a fraudulent preference.

15 In my opinion, the trustee is now seeking to reopen a matter which has already been decided by the judgment of the Court of Appeal, namely, that the debenture is not void as against the trustee. On the basis of the principles set out in the judgment of the Supreme Court of Canada in *Maynard v. Maynard*, supra, I am constrained to conclude that the contention of Mr. Windsor is correct and the trustee is now estopped by res judicata from asserting the position he now takes.

16 If more is required I would point out that if this is the result, it would be open to the trustee to proliferate litigation almost without end. For example, as I indicated to counsel in the course of argument, it would be possible for the trustee to attack a transaction successively on the grounds that it was firstly a fraudulent preference, secondly it was a fraudulent conveyance, thirdly, it was a fraudulent settlement, and further to attack it under the applicable provincial statutes.

17 It goes without saying that it would be an abuse of the process of the court to permit successive motions on different occasions to be brought in those circumstances, when by the exercise of reasonable diligence the means could be found to assert them all and have them disposed of at the same time.

18 Likewise, in the present case, I am quite satisfied that in the original proceeding the facts could easily have been placed before the court to have the court adjudicate the question of the invalidity or otherwise of the debenture as a fraudulent preference.

19 It also goes without saying that in view of the limited amount of most estates in bankruptcy it would not be proper management of the processes of the court to permit the trustee, by successive applications, to not only place a financial burden on the limited resources of the estate, but also to place a creditor whose security he is taking in the position of having to defect his security on the different occasions when the matter might have been dealt with on a single occasion in a definitive way. It was with the objective of the court to control its process in mind that, in my opinion, the language used by Cartwright J. and the learned judges in the decisions that have been cited was used.

20 In the result, therefore, the application will be dismissed on the preliminary ground raised by the bank.

21 Costs will follow the event, and the application is therefore dismissed with costs. The trustee may have his costs out of the assets of the estate, if any.

END OF DOCUMENT

TAB 25

CANADA

CONSOLIDATION

CODIFICATION

Supreme Court Act

Loi sur la Cour suprême

R.S.C., 1985, c. S-26

L.R.C. (1985), ch. S-26

Current to June 10, 2013

Last amended on July 2, 2003

À jour au 10 juin 2013

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Exception

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

(*a*) quashing a conviction of an offence punishable by death; or

(*b*) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

R.S., 1985, c. S-26, s. 43; R.S., 1985, c. 34 (3rd Supp.), s. 4; 1990, c. 8, s. 38; 1994, c. 44, s. 98; 1997, c. 18, s. 138.

Exception au quorum

(4) Le quorum est porté à cinq juges lorsque la demande d'autorisation d'appel concerne des jugements :

a) annulant la déclaration de culpabilité, dans le cas d'une infraction punissable de mort;

b) rejetant l'appel d'un acquittement rendu dans le cas d'une infraction punissable de mort, y compris d'un acquittement à l'égard d'une infraction principale dans le cadre de laquelle l'accusé a été déclaré coupable d'une infraction incluse dans l'infraction principale.

L.R. (1985), ch. S-26, art. 43; L.R. (1985), ch. 34 (3e suppl.), art. 4; 1990, ch. 8, art. 38; 1994, ch. 44, art. 98; 1997, ch. 18, art. 138.

JUDGMENTS

JUGEMENTS

Quashing proceedings in certain cases

44. The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith.

R.S., c. S-19, s. 46.

Cassation des procédures en certains cas

44. La Cour peut casser les procédures dans les causes portées devant elle qui ne peuvent faire l'objet d'appel ou quand les procédures sont entachées de mauvaise foi.

S.R., ch. S-19, art. 46.

Appeal may be dismissed or judgment given

45. The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

R.S., c. S-19, s. 47.

Rejet de l'appel ou prononcé d'un jugement

45. La Cour peut rejeter l'appel ou se substituer à la juridiction inférieure pour le prononcé du jugement et l'engagement des moyens de contrainte ou autres procédures.

S.R., ch. S-19, art. 47.

New trial may be ordered

46. On any appeal, the Court may, in its discretion, order a new trial if the ends of justice seem to require it, although a new trial is deemed necessary on the ground that the verdict is against the weight of evidence.

R.S., c. S-19, s. 48.

Nouveau procès

46. La Cour a le pouvoir discrétionnaire d'ordonner un nouveau procès si les fins de la justice paraissent l'exiger; un nouveau procès est toutefois présumé nécessaire en cas de verdict rendu à l'encontre de la preuve.

S.R., ch. S-19, art. 48.

Appeal may be remanded

46.1 The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

1994, c. 44, s. 99.

Renvoi à la juridiction inférieure

46.1 La Cour peut renvoyer une affaire en tout ou en partie à la juridiction inférieure ou à celle de première instance et ordonner les mesures qui lui semblent appropriées.

1994, ch. 44, art. 99.

COSTS

FRAIS

Payment of costs

47. The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

R.S., c. S-19, s. 49.

Paiement des frais

47. La Cour a le pouvoir discrétionnaire d'ordonner le paiement des dépens des juridictions inférieures, y compris du tribunal de première instance, ainsi que des frais d'appel, en tout ou en partie, quelle que soit sa décision finale sur le fond.

S.R., ch. S-19, art. 49.

N THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF INDALEX LIMITED et al. the Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RETIREES
(Returnable July 24, 2013)

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